

INDIAN CLAIMS COMMISSION

JAMES SMITH CREE NATION TREATY LAND ENTITLEMENT INQUIRY

PANEL

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Commissioner Alan C. Holman**

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SUMMARY

JAMES SMITH CREE NATION TREATY LAND ENTITLEMENT CLAIM Saskatchewan

This report may be cited as Indian Claims Commission, *James Smith Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

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

Treaties – Treaty 6 (1876); **Treaty Land Entitlement** – Amalgamation – Land Occupied Prior to Treaty – Quality of Land – Paylist – Sufficiency of Treaty Lands; **Mandate of the Indian Claims Commission** – Issues; **Saskatchewan**

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 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. Canada was unable to meet the April 2005 deadline and formally requested an extension of time to file submissions. On June 22, 2005, the Commission panel granted an extension until January 2006. The delivery of Canada's submission was delayed until April 13, 2006.

In March 2005, the Commission delivered its report on the single issue of the validity of the 1902 "amalgamation" of the James Smith Band and the Cumberland Band 100A. The Commission panel found the amalgamation to be invalid. This report addresses the remaining issues.

The community sessions for this inquiry were held in June 2001 and October 2002, and an expert witness session was held in June 2003. Oral hearings, based on written submissions, took place in June 2004 and June 2006.

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 Indian Reserve (IR) 100 and the Cumberland 100A Band at IR 100A in 1902.

ISSUES

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? Does Treaty 6 obligate Canada to provide lands of specified quality, and, if so, what lands did Canada actually provide of specified quality? In terms of Treaty 6 requirements with regards land quality, did Canada breach any obligation(s) in setting aside IR 100? Does Treaty 6 and/or the *Indian Act* of 1876 exclude lands occupied prior to treaty from treaty land quantum calculations, and, if so, what should have been excluded? Did Canada breach any obligation(s) based on any requirement to exclude lands? As regards the alleged amalgamation, did the Peter Chapman Band have a surplus of treaty lands at the time of the alleged amalgamation? What effect if any did Peter Chapman's surplus treaty land have on the entitlement of James Smith? In sum, did Canada provide sufficient treaty lands to fulfill its obligations to James Smith Cree Nation under Treaty 6?

FINDINGS***Paylist***

After additional research undertaken during the course of this inquiry, the parties agreed upon a 155-person shortfall at the date of first survey. As a result of this agreement, no further analysis is required from the panel on this issue.

Quality of Lands

The purpose and intention of the reserve clause of Treaty 6 is to set aside a reserve specifically for (a) farming land, and (b) other purposes (without limitation). The Band is to be consulted about the location of the reserve land. That choice is dependent upon the nature and the quality of the land. The evidence is that, the James Smith Band was consulted on the location and the quality of the lands to be set aside as its reserve and the Band selected land that would support multiple uses, including farming. The Crown did not breach its obligation to the Band.

Lands Occupied Prior to Treaty

It is a fundamental principle in calculating treaty land entitlement that every treaty Indian is entitled to be counted as a member of a band. According to the terms of Treaty 6, the James Smith Band was entitled to 128 acres of land for each member of the Band. This treaty land entitlement is a right of the Band as a collective and is not a right that attaches to the land under cultivation. Therefore, lands under cultivation by an individual prior to treaty are not relevant to and have nothing to do with determining a Band's entitlement under treaty.

Alleged Amalgamation

According to our March 2005 *Report on Issue 9: Amalgamation*, 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 IR 100A, and not only 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.

The amalgamation agreement is invalid because its two signatories could not have given a joint and undivided interest in IR 100A as they were not the "owners of Cumberland 100A." Canada's failure to seek and obtain the informed consent of the whole of the Cumberland Band is a breach of its treaty and fiduciary duties.

As a result of the July 24, 1902, surrender and amalgamation, the Cumberland House Cree Nation has been deprived of its interest in IR 100A. We find that Canada has improperly satisfied the James Smith Cree Nation's outstanding TLE shortfall by the addition of IR 100A lands to IR 100.

Sufficiency of Treaty Lands

Given our findings on the issue of amalgamation, the IR100A lands could not have been validly transferred to the credit of the James Smith Band in 1902, and yet today the Band is in possession of the unsurrendered portion of IR 100A. In our view, there is an outstanding obligation owed to the Cumberland House Cree Nation which includes the 2,048 acres of IR 100A that the Crown used to cure the 16-person shortfall of the James Smith Cree Nation's treaty land entitlement.

REFERENCES

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

Cases Referred To

R. v. Marshall, [1999] 3 SCR 456.

ICC Reports Referred To

James Smith Cree Nation: Treaty Land Entitlement Report on Issue 9 – Amalgamation (Ottawa, March 2005); *Cumberland House Cree Nation: Indian Reserve 100A Inquiry* (Ottawa, March 2005); *James Smith Cree Nation: Indian Reserve 100A Inquiry* (Ottawa, March 2005).

Treaties and Statutes Referred To

Canada, *Copy of 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); *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); *Indian Act*, SC 1876.

Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); reprinted in (1994) 1 (ICC) 171; Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976); 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); John Leonard Taylor, *Treaty Research Report, Treaty Six* (Ottawa: Treaties and Historical Research Centre, DIAND, 1985).

COUNSEL, PARTIES, INTERVENORS

W. Selnes for the James Smith Cree Nation; P. Robinson for the Government of Canada; K.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, 1883-1920.

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.

Poundmaker, a key negotiator who signed Treaty 6 in 1876 as headman of the Red Pheasant Band; later Chief of his own Band and settled on a reserve in 1879 pursuant to Treaty 6.

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.ⁱ 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 payroll was 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.

ⁱ 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).ⁱⁱ

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.ⁱⁱⁱ

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.

ⁱⁱ 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).

ⁱⁱⁱ 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 question of whether there was a lawful amalgamation of the “Peter Chapman Band” and the James Smith Band was the subject of a separate report by this panel. A summary of this Report is provided in Appendix B. The focus of the current report is on all remaining issues of the James Smith Cree Nation treaty land entitlement.

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

It has taken this Commission, the First Nations, and Canada’s representatives nearly seven years to conclude our process in these four inquiries, 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 1902.¹

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 would provide

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

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.”² 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.³ 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.⁴

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

² 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.

³ 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*).

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

Cumberland Band first.⁵ This issue was the subject of a separate report issued in March 2005 by this panel⁶. At the same time, Canada was given until April 2005 to respond to the additional issues of land quality and lands occupied prior to treaty.⁷ Canada was unable to meet the April 2005 deadline and brought a formal motion requesting an extension of time to file submissions. On June 22, 2005, the Commission panel granted an extension until January 2006. , On March 9, 2006, Canada delivered its formal rejection of this claim. A copy of this rejection letter is reproduced at Appendix D to this report. The delivery of Canada's final claim submission was interrupted by a federal election and the need to await a new Minister. With this report, we set out our findings and conclusion regarding the remaining issues.

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

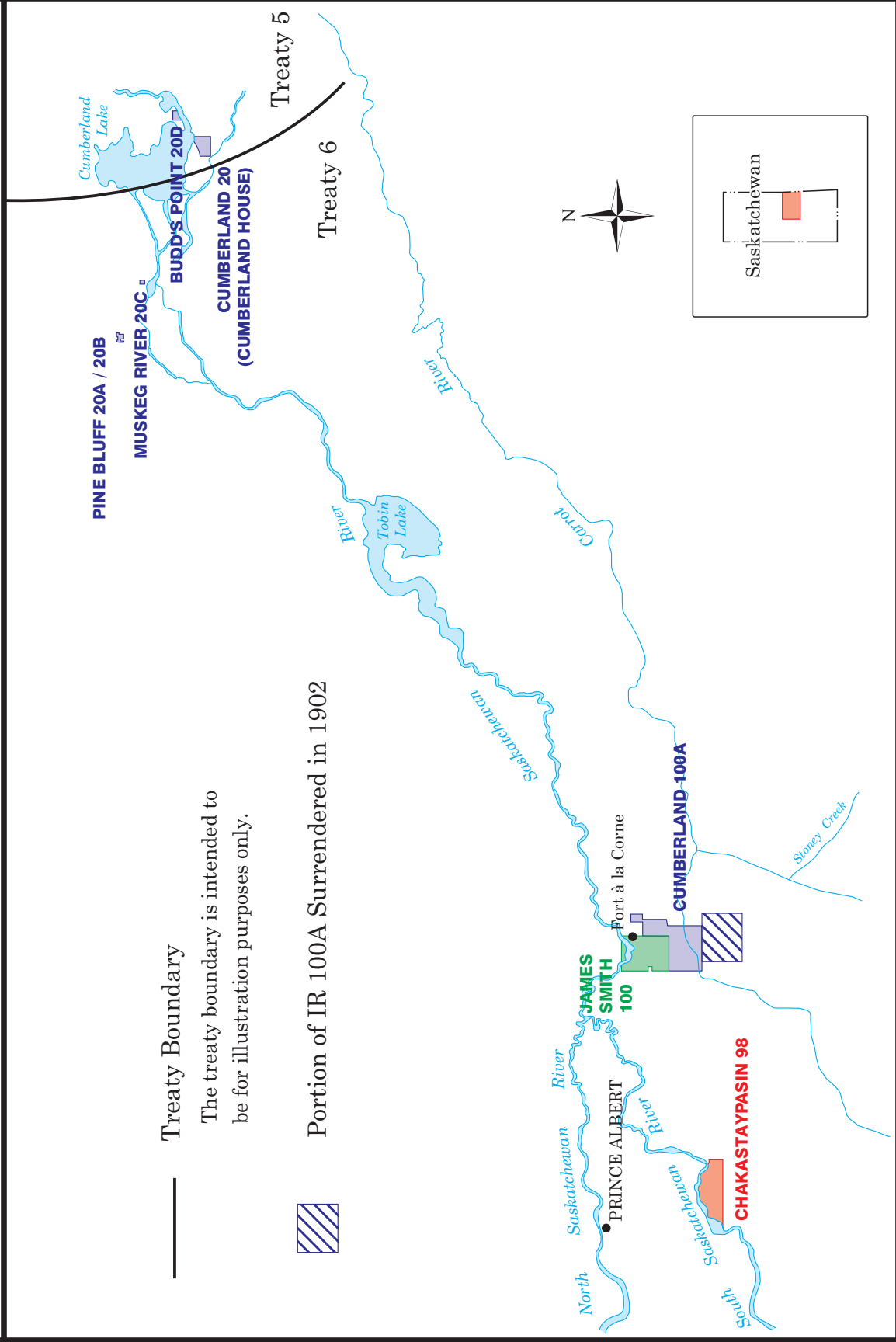
⁵ Denielle Boissoneau-Thunderchild, Associate Legal Counsel, to William Selnes and Robert Winogron, October 30, 2003.

⁶ See the Summary Report on Issue 9: Amalgamation, reproduced as Appendix B.

⁷ Kathleen N. Lickers, Legal Advisor to the Indian Claims Commission, to William Selnes and Robert Winogron, November 27, 2003, reproduced as Appendix C 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.”⁸

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.⁹ 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.¹⁰

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,

⁸ David Meyer and Olga Klimko, “The James Smith Archaeological Survey,” Saskatchewan Research Council, February 1986, pp. 37, 44 (ICC Exhibit 10a, pp. 48, 55).

⁹ 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).

¹⁰ 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.’”¹¹ 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.¹²

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.¹³

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 ...¹⁴

¹¹ 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).

¹² ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 56, Isaac Daniels).

¹³ 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).

¹⁴ 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 “was in the process of ploughing and building”.¹⁵ 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).¹⁶

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.¹⁷

As to why people settled in the area prior to signing treaty, Elder Isaac Daniels stated:

there was a vast abundance of buffalo to the south of the river and to the north was a vast number, abundance of fur-bearing animals. And the river itself provided fish and drinking water, transportation ... why the Indian people settled in this area was because it catered to the way of life, of existence, like I said earlier, the animals and the water.¹⁸

Although there is no evidence of the specific location of lands under cultivation by the James Smith Band prior to treaty, Elder James Burns testified that it was the Band’s understanding that

¹⁵ 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).

¹⁶ Lorraine Patrick, DLS, Field notes, April 2–18, 1883, Canada Lands Surveys Records (CLSR), Field book 3869, p. 32 (ICC Exhibit 8i, p. 21).

¹⁷ ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, pp. 44–45, Mervin Burns).

¹⁸ ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, pp. 53–54, Isaac Daniels).

“any lands that they [the Band] lived on before treaty signing would not be counted as part of the size of the reserve for farming.”¹⁹

The 1876 Indian Act

The first consolidation of laws respecting Indians received royal assent on April 12, 1876, four months prior to the signing of Treaty 6. As regards the rights of individual band members in possession of land under cultivation prior to treaty, section 10 of the Act stated:

Any Indian or non-treaty Indian in the Province of British Columbia, the Province of Manitoba, in the North-West Territories, or in the Territory of Keewatin, who has, or shall have, previously to the selection of a reserve, possession of and made permanent improvements on a plot of land which has been or shall be included in or surrounded by a reserve, shall have the same privileges, neither more nor less, in respect of such plot, as an Indian enjoys who holds under a location title.²⁰

Thus, in circumstances where an individual band member was in possession of land under cultivation and this land became reserve land for the whole of the band, the individual band member would be protected in his land holdings as against the whole of the band.

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;²¹ the other is a memoir of the

¹⁹ Affidavit of James Burns, April 25, 2003 (ICC Exhibit 5c, p. 3).

²⁰ SC 1876, c. 18.

²¹ 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).

Chiefs' hired interpreter, Peter Erasmus, told some 45 years after the event.²² 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.²³ 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.²⁴ 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.”²⁵

²² Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976) (excerpts in ICC Exhibit 13d).

²³ 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).

²⁴ Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), 241–42 (ICC Exhibit 13d, pp. 43–44).

²⁵ 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 one²⁶ 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.²⁷ Elder Mervin Burns told the ICC Commissioners that his ancestors "understood the treaty. These people, their spokesmen there had fairly good English."²⁸

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,²⁹ 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

²⁶ 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).

²⁷ 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).

²⁸ ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 43, Mervin Burns).

²⁹ Canada, *Copy of 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.³⁰

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.”³¹ 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 ...³²

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

³⁰ Canada, *Copy of 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).

³¹ Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), 243 (ICC Exhibit 13d, p. 45).

³² 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.”³³

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.”³⁴ 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.³⁵

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.

...

³³ Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), 244 (ICC Exhibit 13d, p. 46).

³⁴ Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), 246 (ICC Exhibit 13d, p. 48).

³⁵ 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.³⁶

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.³⁷ 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.³⁸

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

³⁶ 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).

³⁷ John Leonard Taylor, *Treaty Research Report, Treaty Six* (Ottawa: Treaties and Historical Research Centre, DIAND, 1985), 25 (ICC Exhibit 13c, p. 25).

³⁸ 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.”³⁹ 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.⁴⁰

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.⁴¹ 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 of Reserve.” On instructions from the Assistant Surveyor General, Hart discontinued the Fort à la Corne work and left for Prince Albert.⁴²

³⁹ 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).

⁴⁰ David Laird, Indian Superintendent, to Superintendent General of Indian Affairs (SGIA), November 18, 1877, *Annual Report for the Department of the Interior for the Year Ended June 30, 1877*, 45–46 (ICC Exhibit 1, pp. 12–13).

⁴¹ Milner Hart, DLS, to Surveyor General, November 29, 1878, in CLSR, Field book 724, p. 29 (ICC Exhibit 8a, p. 30).

⁴² 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).

Another surveyor, Elihu Stewart, was charged with laying out reserves for John Smith (brother to James Smith)⁴³ 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.⁴⁴ 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.⁴⁵

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.⁴⁶

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.

⁴³ See ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 60, Isaac Daniels).

⁴⁴ E. Stewart, DLS, Indian Reserve Survey Diary, 1878–79, in CLSR, Field book 729 (ICC Exhibit 8c, p. 28).

⁴⁵ 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).

⁴⁶ 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).

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.⁴⁷ 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.⁴⁸

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.”⁴⁹ 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 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

⁴⁷ Milner Hart, “Plan of partial survey of Indian Reserve at Ft. a la Corne, Chief James Smith,” CLSR, Plan A1029 (ICC Exhibit 8b).

⁴⁸ “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.”

⁴⁹ 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).

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.⁵⁰

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.⁵¹

According to Hart's field notes, William Smith (James Smith Band, 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.⁵²

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 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:

⁵⁰ 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).

⁵¹ 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).

⁵² 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).

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.⁵³

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.⁵⁴ 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.⁵⁵ Patrick's report, however, describes the area as generally unsuitable for agriculture:

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

⁵³ L. Vankoughnet, DSGIA, to Sir John A. Macdonald, SGIA, November 16, 1881, LAC, RG 10, vol. 3768, file 33642 (ICC Exhibit 1, p. 86).

⁵⁴ Lorraine Patrick, DLS, Field notes, township 48, range 20, W2M, April 2–18, 1883, in CLSR, Field book 3869 (ICC Exhibit 8i).

⁵⁵ Lorraine Patrick, DLS, Field notes, township 48, range 20, W2M, April 2–18, 1883, in CLSR, Field book 3869 (ICC Exhibit 8i).

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.⁵⁶

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,⁵⁷ but the Chief refused to accept the latter.

... [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.⁵⁸

⁵⁶ 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).

⁵⁷ 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.

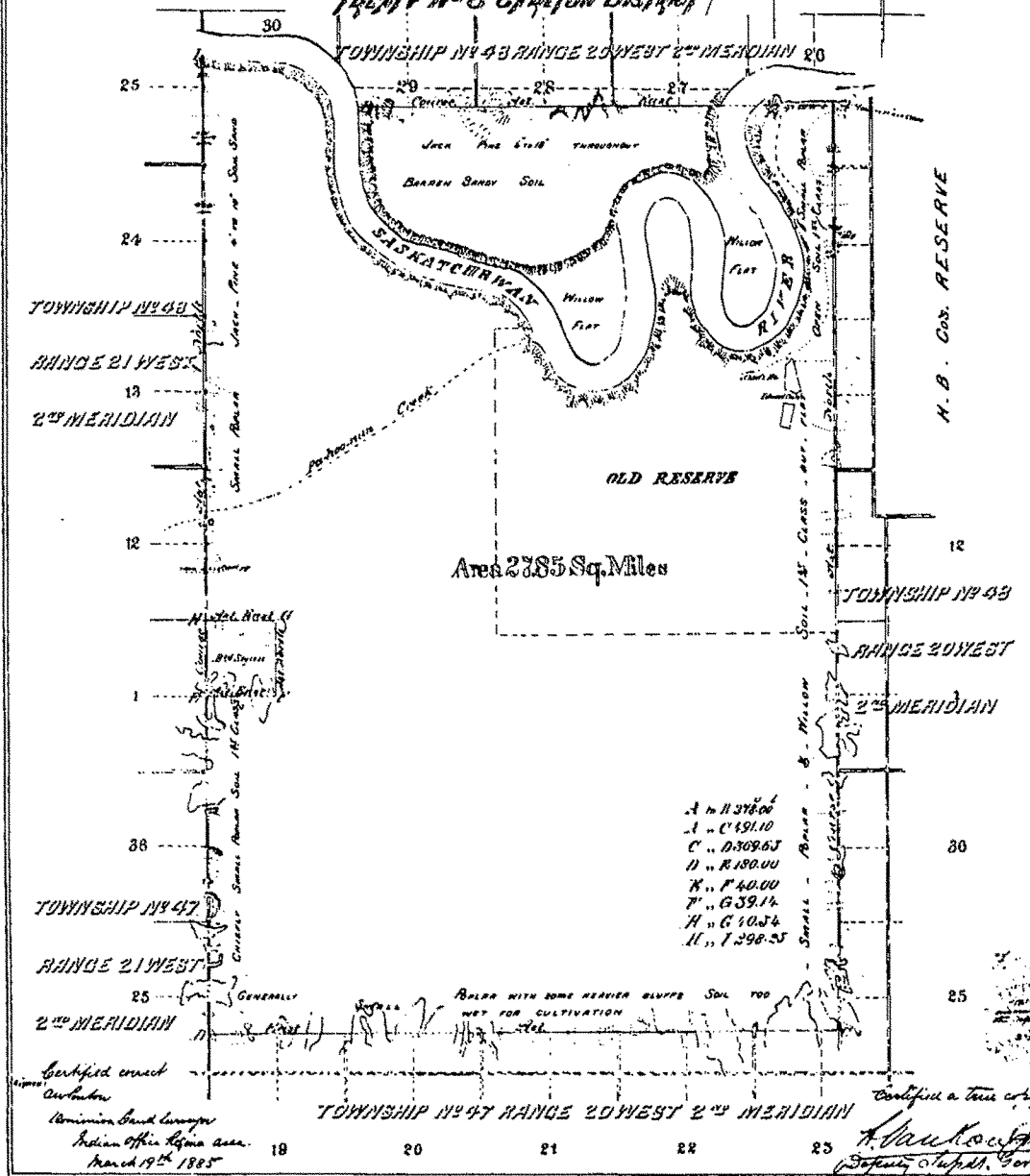
⁵⁸ L. Vankoughnet, DSGIA, Ottawa, to E. Dewdney, Indian Commissioner, Regina, November 20, 1883, in LAC, RG 10, vol. 3576, file 353 (ICC Exhibit 1, pp. 214–15).

I. R. N. 100

PLAN INDIAN RESERVE

Chief James Smith
AT FORT A LA CORNE
TREATY NO 6 CANADIAN DISTRICT

Scale 40 Chains = 1 Inch



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.”⁵⁹ 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.⁶⁰

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 coincident with the old arrangement of Mr. Russell.”⁶¹ (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, that of Btd Scyiese, was in the northwest corner of section 6, township 48, range 20, W2M, and adjoined the west boundary, so it

⁵⁹ 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).

⁶⁰ 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).

⁶¹ 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).

was simply omitted from the reserve. Three others, those of Edward Cook,⁶² Charles Fiddler, and Alexander Fiddler,⁶³ 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.⁶⁴

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.⁶⁵ 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."⁶⁶ 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 little cultivation.⁶⁷ 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:

⁶² 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).

⁶³ 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).

⁶⁴ 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).

⁶⁵ 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).

⁶⁶ 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).

⁶⁷ 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).

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.⁶⁸

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.”⁶⁹

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 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?⁷⁰

The Elders’ testimony in this inquiry further paints a picture of lands specifically chosen by the James Smith Band for its multiple uses:

⁶⁸ 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).

⁶⁹ ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 38, Chief Walter Constant).

⁷⁰ ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, pp. 20, 24, Chief Walter Constant).

why he [Chiefs James Smith] selected land across the river was because of the timber, they could make homes with that timber, so that they could make a living, or make a home to live in.⁷¹

The Hudson's Bay Company was here, and the people were living off the river and bushes around here on both sides of the river. It was a trapping area, there was a lot of game [on] both sides of the river, 'cause our buffalo were dwindling.⁷²

So I guess the real reason why a lot of people, why the Indian people settled in this area was because it catered to the way of life, of existence, like I said earlier, the animals and the water.⁷³

As for farming, the Elders testified that, at the time of treaty, some farming was underway but "they were not forecasting that they were going to be farmers";⁷⁴ "they weren't farmers ... so I don't think that they'd realize if the land was good for farming or not."⁷⁵ Yet, some members of the James Smith Band did choose to farm, and, for those who did, "some places [within the reserve] it's good, some places it's not worth it."⁷⁶

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."⁷⁷ In his field notes, Ponton described the soil above the Scyiese claim as being sandy or sandy loam, except for one area

⁷¹ ICC Transcript, June 27–28, 2001 (ICC Exhibit 5a, pp. 43, 44, James Burns).

⁷² ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 40, Melvin Burns).

⁷³ ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 53, Isaac Daniels).

⁷⁴ ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 69, Isaac Daniels).

⁷⁵ ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 96, Osborne Turner).

⁷⁶ ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 138, Wilfred Constant).

⁷⁷ 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).

opposite section 13, township 48, range 20, W2M, which he states is unfit for cultivation.⁷⁸ 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.⁷⁹

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 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 pruce 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.⁸⁰

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

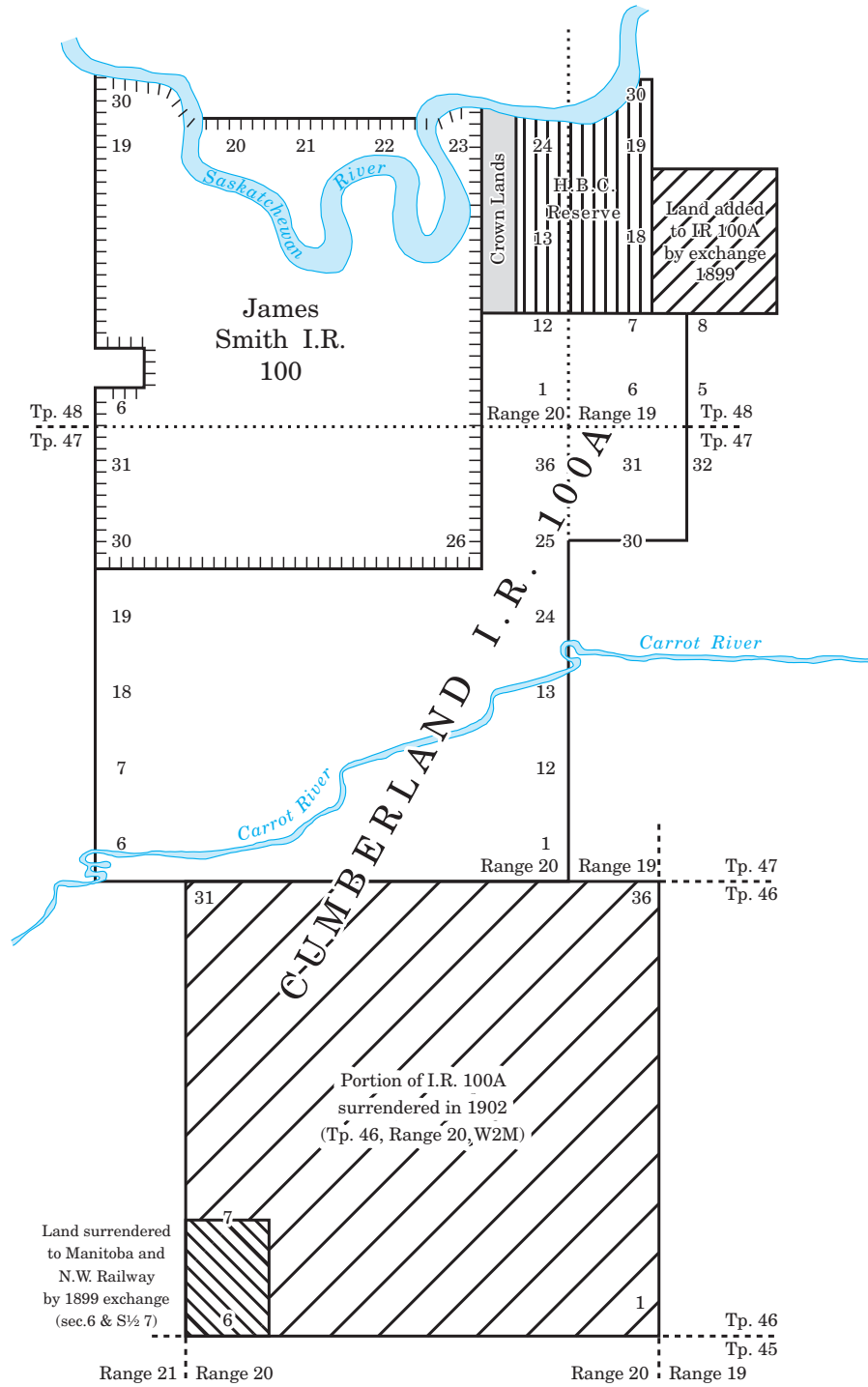
⁷⁸ A.W. Ponton, DLS, “100 Field Notes, Indian Reserve at Fort à la Corne, Treaty No. 6, Chief James Smith,” no date [July–August 1884], CLSR, Field book 149, pp. 21–24 (ICC Exhibit 8j, pp. 16–17).

⁷⁹ 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).

⁸⁰ Order in Council PC 1151, May 17, 1889, pp. 52–53 (ICC Exhibit 1, pp. 652–53).

Map 3

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)

Band on October 6, 1884,⁸¹ and two others were absent from that payment but returned in 1886 and were paid arrears for 1884.⁸² 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 ($(144 - 139) \times 128 = 5 \times 128 = 640$). 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 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.'"⁸³

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.⁸⁴ 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

⁸¹ 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).

⁸² 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).

⁸³ *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).

⁸⁴ J.A. MacKay to James F. Graham, September 21, 1880, in LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1, pp. 38–40).

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.”⁸⁵ 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,⁸⁶ land which the Superintendent General of Indian Affairs described the following year as a “miserable tract of sterile land.”⁸⁷ 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 ($345 \times 128 = 44,160$).⁸⁸ Despite the fact that only a portion of the Cumberland people moved south, in July 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).”⁸⁹

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

⁸⁵ 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).

⁸⁶ 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).

⁸⁷ 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).

⁸⁸ 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).

⁸⁹ Order in Council PC 1151, May 17, 1889, pp. 54–55 (ICC Exhibit 1, pp. 655–57).

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 5.⁹⁰

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

Chakastaypasin Members Move to IR 100A

Chief Chakastaypasin and four headmen 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.⁹¹

⁹⁰ 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).

⁹¹ Edgar Dewdney, Indian Commissioner, Notice, May 6, 1885, LAC, RG 10, vol. 3584, file 1130 (ICC Exhibit 1, p. 320).

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, its reserve surrendered, and its membership forcibly transferred to surrounding bands.⁹² 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.⁹³

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 Rebellion as to merit recognition” and would be added to “the list of those to be rewarded for loyalty.”⁹⁴

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.”⁹⁵ By early May, Kahtapiskowat and most of his followers left IR 98 for Fort à La Corne.⁹⁶ In April 1889, Chief Chakastaypasin reportedly also decided to “come in onto the reserve [IR 100A],” as he “cannot support himself any

⁹² 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).

⁹³ 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).

⁹⁴ Edgar Dewdney, Indian Commissioner, to Acting Agent, Prince Albert, May 25, 1886, LAC, RG 10, vol. 1591 (ICC Exhibit 1, pp. 425–26).

⁹⁵ 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).

⁹⁶ 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).

longer.”⁹⁷ 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’s 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.”⁹⁸ In 1895, the *Indian Act* was amended to formalize the procedures for transfer of membership between bands. Section 140 provided:

When by a majority vote of a band, or the council of a band, an Indian of one band is admitted into membership in another band, and his admission thereinto is assented to by the superintendent general, such Indian shall cease to have any interest in the lands or moneys of the band of which he as formerly a member, and shall be entitled to share in the lands and moneys of the band to which he is so admitted; but the superintendent general may cause to be deducted from the capital of the band of which such Indian was formerly a member his per capita share share of such capital and place the same to the credit of the capital of the band into membership in which he had been admitted in the manner aforesaid.⁹⁹

In addition, Forget instructed that all the former Chakastaypasin members being paid with the James Smith Band should be transferred to the Cumberland Band 100A as well, since they had “never ...

⁹⁷ R.S. McKenzie to Indian Commissioner, monthly report for April 1889, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 644).

⁹⁸ A.E. Forget, Indian Commissioner, to the Indian Agent, Duck Lake Agency, February 17, 1896, no file reference available (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 1, p. 744).

⁹⁹ *Indian Act*, RSC 1886, c. 43, s. 140, as amended by SC 1895, c. 35, s. 8 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 24a, p. 59).

formally transferred” to James Smith.¹⁰⁰ 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.¹⁰¹

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.¹⁰²

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.¹⁰³

¹⁰⁰ 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).

¹⁰¹ 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).

¹⁰² 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).

¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ (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.¹⁰⁶

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.

¹⁰⁴ 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).

¹⁰⁵ 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).

¹⁰⁶ 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.¹⁰⁷

W.A. Orr, in charge of the Land and Timber Branch at the Department of Indian Affairs, approved Laird's suggestion regarding the amalgamation.¹⁰⁸

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.¹⁰⁹

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,

¹⁰⁷ 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).

¹⁰⁸ 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).

¹⁰⁹ 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.¹¹⁰

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 Band, No. 29),¹¹¹ the son of Robert Burns, was 20 years old¹¹² 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

¹¹⁰ Amalgamation Agreement, July 24, 1902, LAC, RG 10, vol. 2562, file 82, pt. 9 (ICC Exhibit 1, pp. 945–46).

¹¹¹ Angus Burns was given number 175 in 1901; in 1903, when the payroll was reorganized, he was assigned number 29.

¹¹² 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.¹¹³

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.”¹¹⁴ The James Smith band payroll indicates 107 people were paid annuities that day, including 28 adult men.¹¹⁵ Agent Jones’s annual report for that year notes 25 men in the James Smith Band and 27 in the Cumberland Band 100A.¹¹⁶

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.

¹¹³ 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).

¹¹⁴ 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).

¹¹⁵ 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).

¹¹⁶ 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 ENTITLEMENT¹¹⁷

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 Amalgamation¹¹⁸**

- 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?

¹¹⁷ 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.

¹¹⁸ See ICC, *James Smith Cree Nation: Treaty Land Entitlement Report on Issue 9 – Amalgamation* (Ottawa, March 2005).

- 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?

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

ISSUE 1 PAYLIST

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?

Additional Paylist Analysis and Agreement of the Parties

Following the initial stage of establishing the issues to be inquired into, and because 16 years had lapsed between the original rejection of the Band's claim (c. 1982) and Canada's 1998 "Draft Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines,"¹¹⁹ the parties agreed that further paylist analysis would benefit the inquiry.

In January 2002, Canada delivered its additional paylist research report, which it revised in December 2002 to include supporting worksheets and paylists. This report concluded, based upon an 1884 date of first survey (DOFS), that the First Nation had a population of 144 people and 11 late additions for a total TLE population of 155 people.¹²⁰ In February 2003, the James Smith Band delivered its paylist research report which concluded that an 1884 DOFS resulted in a total TLE population of 154 people.¹²¹

In its Reply Submissions submitted to this inquiry, the James Smith Cree Nation has agreed with Canada's paylist analysis and states that it "has agreed to accept that number [a TLE population of 155] for the purposes of this Inquiry, reserving the right to deal with this issue at the time a settlement is negotiated."¹²²

¹¹⁹ ICC Exhibit 7a, DIAND, Specific Claims Branch, "Draft Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines," October 1998.

¹²⁰ ICC Exhibit 3b, Neil W. Vallance, "Treaty Land Entitlement Review for James Smith Cree Nation," December 2002.

¹²¹ ICC Exhibit 2b, John Hay, "James Smith Band TLE – Summary Paylist Analysis," February 11, 2003.

¹²² Reply Submissions on Behalf of the James Smith First Nation, June 11, 2006, p. 13, para. 44–45.

We are glad that the parties, through additional research undertaken during this inquiry, have come to an agreement that resolves the first issue. Thus, no further analysis is required from the panel.

ISSUES 2, 3, AND 4: 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?

Interpretation of Reserve Clause

The principal issues in this inquiry involve the interpretation of Treaty 6 and how the parties intended to determine the quality and quantum of land owed to the James Smith Band under the treaty. The relevant portion of Treaty 6, referred to throughout this inquiry as the “reserve clause,” is reproduced below:

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 with the Indians thereof as to the locality which may be found to be most suitable for them.¹²³

The wording of the reserve clause is clear on two points. First, the clause directs Canada to set aside reserves for the use and benefit of Indian bands, with the amount of land to be determined by applying the treaty formula of one square mile per family of five, “or in that proportion for larger

¹²³ Canada, *Copy of 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). Emphasis added.

or smaller families.” This amounts to 128 acres per person. Second, the treaty describes a process for the selection and survey of reserves. The reserve clause is completely silent, however, regarding what is “farming land” and what interpretation is to be given to “due respect being had to lands at present cultivated by the said Indians.”

The James Smith Band submits that the proper interpretation of “farming land” in Treaty 6 is that Canada is obliged to provide lands that are 100 per cent capable of growing crops, which the Band describes in these terms:

It is submitted that the facial meaning of “farming lands” is land capable of growing crops. Particularly at that time, “farming lands” were very distinct from “agricultural lands” or “cattle lands”. A rancher can ranch and raise cattle without growing crops but a farmer cannot farm without land suitable for growing crops. Cattle can be pastured on any land. Whether grass grows well or poorly simply means more or fewer cattle can be pastured in an area. A farmer, however, requires land which will produce crops.¹²⁴

The Band argues that its interpretation of the treaty is supported by the historical evidence of the parties’ intentions at the time they entered into treaty and also by their subsequent conduct in implementing its terms. The First Nation submits that, at the time of treaty, “[s]ome of the James Smith people were farmers who also used the land in their territory for traditional purposes. Others were hunters, fishers, trappers, traders, and gatherers who only used the land in their territory for non-farming purposes. The signing of Treaty 6 marked the beginning of the transition from a traditional Aboriginal “life off the land” which used what presently existed on the land to a traditional Euro-Canadian “life off the land” which changed the land to be able to grow crops and raise cattle.”¹²⁵ Thus, Treaty 6 “was drafted to provide the means through which Indian peoples could become farmers.”¹²⁶ For the First Nation then, Treaty 6 promises the Band a “farming reserve” which

¹²⁴ Submissions on Behalf of the James Smith Cree Nation, July 28, 2003, pp. 25–26, para 41.

¹²⁵ Submissions on Behalf of the James Smith Cree Nation, July 28, 2003, p. 40, para 100.

¹²⁶ Submissions on Behalf of the James Smith Cree Nation, July 28, 2003, p. 42, para 110.

would allow the Band a “modest living; having 640 acres of farming land per family of 5 would allow a modest living for a family.”¹²⁷

Canada submits that the most reasonable interpretation of “farming land” in Treaty 6, based upon the facial meaning of the written text and the historical context surrounding treaty negotiations, is that “farming land” includes land suitable for both growing crops and raising animals and should not be narrowly interpreted to mean only land suitable for crop raising as the Band submits. The argument was framed in these terms:

Canada submits that there seems to be no ambiguity in relation to the term “reserves for farming lands”, as including lands suitable for either cultivating crops or raising animals, or both. It is clear from the above use of the words “farming”, “cultivation” and “agriculture” as including the raising of both plants *and* animals. While some supplies were given for bands engaged in “cultivation”, others clearly related to livestock, both which are included in farming.¹²⁸

Canada further argues that the issue of TLE land quality is not only informed by what was meant by “farming,” but also by other words in Treaty 6, specifically the provision for “other reserves”. Thus, Treaty 6 provides for two types of reserve lands – “farming” and “other” – and because of this, reserves were not intended to be provided solely for the purpose of growing crops. The argument was framed in these terms:

In short, the distinction in the wording of the Treaty between “farming lands” and “other reserves” suggests that two different types of reserve land were contemplated in the overall granting of reserve land based on the *per capita* formula ... First, given that “other reserves” immediately follows “farming lands”, “other reserves” obviously means lands for purposes other than farming. And whatever meaning may be ascribed to “other reserves”, it is clear that both types of reserves (farming and other) are to be included in the total amount of treaty land entitlement according to the following formula.¹²⁹

¹²⁷ Submissions on Behalf of the James Smith Cree Nation, July 28, 2003, p. 42, para 112.

¹²⁸ Submissions on behalf of the Government of Canada, April 13, 2006, p. 30, para 92. Emphasis added.

¹²⁹ Submissions on behalf of the Government of Canada, April 13, 2006, p. 31, para 98.

Canada concludes its argument by submitting that, whatever may be the interpretation to ascribe a certain quality to reserve lands, the “overriding consideration of the Treaty land obligation” is consultation with the band itself. Thus, the ultimate selection of “farming lands” or “other” lands rested with the Band.

Principles of Treaty Interpretation

The principles of interpretation were most recently restated by Madam Justice McLachlin (as she then was) in *R. v. Marshall* (in dissent but not on this point). She stated:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation ...
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories ...
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed ...
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed ...
5. In determining the signatories’ respective understanding and intentions, the courts must be sensitive to the unique cultural and linguistic differences between the parties ...
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time ...
7. A technical or contractual interpretation of treaty wording should be avoided ...
8. While construing the language generously, courts cannot alter the terms of treaty by exceeding what “is possible on the language” or realistic ...
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves

determining what modern practices are reasonably incidental to the core treaty right in its modern context ...¹³⁰

Interpretation of “Farming Land”

Applying these principles and the approach adopted by McLachlin J in *Marshall* to interpret treaty, we must undertake a two-step analysis and give due consideration to both the words of the treaty, as well as the historical and cultural context at the time the treaty was negotiated. The first step involves an examination of the words of the treaty “to determine their facial meaning in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause.”¹³¹ At the second step, “the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty’s historical and cultural backdrop ... Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties’ common intention. This determination requires choosing ‘from among the various possible interpretations of the common intention the one which best reconciles’ the parties’ interests.”¹³²

Step One

First, we must consider the words of the treaty to determine what it provides for. An examination of the reserve land provision reveals:

- 1 An agreement by Her Majesty the Queen to “lay aside reserves for farming lands ... and other reserves for the benefit of the said Indians.”
- 2 The reserve “shall not exceed in all one square mile for each family of five or in that proportion for larger or smaller families”

¹³⁰ *R. v. Marshall*, [1999] 3 SCR 456, para. 78, McLachlin J.

¹³¹ *R. v. Marshall*, [1999] 3 SCR 456, para. 82.

¹³² *R. v. Marshall*, [1999] 3 SCR 456, para. 83.

- 3 A reserve is set aside when 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 with the Indians thereof as to the locality.”

Thus, in the case of Treaty 6, there is a reserve land entitlement of 640 acres per family of five or 128 acres for each Indian who is a member of the band. Further, there is an undertaking by Canada to create a reserve for “farming” and for “other” purposes, without limitation, to a total treaty land entitlement based upon the treaty formula. The treaty does not speak directly as to whether the nature of the “farming” activity at the time required land solely dedicated to raising crops or raising animals, or both. The First Nation has argued that this provision created a treaty obligation on the Crown to provide 100 per cent cultivable land, while Canada has submitted that, on its face, this provision obligated the Crown to provide land suitable for either cultivating crops or raising animals, or both. In our view, the term “farming” varied from one region to another; however, as the honour and integrity of the Crown is to be presumed, the Crown would be expected to provide a reasonable amount of land for *cultivation* but not 100 per cent unless such an intention is (a) common to the parties and (b) found upon the evidence. This conclusion then leads us to consider step two of McLachlin J’s approach.

Step Two

The different interpretations of the treaty must be considered against the treaty’s historical and cultural backdrop. Thus, the question of whether the treaty intends “farming lands” to mean “100 per cent cultivatable” or “land suitable for either cultivation and/or raising animals” must be examined in terms of the negotiations leading up to the signing of Treaty 6, the promises within Treaty 6, and the intention of the parties.

Prior to treaty, only Bernard Constant, who would later become a headman and signatory to Treaty 6 on behalf of the James Smith Band, is documented as having a “mixed farm.”¹³³ Immediately following treaty, there are general references in the evidence to members of the James

¹³³ Four Arrows, “James Smith Cree Nation, Treaty Band No. 100 – General History,” draft, January 25, 1995 (ICC Exhibit 11, pp. 2–3).

Smith Band living near Fort à la Corne, “cultivating the soil”¹³⁴ and wanting to receive the “agricultural implements and cattle”¹³⁵ as promised in Treaty 6.

Following treaty but prior to the reserve’s survey, Chief James Smith clearly requested “good land and not sand hills”¹³⁶ for the Band and, when he was not satisfied with the location of the reserve boundaries, they were adjusted to his satisfaction.¹³⁷

In our view, the Crown’s obligation to provide “farming lands” does not impose a corresponding obligation on the band to take up farming.. When and if a band took up farming was a decision of the band. In addition to “farming land,” the treaty required the Crown to set aside “other reserves.” Ultimately, however, the selection of land to be set aside by the Crown as a reserve – as “farming” or “other” – was a decision made in consultation with the band and was unique to the circumstances of each band. In this case, some members of the James Smith Band had begun some farming following treaty and before their reserve was surveyed. We know that the Chief had made a specific request for “good land and not sand hills.” If we interpret the Chief’s words to mean land capable of cultivation, there is no evidence that he was requesting 100 per cent farm land since many members of the Band were pursuing other means of living and not simply farming. Nevertheless, the treaty required the Crown to lay aside reserve for farming lands, and given that the integrity and honour of the Crown are to be presumed, although there is no obligation on the Crown to set aside 100 per cent cultivable land, the Crown did have an obligation to set aside a reasonable amount of cultivable land in the event the First Nation elected to take up farming. Though Treaty 6 bands had the option of selecting lands for multiple reserves, the James Smith Band selected land for a single reserve to support its farming, hunting, and fishing way of life and, based upon the evidence, some

¹³⁴ W.J. Christie, Indian Commissioner, Fort Garry, Memorandum, October 10, 1876, in LAC, RG 10, vol. 3636, file 6694-1 (ICC Exhibit 1, pp. 1–3; 9–11).

¹³⁵ Four Arrows, “James Smith Cree Nation, Treaty Band No. 100 – General History,” draft, January 25, 1995 (ICC Exhibit 11, pp. 1–3, 4–8).

¹³⁶ Four Arrows, “James Smith Cree Nation, Treaty Band No. 100 – General History,” draft, January 25, 1995 (ICC Exhibit 11, p. 86).

¹³⁷ Four Arrows, “James Smith Cree Nation, Treaty Band No. 100 – General History,” draft, January 25, 1995 (ICC Exhibit 11, p. 305).

settlers were moved to accommodate the Band's choice. Thus, it actively selected the lands that would become IR 100, and the lands chosen were agreed to by both the Crown and the Band.

Summary of Findings on Issues 1, 2, and 3

Based on established principles of law relating to the interpretation of treaties and the approach of McLachlin J in *Marshall*, we make the following findings about the obligations of the Crown to provide reserve land of a specific quality under the terms of Treaty 6:

- 1 The purpose and intention of the reserve clause of the treaty is that a reserve of a specific quality would be set aside , for
 - a) farming land; and
 - b) other purposes (without limitation).
- 2 The band is to be consulted about the *location* of the land. In our view, the band's choice of location would be determined by the nature and quality of the land being selected and surveyed as reserve land.
- 3 Based on the evidence in this case, members of the James Smith Band were relying upon the land in and around Fort à la Corne for multiple uses, i.e. farming, hunting, and fishing, at the time IR 100 lands were being selected as a reserve. As regards farming, at the time of survey, Chief James Smith wanted "good land and not sand hills." We infer from his statement that he was referring to farmland capable of cultivation.
- 4 Based on the totality of evidence, the Crown did provide farming land to the James Smith Band. The Band was consulted on the location and quality of the lands to be set aside as its reserve, and they therefore could have chosen land exclusively for farming. Instead they chose land that supported multiple uses.
- 5 The goal of treaty interpretation is to choose the meaning that best reconciles the interests of both parties. In our view, the Crown did set aside the reserve land selected by the Band at the time. Some of this land supported an agricultural use. Other portions supported band members' desire to continue to hunt and fish. If the goal of treaty interpretation is to be met, then to accept the Band's argument would mean that the Crown would be imposing its intention onto the James Smith Cree Nation, i.e. setting aside reserve land that would only support crop raising and not the way of life referred to in the record. Thus, based upon the above, the Crown did not breach its obligation.

ISSUES 5, 6, AND 7: 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)?

Interpretation of Reserve Clause and “Due Respect Being Had”

As in the previous issues, we have been asked to interpret the reserve clause of Treaty 6. In this portion of the report, we consider the meaning of the “due respect” phrase. For ease of reference, we have repeated the reserve clause below:

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 with the Indians thereof as to the locality which may be found to be most suitable for them.¹³⁸

The James Smith Band submits that the phrase “due respect being had to lands at present cultivated by the said Indians” within the reserve clause creates an obligation on the Crown to exclude the lands occupied and improved by members of the James Smith Band prior to treaty when calculating the land entitlement for the James Smith Band. In addition to excluding these lands when calculating the Band’s TLE, James Smith argues that the Indians making these land improvements had a right to individual ownership, which the Band describes in these terms:

It has been established that there were members of James Smith residing at Fort à la Corne at the time of Treaty in 1876 who had occupied and improved lands. The

¹³⁸ Canada, *Copy of 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). Emphasis added.

surveyor should have deducted these area [*sic*] of these homelands from the land to which the James Smith Band was entitled pursuant to Treaty ... How many families occupied and improved land and the amount of land to which those families were entitled need not be determined in this Inquiry. It is sufficient for the Commission to find there was land occupied and improved by Indian people to which the owners had a right to individual ownership, the area of which was not deducted from the land to which the James Smith Band was entitled.¹³⁹

The Band argues that its interpretation of this “due respect” phrase is supported by the historical evidence and by the Crown’s desire to achieve consistency in treaty interpretation. Thus, the Band argues that “it would be most unfair and unjust for Canada to allow settlers to have the areas in which they occupied, whether or not cultivated, at the time of treaty but to deny Indian peoples the land which they occupied at the time of treaty.”¹⁴⁰

Canada submits that the most reasonable interpretation of the “due respect” phrase, based on the written text and the historical context surrounding the treaty, is a reference to land “cultivated” rather than lands “occupied” at the time of treaty (not the time of survey), and these lands were to be included in the band’s total treaty land entitlement and not in addition to its TLE. Canada describes its position in these terms:

the facial meaning of the “due respect” clause in question, when read in the context of the whole paragraph, does not support an interpretation that lands previously occupied or cultivated were to be recognized *in addition* to reserves provided under the TLE formula. Rather, when setting aside reserves, (which included input from the band), lands which had been cultivated at the date of treaty and which were identified by the band at the time of survey could be included in the portion of the TLE reserve comprising “reserves for farming lands.”¹⁴¹

Therefore, Canada’s position is that the purpose of the reserve clause was to provide reserves (including those for farming lands) for the collective benefit of the band, the total area of which was to be based on a maximum of one square mile per family of five, and according to the band’s

¹³⁹ Submissions on Behalf of the James Smith Cree Nation, July 28, 2003 p. 18, paras. 26–27.

¹⁴⁰ Submissions on Behalf of the James Smith Cree Nation, July 28, 2003, p. 41, para. 106.

¹⁴¹ Submissions on Behalf of the Government of Canada, April 13, 2006, p. 65, para. 175. Emphasis in original.

selection. As such, a band could identify those lands it had already cultivated, occupied, or otherwise collectively used or valued for inclusion in the band's treaty land entitlement.¹⁴²

If we apply the treaty principles and two-step approach outlined in the discussion above, then what interpretation is to be given to "due respect being had to lands at present cultivated by the said Indians"? Must we include or exclude lands occupied prior to treaty when calculating a band's TLE? In this claim, the specific location and extent of lands allegedly cultivated prior to treaty has not been clearly identified. In fact, according to the James Smith Cree Nation, the amount of land under cultivation "need not be determined in this inquiry."

At the same time, we know that it is a fundamental TLE principle that every treaty Indian has the right to be counted as a member of a band in an entitlement calculation. According to the terms of Treaty 6, collectively each band is entitled to 128 acres of land for each member of the band. Further, treaty land entitlement is a right of the band as a collective based on its total population at the date of first survey and does not attach to the land under cultivation by its members at the time the treaty was signed. Thus, land under cultivation is not relevant to determining a Band's entitlement under treaty. Therefore, if we look at the case of Bernard Constant, who the evidence indicates was the sole James Smith band member cultivating soil prior to treaty within the limits of what would become IR 100, he should have been counted towards the whole of the James Smith TLE quantum regardless of the location of the lands he was cultivating. Thus, the James Smith Band was entitled to receive 128 acres for Bernard Constant as a band member, whether he had 5 acres under cultivation or 125, and in fact the Band did receive credit for Constant's entitlement.

In other words, lands held by individuals and cultivated prior to treaty are not to be taken into consideration when calculating a Band's TLE.

Section 10 of the *Indian Act*, 1876

As regards the rights of individual members of the James Smith Band found to be in possession of land under cultivation prior to treaty and further included in the reserve, these are addressed not only by the collective rights of the band but also by statute. Section 10 of the *Indian Act*, 1876, states:

¹⁴² Submissions on Behalf of the Government of Canada, April 13, 2006, p. 69, para. 191.

Any Indian or non-treaty Indian in the Province of British Columbia, the Province of Manitoba, in the North-West Territories, or in the Territory of Keewatin, who has, or shall have, previously to the selection of a reserve, possession of and made permanent improvements on a plot of land which has been or shall be included in or surrounded by a reserve, shall have the same privileges, neither more nor less, in respect of such plot, as an Indian enjoys who holds under a location title.¹⁴³

Thus, where a band member had made improvements to land that would become reserve land, this band member was given the right to occupy these improved lands (to the exclusion of the band) and could dispose of these lands to another member of the band.

Summary of Findings on Issues 5, 6, and 7

- 1 A band's treaty land entitlement is a collective right of the band based upon its population at the date of first survey. Pursuant to the terms of Treaty 6, a band is entitled to receive 128 acres per band member.
- 2 Land under cultivation by an individual band member is not relevant to determining nor does it diminish a band's treaty land entitlement.
- 3 However, where a band member has land under cultivation prior to treaty (in this case, Treaty 6) and this land becomes reserve land, the individual has the right of occupation to the exclusion of the band and the right to dispose of this land to another band member in accordance with section 10 of the *Indian Act*, 1876.
- 4 On the facts of this case, no lands should have been excluded from treaty land quantum calculation and, based upon the evidence before us, Canada did not breach an obligation regarding lands occupied prior to treaty.

ISSUES 8, 9, AND 10: 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?

¹⁴³ *Indian Act*, SC 1876, c. 18.

As the panel reported in the *Cumberland House Cree Nation: IR 100A Inquiry*, a band separate from the Cumberland Band that adhered to Treaty 5 and originally settled at IR 20 was not created in fact or in law at any point in time prior to the surrender of land or alleged amalgamation of IR 100A in 1902. To answer issue 8, there is therefore no “Peter Chapman Band” and, consequently, no surplus of treaty lands owned by any such “Peter Chapman Band.” In our March 2005 *Cumberland House Cree Nation: IR 100A Inquiry Report*, we concluded that Canada surveyed and set aside IR 100A in fulfillment of its outstanding Treaty 5 obligations to the Cumberland Band. That some of the members of this Band began to migrate to Fort à la Corne before, during, and after IR 100A was set aside; that leadership separate from the Chief and council of the Cumberland Band at IR 20 was continually denied to the residents at IR 100A on the basis that their leadership existed at IR 20; that the decision to settle at a location acceptable to the Cumberland Band and Canada in 1887 (when IR 100A was finally surveyed) was approved by order in council in 1889; and, finally, that the evidence indicates that Canada was at all times under the belief that the whole of the Cumberland Band living at Cumberland Lake would eventually move to IR 100A, owing to the “utter uselessness” of the land at IR 20, all lead us to our conclusion: IR 100A was set aside as a reserve for the whole of the Cumberland Band and not just those members resident at the time of its survey. This is a fact that Canada conceded in the *Cumberland House Cree Nation: IR 100A Inquiry*.¹⁴⁴

As stated previously, in March 2005 this panel delivered its Report on Issue 9: Amalgamation.¹⁴⁵ In our report, we conclude, based on the totality of the evidence, that the “amalgamation” of the James Smith Band and the “Peter Chapman Band” was invalid. Our determination in March 2005 ends any further consideration of this issue of amalgamation. Given our findings and conclusions to issues 8 and 9, no further consideration of issue 10 is needed. We now turn to the final issue of this inquiry.

¹⁴⁴ ICC, *Cumberland House Cree Nation: Indian Reserve 100A Inquiry Report* (Ottawa, March 2005), 127, 134.

¹⁴⁵ See the Summary Report on Issue 9: Amalgamation, reproduced as Appendix B.

ISSUE 11 SUFFICIENCY OF 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?¹⁴⁶

As we stated in our March 2005 report, we believe the owners of Cumberland Reserve 100A were all members of the Cumberland Band, including those resident at IR 20 and not just those resident at IR 100A. It follows then that a decision to dispose of IR 100A by an amalgamation of the Cumberland IR 100A Band with the James Smith Band required the informed consent of the whole of the Cumberland Band. Canada's failure to seek and obtain an informed consent is a breach of its treaty and fiduciary duties to the Cumberland Band. Based on our findings, we reiterate that the amalgamation of the James Smith Band and the "Peter Chapman Band" was invalid. Therefore, IR 100A could not have been validly transferred to the credit of the James Smith Band in 1902, and yet today that Band is in possession of the unsurrendered portion of IR 100A, which represents more than the number of acres needed to make up for a 16-person shortfall. Based on the treaty land entitlement formula, the James Smith Band today has more than the sufficient acreage required by Treaty 6.

In our view, there is an outstanding obligation owed to the Cumberland House Cree Nation, which includes the 2,048 acres of IR 100A that the Crown used to "cure" the 16-person shortfall of the James Smith Cree Nation land entitlement under Treaty 6. As stated in our conclusion to the *Cumberland House Cree Nation: Indian Reserve 100 A Inquiry*, the Cumberland House Cree Nation should be compensated for the whole of IR 100A, which includes the 2,048 acres now in the possession of the James Smith Cree Nation.

¹⁴⁶

Please refer to Part III of this report for a complete list of issues at pp. 39– 40.

PART V
CONCLUSION

Following the initial stage of establishing the issues to be inquired into, the parties agreed to undertake further payroll analysis. The result was an agreement that an 1884 date of first survey created a 16-person shortfall for the James Smith Band within the terms of Treaty 6. It has been Canada's position throughout this inquiry, however, that this shortfall became a surplus in 1902, when the James Smith Band and the "Peter Chapman Band" were amalgamated and IR 100A was added to the land base of the amalgamated James Smith Cree Nation.


In March 2005, this panel rendered its view of the so-called amalgamation and concluded that Canada's failure to seek and obtain the consent of whole of the Cumberland Band to the amalgamation was a breach of its treaty and fiduciary obligations to the Cumberland Band. Therefore, we reiterate our view that the amalgamation is invalid.

In addition to the issues of the population and amalgamation of the James Smith Cree Nation, this inquiry also examined the issues of land quality and lands occupied prior to treaty. As we have set out in this report, we find that Canada owes no further obligation to the James Smith Cree Nation regarding the quality of land selected as IR 100 or for lands occupied by James Smith prior to treaty.

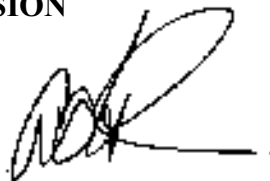
The panel notes that the James Smith Cree Nation and Canada agree that there was a 16 person shortfall as of the date of first survey however, based on our findings, the James Smith Cree Nation today has more than sufficient land required by Treaty 6. On the facts of this inquiry, no outstanding treaty land entitlement is owed to the James Smith Cree Nation.

As we stated in March 2005, we reiterate our recommendation that Canada is obliged to put the Cumberland House Cree Nation in the same position it would have been had the breach of treaty and of fiduciary responsibility not occurred.

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis, C.M.
Chief Commissioner



Alan C. Holman
Commissioner

Dated this 27th day of February, 2007.

APPENDIX A*

**James Smith Cree Nation:
Treaty Land Entitlement and Cumberland 100A Reserve Inquiries – Interim Ruling**

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

JAMES SMITH CREE NATION INQUIRIES

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.

INDIAN CLAIMS COMMISSION PROCEEDINGS

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.

JAMES SMITH CREE NATION INQUIRIES

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.¹

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. Bibeault*² 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.”³ We have also recently stated that “[t]o restrict the mandate of the Commission to a

1 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).

2 *U.E.S., Local 298 v. Bibeault*, [1988] 2 SCR 1048.

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

INDIAN CLAIMS COMMISSION PROCEEDINGS

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.”⁴

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 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

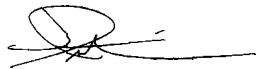
⁴ ICC, “Interim Ruling: Alexis First Nation Inquiry, Transalta Utilities Rights of Way Claim,” p. 8; see above at 59.

JAMES SMITH CREE NATION INQUIRIES

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 claimants, and will attempt to avoid any unfairness the government feels their decision to proceed with the inquiry causes."⁵ 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.

⁵ ICC, "Interim Ruling: Lac La Ronge Indian Band Inquiries, Candle Lake and School Lands Claims," see above at 19.

APPENDIX B

James Smith Cree Nation: Treaty Land Entitlement Inquiry – Summary Report on Issue 9 Amalgamation

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

Treaties – Treaty 6 (1876); **Treaty Land Entitlement** – Amalgamation – Land Occupied Prior to Treaty – Quality of Land; **Mandate of Indian Claims Commission** – Issues; **Saskatchewan**

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

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

Treaties Referred To

Treaty 6.

COUNSEL, PARTIES, INTERVENORS

W. Selnes for the James Smith Cree Nation; U. Ihsanullah, R. Winogron for the Government of Canada; K.N. Lickers to the Indian Claims Commission.

APPENDIX C

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, 10th 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

APPENDIX D



Affaires indiennes
et du Nord Canada

Indian and Northern
Affairs Canada

Sous-ministre adjoint

Assistant Deputy Minister

Ottawa, Canada
K1A 0H4

WITHOUT PREJUDICE

MAR - 9 2006

B8260-17-J1

Chief Luther Constant
Chief Calvin Sanderson
Chief Phyllis Head
James Smith Cree Nation
P.O. Box 1059
MELFORT SK S0E 1A0

Dear Chiefs:

I am writing to advise that Canada has completed its review and prepared its position regarding the land quality and lands occupied prior to treaty aspects of the James Smith Cree Nation Treaty Land Entitlement claim. Before continuing, I should note that in previous correspondence, Canada had advised that the Minister would issue Canada's response to these allegations. However, I was recently authorized by the Minister to issue Canada's response.

On May 22, 1984, Minister John Munro, Indian and Northern Affairs Canada, wrote to Chief Angus Maclean, James Smith Cree Nation, to confirm Canada's position concerning the rejection of the Treaty Land Entitlement claim. In that letter, Mr. Munro stated that Canada was unable to accept the claim for negotiation on the basis that the Treaty Land Entitlement shortfall at the date of first survey in 1884 became a Treaty Land Entitlement surplus in 1902 when James Smith Band and Peter Chapman Band were amalgamated and I.R. No. 100A was added to the land-base of the amalgamated band. In 1999, your First Nation requested an Indian Specific Claims (ISCC) Inquiry into Canada's rejection of this claim. At that time, James Smith Cree Nation raised new allegations regarding land quality and lands occupied prior to treaty. The ISCC agreed to include these issues in the Treaty Land Entitlement Inquiry, but recognized that Canada had not had the opportunity to respond to them. Further to this, Canada advised that a clear set of allegations and supporting evidence needed to be provided for Canada to respond. On July 28, 2003, the First Nation delivered a written legal submission addressing the land quality and lands occupied prior to treaty issues. Having considered this submission, it has been determined that these allegations do not identify a basis to accept the Treaty Land Entitlement claim for negotiation under the Treaty Land Entitlement Policy or the Specific Claims Policy.

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Set out below is a description of your First Nation's allegations and Canada's responses:

James Smith Cree Nation

- 1) Canada breached a treaty obligation to provide reserve land suitable for farming because a portion of the reserve land allotted to James Smith is not suitable for farming. Only farming lands can be used to fulfill treaty land entitlement. The obligation to provide farming land can only be satisfied by providing lands for growing crops as opposed to raising cattle or some other agricultural purpose.
- 2) Canada breached treaty obligations by failing to exclude lands occupied and improved prior to treaty when calculating Treaty Land Entitlement for the First Nation.

Canada's response

Canada's assessment of the allegations is based on the application of the Supreme Court of Canada *Marshall* decision which identifies two steps in treaty interpretation:

Step 1)

There must be an examination of the facial meaning of the written text and identification of any ambiguities or misunderstandings that may have arisen from linguistic and cultural differences;

Step 2)

Even where there is no ambiguity on the face of the text, extrinsic evidence of the historical and cultural content of a treaty must be reviewed. This review may identify any ambiguities or misunderstandings that are not evident from the facial meaning of the text. Ultimately, this step is intended to determine the common intention of the parties at the time of treaty. The relevant common intention is that which best reconciles the interests of the parties and maintains the honour of the Crown. As a result of this analysis, it may be determined that there are implied terms in a treaty (i.e. terms that are not included in the written terms) to give effect to the common intention.

Land Quality

Step 1)

The written text of the treaty indicates that the Crown was to set aside reserves for farming. However, the text of the treaty does not support the First Nation's view that the Crown had an obligation to ensure that all of the reserve land provided pursuant to Treaty was suitable for cultivation of crops. Firstly, the Treaty made provision to assist First Nations with raising livestock. Secondly, the Treaty stipulates that the Crown

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would set aside reserves for farming lands and other reserves. Given that the reference to “other reserves” immediately follows the reference to “farming lands”, it is obvious that “other reserves” is a reference to lands for purposes other than farming.

Both types of reserves were to be allocated pursuant to the treaty according to the formula set out in the Treaty:

“...*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...” (Emphasis added)

However, the Treaty is silent as to any commitments to the amounts of each type of land to be allotted and the quality of each type of land to be allotted.

Thirdly, the text of the Treaty indicates that reserve selection was not a unilateral or unfettered decision of the Crown. The Treaty provides that reserves were to be determined in consultation with the First Nations for which they were set apart. As such, each First Nation was intended to play a role in selection of the type of land to be included in their reserves.

Step 2)

The extrinsic evidence available suggests that the common intention of the parties was to encourage and foster self-sufficiency. Prior to Treaty 6 and during Treaty 6 negotiations, both parties raised concerns about the ability of First Nations to subsist in the face of significant changes to their way of life, including the decline of the bison population. During Treaty 6 negotiations, both parties discussed cultivation at length, and cattle to a lesser degree. Emphasis was placed on First Nations’ continued hunting activities and it was clear that neither party intended that farming would entirely replace hunting and fishing. Farming was seen by both parties as a viable way for First Nations to supplement their economic well-being with alternate resources. In addition, it was clear in treaty discussions that both parties understood that First Nations would be involved in selecting their reserve lands.

The terms of Treaty 6 were reflected in other numbered treaties. The terms of Treaties 1 through 7 provide assistance for agriculture, including stock-raising and provision for First Nations to be consulted in the selection of reserve lands. Treaties 3 and 5, like Treaty 6, include provision for some reserve lands for farming.

Following Treaty 6, James Smith Band was consulted on a number of occasions concerning the location of its reserve. There is no record of what was said during the discussions at the time of the survey of the reserve in 1884, but evidence suggests that in preceding years, the First Nation had selected the area near Fort à la Corne,

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which is where the reserve was eventually surveyed. Prior to 1884, the Chief had indicated a preference for good quality soil. The placement of the reserve mostly on the south side of the Saskatchewan River, with only a small portion on the north side of the river would appear to have satisfied this request as the land on the south side was of better quality for farming. The land on the north side, of which a small portion was included in the reserve, was well suited for hunting and fishing.

Following the survey of the reserve, there are no complaints on record regarding the reserve land selected. The band members engaged in the raising of cattle and some cultivation, but remained chiefly engaged in hunting and fishing. Reports from the department suggested that in the years following the setting aside of the reserve the First Nation was able to be largely self-sufficient.

It is clear that both parties to Treaty 6 placed importance on ensuring that First Nations could provide themselves with enough food to survive and that they both considered farming to be one of the options for subsistence. As the common intention of the parties was not to provide reserve land solely for the purpose of farming, there was no duty on the Crown to provide land solely for farming and no corresponding breach. Further research into the quality of soil on the reserve, the proportion of soil classifications and the nature of activities allowed by those factors would be required in order to determine with certainty whether Canada breached obligations to provide a reasonable amount and quality of farming lands to JSCN. However, on a balance of probabilities, the available evidence suggests that Canada did not breach obligations in this regard.

Lands Occupied Prior to Treaty

Step 1)

There is nothing in Treaty 6 or in any schedule thereto to indicate which lands were occupied or cultivated by the band at the time of treaty, or anything to indicate that lands occupied or cultivated prior to treaty were not to be considered as fulfilling the First Nation's Treaty Land Entitlement. The facial meaning of the clause stipulating that reserves would be set aside for farming lands, "due respect being had to lands at present cultivated by the said Indians" should be read in the context of the other terms of the Treaty. It clearly refers only to lands "cultivated" rather than lands occupied, and at the time of treaty, rather than at the time of survey. The Treaty provision that "all such reserves shall not exceed in all one square mile for each family of five" does not support the interpretation that "lands at present cultivated by the said Indians" were not to be included in provision of a First Nation's Treaty Land Entitlement reserves.

Step 2)

The extrinsic evidence available suggests that the common intention of the parties was that lands occupied prior to treaty collectively or individually by James Smith Cree Nation members were to be included in the First Nation's Treaty Land Entitlement. Prior to and during the negotiation of Treaty 6,

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First Nations and the Crown expressed interest in First Nations pursuing agriculture as an option for subsistence. However, no mention was made during negotiations of excluding lands occupied prior to treaty from Treaty Land Entitlement. Following Treaty 6, there are no complaints on record regarding the inclusion of any lands occupied prior to Treaty.

In fact, there is no evidence regarding which specific lands were collectively or individually occupied prior to Treaty (1876), although there is some evidence regarding reserve lands individually occupied prior to the reserve survey (1884). Members that held lands occupied prior to the reserve survey were reportedly involved in the survey. Their involvement and apparent lack of complaint does not support the contention that such lands should not have been included for Treaty Land Entitlement purposes.

The issue of lands occupied prior to treaty arose with regard to Treaty 1 First Nations in Manitoba. It appears that where individual plots held by Indians fell within the boundaries of reserves, the government agreed with bands that Indians would be allowed to retain individual holdings within a band's reserve, but in addition to the band's Treaty Land Entitlement. However, this practice addressed a very specific situation involving densely settled areas and involved agreement by the parties at the time of treaty. This was not the case in Treaty 6.

I thank you for your patience in waiting for Canada's response and regret that the reply could not be more positive.

Yours sincerely,



Michel Roy
Assistant Deputy Minister
Claims and Indian Government

c.c.: Mme Renée Dupuis, Chief Commissioner, Indian Specific Claims Commission

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
- Written Submissions on Behalf of the Government of Canada, April 13, 2005
- Reply Submissions on Behalf of the James Smith Cree Nation, June 12, 2006

6 Oral legal submissions

Saskatoon, June 15, 2004

Saskatoon, June 21, 2006

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, June 15, 2004)
- transcript of oral session (1 volume, June 21, 2006)

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