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FROM THE CHIEF COMMISSIONER

This is the 20th volume of the Indian Claims Commission Proceedings to be published and I am pleased to present it on behalf of the Commissioners of the Indian Claims Commission. The volume includes five inquiry reports, and the Key Words Index, updated to include the final report of these inquiries.

The Commission conducted concurrent inquiries and reported in March 2005 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 Claim. As for the treaty land entitlement inquiry, by agreement of the parties, the Commission issued a first report on Issue 9: Amalgamation, and proceeded with the remaining issues in this inquiry and issued a further report in February 2007.

In the James Smith Cree Nation: IR 100A Inquiry, the panel found that they owed no outstanding lawful obligation to the James Smith Cree Nation. In the Cumberland House Cree Nation: IR 100A Inquiry the panel found that Canada owes an outstanding lawful obligation to that First Nation for the loss of its interest in and the use of IR 100A from 1891 forward. The panel's findings in the James Smith Cree Nation: Chakastaypasin Inquiry are that Canada required a surrender of IR 98 before it could lawfully dispose of these reserve lands, that the surrender sought was invalid, and that Canada owes an outstanding lawful obligation for its breach of treaty, statutory, and fiduciary duties. Finally, in the fourth report on James Smith Cree Nation: Treaty Land Entitlement Inquiry — Issue 9: Amalgamation, the panel found that the amalgamation of the “Peter Chapman Band” and the James Smith Cree Nation was invalid.

The fifth report published in this volume relates the facts and the panel's conclusions into the remaining issues of the James Smith Cree Nation: Treaty Land Entitlement Inquiry.

Renée Dupuis, C.M., Ad.E.
Chief Commissioner
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ABBREVIATIONS

Sask QB Saskatchewan Court of Queen’s Bench
SC Statutes of Canada
SCB Specific Claims Branch
SCC Supreme Court of Canada
SCR Canada Supreme Court Reports
SGIA Superintendent General of Indian Affairs
SProvC Statutes of the Province of Canada
WWR Western Weekly Reports
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JAMES SMITH CREE NATION
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MARCH 2005
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JAMES SMITH CREE NATION
INDIAN RESERVE 100A INQUIRY
Saskatchewan

The report may be cited as Indian Claims Commission, James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3.

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 5 (1876); Treaty Interpretation – Reserve Clause; Treaty Right – Minerals; Band – Division – Amalgamation; Reserve – Surrender – Disposition; Royal Prerogative; Fraud; Practice and Procedure – Intervenor – Witness; Evidence – Admissibility; Mandate of Indian Claims Commission – Issues; Saskatchewan

THE SPECIFIC CLAIM
On January 24, 1991, the James Smith Cree Nation (JSCN) submitted a specific claim regarding the surrender and sale of the southern portion of Indian Reserve (IR) 100A totalling 22,080 acres. The First Nation claimed that Canada breached its statutory, treaty, trust, and fiduciary duties in taking the alleged surrender and further argued that Canada breached its statutory, treaty, trust, and fiduciary duties in its unlawful disposition of IR 100A. On March 13, 1998, Canada rejected the First Nation’s claim regarding the validity of the surrender, while accepting for negotiation an outstanding lawful obligation with respect to the sale of the surrendered lands. The Indian Claims Commission (ICC) accepted the May 18, 1999, request of the JSCN to conduct an inquiry into the surrender and subsequent sale of IR 100A.

BACKGROUND
Chief James Smith and four councillors signed Treaty 6 in August 1876 on behalf of the James Smith Band. On May 17, 1889, IR 100 was confirmed for the James Smith Band by Order in Council 1151 and consisted of 27.8 square miles.

On July 24, 1902, Canada took a surrender of 22,080 acres from IR 100A and sought to amalgamate the “owners of the James Smith’s Indian Reserve No. 100” and
the “owners of Cumberland Reserve 100A.” For both the surrender and amalgamation, Canada relied upon two signatories who had allegedly transferred to IR 100A in 1896 from the Chakastaypasin Band. With this amalgamation, IR 100A lands were joined with IR 100, and any outstanding treaty land entitlement owed to the James Smith Band at IR 100 was, in Canada’s view, cured by the addition of IR 100A to IR 100 lands.

In 1903, Canada subdivided the surrendered land for sale. The majority of the quarter sections were purchased by government officials who were investigated in 1913 and found to be in breach of their duties. All quarter sections were sold for less than their appraised value.

**ISSUES**

What were Canada’s obligations in taking the 1902 surrender at IR 100A? Is Canada in breach of any such obligations, and, if so, is the surrender valid and does Canada owe an outstanding obligation? Was there an amalgamation of the “Peter Chapman Band” and the James Smith Band? What were Canada’s obligations in disposing of IR 100A? Was there a surrender of the IR 100A Strip, and, if so, what were Canada’s obligations in disposing of it?

**FINDINGS**

Canada today concedes that IR 100A was set aside for the Cumberland Band. We agree. Based on the totality of the evidence, a separate band was not created at any time. The Cumberland Band that adhered to Treaty 5 resided at two locations: IR 20 and IR 100A. The Cumberland Band continues to exist and continues its treaty relationship with the Crown. This relationship and the terms of Treaty 5 limit the exercise of the Crown’s royal prerogative, especially where that prerogative is being exercised to deprive a band of its reserve land. Thus, a transfer of an interest (i.e., a reallocation) in reserve lands to some other group triggers the requirements, under treaty, that Canada seek and obtain the consent of the Band to dispose of its interest in its reserve lands. On the evidence, no such consent was sought.

Canada’s failure to have sought the informed consent of the whole of the Cumberland Band to the transfer of people into IR 100A, to the surrender of the southern portion of IR 100A, and to the agreement to amalgamate its interest in IR 100A with the James Smith Band at IR 100 is a breach of treaty, statute, and fiduciary duties.

Upon the surrender of reserve land, Canada has treaty, statutory, and fiduciary duties in disposing of this land by sale. Canada has admitted its breach of fiduciary duties in accepting prices below the appraised value and for failing to enforce the terms of sale. Canada has admitted it breached its statutory duty for its failure to have
immediately dismissed its employee for his conduct involving the sale of IR 100A and for its failure to have cancelled the sales attributable to him. In the absence of clear and unequivocal evidence, the panel is unable to make a finding of fraud.

**Recommendation**
That the lawful obligations that arise from Canada dispositions of Indian Reserve 100A be accepted for negotiation with the Cumberland House Cree Nation.

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

**Cases Referred To**

**ICC Reports Referred To**

**Treaties and Statutes Referred To**
*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; *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), 1–2; *Indian Act*, RSC 1886.

**COUNSEL, PARTIES, INTERVENORS**
W. Selnes, for the James Smith Cree Nation; U. Ihsanullah and R. Winogron 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.

Big Head, see Kahtapiskowat.

Bray, Samuel, Chief Surveyor for the Department of Indian Affairs, in 1899–1903.


Calvert, W.S., Member of Parliament and an associate of the Prendergast group.

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.

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.

Constant, John, member of the Treaty 5 Pas Band; was paid annuities on the Cumberland Band paylist at Fort à la Corne from 1886 to 1890.

Courtney, Joseph, Indian Agent for the Pas Agency, 1898–1906.
Daly, Thomas M., Superintendent General of Indian Affairs and Minister of the Interior, October 1892–April 1896.

Davis, Thomas O., Member of Parliament for Prince Albert and a member of the Prendergast group; also purchased lands in the sale of Chakastaypasin IR 98 in 1901.

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

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.

Fraser, A.W., Ottawa lawyer and a member of the Prendergast group.


Head, James, received annuities with the Cumberland Band at IR100A until 1902; appointed Chief of the James Smith Band, 1903.

Herchmer, L.W., Inspector of Indian Agencies, in 1886.


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.
Lamont, J.H., Prince Albert attorney and a member of the Prendergast group; also purchased lands in the sale of Chakastaypasin IR 98 in 1901.

Macarthur, James, Indian Agent for the Duck Lake Agency, 1903–12.

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.


McGibbon, Alexander, Inspector of Indian Agencies and Reserves, North-West Territories, in 1889–96.

McKenna, J.A.J., Assistant Indian Commissioner, in 1904–6.

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

McLean, J.D., Secretary for the Department of Indian Affairs; later promoted Assistant Deputy and Secretary for the same department.

Menary, A.J., stenographer with a Toronto law firm, purchased a majority of the lands in the surrendered portion of IR 100A in 1903; it was later discovered that these tenders were submitted on behalf of Frank Pedley, Deputy Superintendent General of Indian Affairs (DSGIA); James A. Smart, the former DSGIA; and W.J. White, an Immigration Inspector, as represented by Toronto lawyer A.C. Bedford-Jones.
**Mossom Boyd group**: Mossom M. Boyd and William T.C. Boyd, Ontario speculators who purchased lands in the surrendered portion of IR 100A in 1903.

**Nelson, John C.**, Dominion Land Surveyor, surveyed IR 100A 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.

**Pedley, Frank**, Deputy Superintendent General of Indian Affairs, November 1902–October 1913; previously held the positions of Superintendent of Immigration and Inspector of Immigration Offices within the Department of the Interior.

**Prendergast, James E.P.**, a member of the Prendergast group; also Judge of the Supreme Court of the North-West Territories, 1902–5; Judge of the Supreme Court of Saskatchewan, 1906–10.

**Prendergast group**: James E.P. Prendergast, J.H. Lamont, P.D. Tyerman, T.O. Davis, and A.W. Fraser, five speculators who purchased lands in the surrendered portion of IR 100A in 1903. Fraser later assigned his interest to W.S. Calvert, a Member of Parliament.

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

**Reader, Joseph**, Indian Agent for the Pas Agency, 1884–98.

**Reed, Hayter**, Acting Assistant Indian Commissioner, 1883–84; Assistant Indian Commissioner, 1884–88; Indian Commissioner, 1888–93; Deputy Superintendent General of Indian Affairs, 1893–97.

**Reid, J. Lestock**, Dominion Land Surveyor, carried out the subdivision survey of the surrendered portion of IR 100A in 1902.

**Rimmer, Reginald**, Law clerk for the Department of Indian Affairs in 1899.

**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.


**Sifton, Clifford**, Superintendent General of Indian Affairs and Minister of the Interior, November 1896–February 1905.

**Smart, James A.**, Deputy Superintendent General of Indian Affairs, July 1897–November 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.

**Tyerman, P.D.**, a member of the Prendergast group; also a Prince Albert physician employed with the Department of Indian Affairs as a medical officer from 1899 to 1904 in the Duck Lake and Carlton Agencies.

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

The terms that follow relate to the James Smith Cree Nation, and 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 the counterparts in other communities is unclear. It seems that there would be one person recognized by all the communities as “chief” of the larger “band,” but the evidence is not entirely consistent on this point.\(^1\) 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 paylist 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 paylist 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.

**Cumberland Band / Cumberland Band of Indians / Cumberland Indians** – These terms are used interchangeably in departmental

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\(^1\) ICC Transcript, November 20, 2001 (ICC 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).
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, and Grand Rapids Bands, and others).²

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.³

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.

**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 the 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

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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 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 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 the 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.

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

It has taken this Commission, the First Nations, and Canada’s representatives five years to conclude our process, and we are mindful of the dedication, commitment, and hard work that each has applied. We thank you.
INTRODUCTION

On May 17, 1889, the Government of Canada confirmed by Order in Council Indian Reserve (IR) 100A “[f]or the Indians of Cumberland District (of Treaty No. 5).” Within 13 years, the Government of Canada sought the surrender of 22,080 acres from the 65 square mile reserve. On July 24, 1902, the Government of Canada procured this surrender from only two signatories: Kahtapiskowat and George Sanderson – two former members of the Chakastaypasin Band IR 98.

On January 24, 1991, the James Smith Cree Nation (JSCN) submitted a claim under the Specific Claims Policy regarding the surrender and sale of the southern portion of IR 100A. The First Nation claimed that Canada breached its statutory, treaty, trust, and fiduciary duties and obligations to the James Smith Band in taking the alleged surrender, and that the transaction was therefore void. It was also argued that, after the surrender was taken, the Crown breached its statutory, treaty, trust, and fiduciary duties and obligations to the James Smith Band in its unlawful and illegal disposition of Indian lands. On February 4, 1992, a separate claim regarding the 100A Strip – land adjoining the reserve but not included in the survey – was submitted for consideration as well.1

On March 13, 1998, Assistant Deputy Minister John Sinclair communicated Canada’s rejection of the First Nation’s claim regarding the invalidity of the 1902 surrender. Sinclair wrote:

As a result of our review of the historical evidence, it is our preliminary position that the surrender is valid. The only available historical documents support the conclusion that the Cumberland 100A Band intended to surrender the lands that are

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1 In 1902, when Surveyor J.L. Reid subdivided the allegedly surrendered portion of IR 100A, he found that the reserve boundaries did not coincide with surrounding township boundaries; IR 100A included a strip of land in township 46, range 19, west of the 2nd meridian (W2M), along the western boundary of that township. The 1902 surrender described lands within township 46, range 20, but not range 19. The strip measures 191.33 acres.
the subject of this claim and gave their free and informed consent to the surrender in accordance with the procedural requirements of the 1886 Indian Act.\(^2\)

However, certain other aspects of the claim were accepted for negotiation. Canada acknowledged “an outstanding lawful obligation on the part of the Government of Canada to JSCN for having breached its fiduciary obligations with respect to the sale of the surrendered lands, including the remaining lake beds and No Man’s Land.”\(^3\) Specifically, these include the obligations to dispose of the lands for a reasonable price, to cancel sales when payments were not made in a timely fashion, and to cancel the 72 sales made to its employee Frank Pedley, who “acted improperly” by participating in the sales.\(^4\)

On May 10, 1999, Pamela Keating, Research Manager for the Specific Claims Branch, confirmed Canada’s position that “the procedural requirements for the 1902 surrender of the Cumberland 100A lands were met, and therefore, the surrender of 22,080 acres of the southern portion of the Cumberland 100A Reserve was valid.” In the same letter, with respect to James Smith Cree Nation’s TLE claim, it was stated that the amalgamation agreement of 1902 was also valid.\(^5\)

On May 18, 1999, the James Smith Cree Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its claims with respect to the surrender and sale of the southern portion of IR 100A and the status of the 100A Strip. On February 1, 2000, the Cumberland House Cree Nation (CHCN) requested its own inquiry with respect to its interests in IR 100A.\(^6\) Following discussions between both First Nations, the ICC ruled, on June 4, 2001, that it would conduct a single fact-finding process with respect to the James Smith and Cumberland House Cree Nations’ claims, while maintaining separate inquiries for each First Nation.\(^7\) The result of this single fact-finding process is

\(^2\) John Sinclair, Assistant Deputy Minister, Department of Indian Affairs and Northern Development (DIAND), Claims and Indian Government, to Chief Eddie Head, James Smith Cree Nation, March 13, 1998, p. 4 (ICC Exhibit 16a, p. 4).


\(^5\) Pamela Keating, Research Manager, DIAND, Specific Claims Branch, to Chief Eddie Head, James Smith Cree Nation, May 10, 1999, pp. 1–2 (ICC Exhibit 16b, pp. 1–2).

\(^6\) Canada challenged the mandate of the ICC to conduct an inquiry into aspects of the JSCN’s claim, and on May 2, 2000, the panel ruled that the inquiry should continue by virtue of its remedial or supplementary mandate. See James Smith Cree Nation: Treaty Land Entitlement and Cumberland 100A Reserve Inquiries – Interim Ruling, May 2, 2000, reproduced as Appendix A to this report.

\(^7\) Kathleen N. Lickers, Commission Counsel, Indian Claims Commission (for Commissioners Prentice, Augustine, and Dupuis), to William Selnes, Kapoor, Selnes, Klimm & Brown; Tom J. Waller, Olive, Waller, Zinkhan & Waller; and Uzma Ihsanullah, Department of Justice, DIAND, June 4, 2001 (ICC file 2107-39-03). This Ruling on Application for Leave to Intervene is reproduced as Appendix B to this report.
reflected in Part II of this report. We have worked to set out our understanding of the separate histories of each First Nation claimant, and our understanding of where their histories began to intersect.

There are numerous issues in this inquiry that overlap with the ultimate issues in the Cumberland House Cree Nation Inquiry into IR 100A and the James Smith Cree Nation –Chakastaypasin IR 98 Inquiry. For this reason, our findings in these other inquiries will necessarily be reflected in this report and will consequently have an impact on our findings in this inquiry. We have worked carefully and diligently to ensure that our findings in each case, and the reasons that support them, are cogent, coherent, and consistent.

A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix D of 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.” 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. 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:

8 On January 24, 2002, the panel also issued an interim ruling on the use of certain oral history evidence. See James Smith Cree Nation: Peter Chapman IR 100A Inquiry and Cumberland House Cree Nation: IR 100A Inquiry – Interim Ruling, which is reproduced as Appendix C to this report.


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.11

Furthermore, Canada is prepared to consider claims based on the following circumstances:

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

It should also be explained that, when the original mandate of the Commission was still under discussion, Tom Siddon, then Minister of Indian Affairs and Northern Development, wrote to then National Chief Ovide Mercredi of the Assembly of First Nations, setting out the basis for what the Commission first referred to as its “supplementary mandate” in the Athabasca Denesuline Inquiry Claim of the Fond du Lac, Black Lake, and Hatchet Lake First Nations:

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.12

In an October 1993 letter to the Commission, the Minister of Indian Affairs, Pauline Browes, reiterated the position taken by her predecessor. Minister Browes’s letter makes two key points in relation to the Commission’s jurisdiction:

1. I expect to accept the Commission’s recommendations where they fall within the Specific Claims Policy;
2. I would welcome the Commission’s recommendations on how to proceed in cases where the Commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair ...13

PART II

HISTORICAL BACKGROUND

CLAIMANTS’ ADHESIONS TO TREATY 5 AND TREATY 6

Geography and Claimants
As they exist today, two separate communities are affected by claims concerning IR100A in this inquiry. The first is the James Smith Cree Nation, which includes descendants from three separate groups: the James Smith Band at IR 100, the descendants of the Chakastaypasin Band at IR 98, and the descendants of the Cumberland Band at IR 20. The James Smith reserves 100 and 100A are located near the forks of the Saskatchewan River at Fort à la Corne, approximately 60 kilometres east of Prince Albert and within Treaty 6 territory. The Cree name for the area is Neechawechichinis, meaning “where they grew their crops” or “good growing.”

The second community is the Cumberland House Cree Nation, who were known as the Cumberland Band when they signed an adhesion to Treaty 5 in 1876. The CHCN’s main reserve, IR 20, is located on Cumberland Island in eastern Saskatchewan, approximately 250 kilometres northeast of James Smith. CHCN members refer to themselves as Waskahihikanihk ininiwak, meaning “the people of Cumberland House,” whose traditional territory includes an area of approximately 95 kilometres in all directions around Cumberland Island. IR 20 itself is located within Treaty 5 territory.

Cumberland Band Adhesion to Treaty 5, 1876
In September 1875, Treaty 5 was concluded at Beren’s River and Norway House by Commissioner Alexander Morris, Lieutenant Governor of the Province of Manitoba and the North-West Territories, and “the Saulteaux and Swampy Cree tribes of Indians” inhabiting an area of 100,000 square miles

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14 ICC Transcript, November 20, 2001 (ICC Exhibit 18b, p. 21, James Burns).
15 Affidavit of Joseph Laliberte, October 7, 2002 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12c, p. 3). See also ICC Transcript, November 19, 2001 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12a, p. 48, Marie Deschambault; p. 49, Joseph Laliberte).
Map 1: Claim Area Map

- Treaty Boundary
  The treaty boundary is intended to be for illustration purposes only.

- Portion of IR 100A Surrendered in 1902
surrounding Lake Winnipeg in Manitoba. Treaty 5 promised “reserves for farming lands” of 160 acres for each family of five (or 32 acres per person), “or in that proportion for larger or smaller families,” and that these “reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty’s Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.” Provisions were also made for yearly annuities, as well as farming implements, tools, oxen, and seed to be furnished “for the encouragement of the practice of agriculture among the Indians.”

On September 7, 1876, “The Cumberland Band,” represented by Chief John Cochrane and headmen Peter Chapman and Albert Flett, signed an adhesion to Treaty 5 at The Pas. The adhesion defines the “Cumberland Band” as “the Band of Saulteaux and Swampy Cree Indians residing at ... Cumberland Island, Sturgeon River, Angling River, Pine Bluff, Beaver Lake and the Ratty Country.” The treaty also provides for a reserve for the “Cumberland Band” 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.’”

The Hudson’s Bay Company (HBC) trading post known as Cumberland House was also located on Cumberland Island, to the south of Cumberland Lake, and the treaty excluded those lands claimed by the HBC and church missions from the future reserve.

**James Smith Band and the Signing of Treaty 6, 1876**

On August 23 and 28, 1876, the Government of Canada, represented by Treaty Commissioner Alexander Morris, signed Treaty 6 with “the Plain and Wood

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16 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), 3–4 (ICC Exhibit 2a, pp. 3–4).
17 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), 4–5 (ICC Exhibit 2a, pp. 4–5).
18 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), 6 (ICC Exhibit 2a, p. 6).
19 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 2a, pp. 10–11).
20 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 (ICC Exhibit 2a, p. 10).
21 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 (ICC Exhibit 2a, p. 10).
22 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 (ICC Exhibit 2a, p. 10).
Cree and the other Tribes of Indians” living in what are now the central portions of Saskatchewan and Alberta.23 Chief James Smith and four councillors – Bernard Constant, Henry Smith, Ma-twa-ahs-tin-oo-we-gin (later known as Chekoosoo),24 and Jacob McLean – signed the treaty on behalf of their Band.25 All were appointed to these positions for “life or resignation.”26

Treaty 6 provided for reserves of “one square mile [640 acres] for each family of five, or in that proportion for larger or smaller families.”27 The treaty also promised yearly annuities, as well as farming implements, tools, oxen, and seed to be furnished “for the encouragement of the practice of agriculture among the Indians.” These are the same promises made in Treaty 5, although Treaty 6 provided for a greater range and quantity of these items.28 In addition, Treaty 6 bands were promised a medicine chest, assistance during “pestilence” or “famine,” and provisions to help those making the transition to agriculture.29

It should be noted that a significant difference between Treaties 5 and 6, for the purposes of this inquiry, relates to the quantity of land entitlement: Treaty 5 provided for 32 acres of reserve land per person (or 160 acres per family of five), while Treaty 6 promised 128 acres per person (or 640 acres per family of five).

Cumberland Band Requests Reserve at Fort à la Corne

In 1878, two years after its adhesion to Treaty 5, E. McColl, the Inspector of Indian Agencies for the Manitoba Superintendency, reported that “the
Cumberland Band request a part of their Reserve at an island 40 miles north where good land is available and where a portion of the Band lives.” An 1881 letter from McColl suggests that “an additional reserve” was granted at Pine Island Lake in response to this request. However, IR 20 for the Cumberland Band at Cumberland Lake (also known as Pine Island Lake) was not surveyed until 1882.

During the winter of 1879–80, “head chief” John Cochrane died. In September 1880, former councillor Albert Flett was elected to be the new Chief for the Cumberland Band, and councillor Peter Chapman resigned his position.

Beginning in 1880, there were a number of requests from the Cumberland Band to be allowed to move up the Saskatchewan River to a point near Fort à la Corne. In September 1880, Angus MacKay, Indian Agent for Treaty 5, reported that “about one half of the band” requested permission “to be allowed a Reserve and move from the Cumberland Band to a point between Fort la Corne and the Forks of the South and North branches of the Saskatchewan.” Their desire “to move from Cumberland” seems to have been motivated by flooding and the failure of the fisheries and hunting grounds in the area, as well as the general unsuitability of the land for agriculture.

These conditions caused great hardship between 1879 and 1882 as widespread hunger, destitution, and sickness were reported in the entire Treaty 5 area. Inspector McColl wrote that, during the winter of 1880, the Agent knew of extreme hunger and destitution prevailing at Cumberland, but failed to provide

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34 A. MacKay, Indian Agent, to James F. Graham, Acting Indian Superintendent, September 21, 1880, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1, p. 4).
35 A. MacKay, Indian Agent, Treaty No. 5, to James F. Graham, Acting Indian Superintendent, November 26, 1880, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880, 323 (ICC Exhibit 1, p. 10); A. MacKay; Indian Agent, Treaty No. 5, to SGIA, September 6, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 72 (ICC Exhibit 1, p. 20); E. McColl, Inspector of Indian Agencies, to SGIA, December 10, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 103–4 (ICC Exhibit 1a, pp. 2–3); James F. Graham, Indian Superintendent, to SGIA, December 31, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 59 (ICC Exhibit 1a, p. 5); E. McColl to SGIA, November 28, 1882, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1882, 146–47 (ICC Exhibit 1, pp. 62–63).
any relief for three months.\textsuperscript{36} The Agent later reported that, due to the lack of food and proper medicines, “the hooping cough carried off a great number of children at The Pas and Cumberland.”\textsuperscript{37}

As the resources on which the people traditionally depended were rapidly failing, Agent MacKay reported in November 1880 that “some of the Indians living in the vicinity begin to feel somewhat anxious, and are more inclined than ever to farm; but they also find the work hard and unsatisfactory to make even a small garden in this part of the country. On this account some of them desire to move further up the river to a place more suited for agricultural purposes.”\textsuperscript{38} The work was made more difficult by the lack of appropriate farming implements. Inspector McColl reported in December 1881 that the garden hoes provided by the department had been refused by the Cumberland Band, as they considered them “unsuitable for the cultivation of that rocky and wooded country.” Grub hoes were sent instead, as requested by the Band, but were not distributed by the Indian Agent that year.\textsuperscript{39}

Indian Agent MacKay corroborated the Cumberland Band’s complaints regarding the quality of land at “Cumberland,” when he reported in 1880 that the land was indeed unfit for agriculture. He explained that

\begin{quote}
a very small portion of this locality is fit for farming purposes ... Were a survey made here and the Indians of this Band allowed 160 acres to each family of five, it would be a difficult matter to find that quantity of land above water in that vicinity and the little there is above water is so very rocky as to render it almost unfit for growing anything on, without very hard work and expense.\textsuperscript{40}
\end{quote}

Inspector McColl concurred, stating that “it is impossible to better their condition in that District, as no land there is well adapted for farming.”\textsuperscript{41}

Around the beginning of 1881, Chief Albert Flett petitioned Inspector McColl, asking him “to place me in that good land up-country, there to have my reserve.” He explained:

\begin{flushright}
\textsuperscript{36} E. McColl, Inspector of Indian Agencies, to SGIA, December 10, 1881, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881}, 104 (ICC Exhibit 1a, p. 3).
\textsuperscript{37} A. MacKay, Indian Agent, Treaty No. 5, to SGIA, September 30, 1882, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1882}, 43 (ICC Exhibit 1, p. 5).
\textsuperscript{38} A. MacKay, Indian Agent, Treaty No. 5, to SGIA, November 26, 1880, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880}, 323 (ICC Exhibit 1, p. 10).
\textsuperscript{39} E. McColl, Inspector of Indian Agencies, to SGIA, December 10, 1881, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881}, 103–4 (ICC Exhibit 1a, pp. 2–3).
\textsuperscript{40} A. MacKay, Indian Agent, to James F. Graham, Acting Indian Superintendent, September 21, 1880, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1, p. 4).
\textsuperscript{41} E. McColl, Inspector of Indian Agencies, to SGIA, March 4, 1881, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 14).
\end{flushright}
I could never keep my people alive in this place as it is almost all water, land not good & altogether too stony.

Besides, it is too small, therefore I must beg for a larger place where you can give me a reserve in good earnest. Also that you would regard or treat [illegible] just as you do the Indian of the Upper Country. And moreover, that you would without delay give me the means of cultivating the land, that I may be the sooner able to do for myself. I shall endeavour to my utmost to do as our Great Mother desires of us, as regards the tilling of the soil.

Already I have heard many expressing a desire to go there, so speedily send us word about this during this winter. I shall be very glad indeed if you will place me on good land before the White man takes it all up.

[Page torn] very clearly I cannot live from the cultivation of the soil here & for that reason desire to leave [page torn]eatly apprehensive (as to the future).

It is only now that I see how to obtain my livelihood: by looking for good land At the first, when you came to buy my land, you said ‘Look for good land. I will give it to you.’ I have found it now.”

Inspector McColl forwarded Chief Flett’s letter to the department in March, explaining in his covering letter that “[t]he Chief brought this matter to my notice last Summer, but as I had no personal knowledge of the section of country where he desired his reserve, I made no allusion to it in my report.”

In March 1881, an inquiry from the Department of Indian Affairs was made to the Department of the Interior, regarding “whether there is any objection to the change as applied for being made.” The same letter noted that no reserve had yet been surveyed for the Cumberland Band in Treaty 5 territory. Surveyor General Lindsay Russell replied that he was “unaware of any objection” to the change, “so long as land is selected that is not specially valuable as Timber Land.” This information was communicated to Superintendent James F. Graham in April 1881, but it appears that no further action was taken at this time.

Concurrent with the Cumberland Band’s requests for permission to move up the Saskatchewan River to Fort à la Corne, some members of The Pas Band were making similar requests. They apparently suffered from many of the same hardships and declining resources, and, in at least a few instances, their

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44 [Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA)], to J.S. Dennis, Deputy Minister of the Interior, March 29, 1881, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 15).
45 Lindsay Russell, Surveyor General, Department of the Interior, to L. Vankoughnet, DSGIA, April 9, 1881, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, pp. 16–17).
46 [Lawrence Vankoughnet, DSGIA], to James F Graham, Indian Superintendent, April 19, 1881, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 18–19).
requests to move were reported together. Agent MacKay reported in September 1881:

There are a number of the Cumberland and Pas Bands who are anxious to leave their reserves and be allowed to go up the Saskatchewan river, to some place in the vicinity of Fort a la Corne, where the land is better adapted for farming purposes than where they at present live. ... they assert that, unless the Department allows them to go to better farming lands, they will be obliged to look to the government for food in the future, as it is impossible to make a living by farming where they are at present, on account of the low, swampland and stony nature of the country.\footnote{47}

He also reported that neither band wanted its reserve surveyed in the areas promised by the treaty, since many wanted to leave those places.\footnote{48}

The same month, Agent MacKay reported that “Henry Ballandine together with about twenty other families from Cumberland” had requested permission to remove to “better farming lands” somewhere in the vicinity of Fort à la Corne, since it was impossible to make a living in farming “at Cumberland.” A similar request from John Constant “and a number of other families from the Pas” is noted in the same letter.\footnote{49}

Lawrence Vankoughnet, the Deputy Superintendent General of Indian Affairs (DSGIA), responded with serious misgivings about the movement of Indians from one treaty area to another. He explained: “I fear that serious complications will result if the same is countenanced as the stipulations of the different Treaties vary considerably.” For this reason, he denied the requests of Henry Ballandine and John Constant to move to Fort à la Corne.\footnote{50}

Despite Vankoughnet’s opposition, John Constant persisted in his request for farming land at Fort à la Corne. He wrote on September 6, 1882, that he had family already living in the area, and explained that he wanted to move so “that I and my family may live by farming.”\footnote{51} Agent MacKay reported the Cumberland Band’s renewed requests for permission to move that same month.\footnote{52}

\footnote{47} A. MacKay, Indian Agent, Treaty No. 5, to SGIA, September 6, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 73 (ICC Exhibit 1, p. 21).
\footnote{48} A. MacKay, Indian Agent, Treaty No. 5, to SGIA, September 6, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 74 (ICC Exhibit 1, p. 22).
\footnote{49} A. MacKay, Indian Agent, to J.F. Graham, Indian Superintendent, September 16, 1881, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1, pp. 24–26).
\footnote{50} L. Vankoughnet, DSGIA, to James F. Graham, Indian Superintendent, April 15, 1882, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1, pp. 35–37, 40).
\footnote{51} John Constant to unidentified recipient, September 6, 1882, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1, p. 52).
\footnote{52} A. MacKay, Indian Agent, Treaty No. 5, to SGIA, September 30, 1882, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1882, 43 (ICC Exhibit 1, p. 53).
Inspector McColl echoed these requests yet again in his annual report that year and reported on the continued scarcity of resources and dire circumstances in the “district”:

Their former resources of subsistence are becoming so exhausted that frequently they are famishing with hunger. They represent that it is impossible for them to obtain a livelihood there any longer, and consequently urgently petition the Department to grant them a suitable reserve elsewhere. They are desirous of going to Carrot River near Fort la Corne. If their request is not granted, they say the Government must supply them with food, as long as the sun courses around the world, for they cannot endure to listen to their children crying with hunger.53

In November 1882, a department official in Winnipeg communicated Indian Commissioner Edgar Dewdney’s objection to a “proposed transfer” from one reserve to another within Treaty 5, saying that “it would be impossible to keep trace of these Indians and would complicate the Pay Sheets.” Furthermore, he was concerned that allowing the transfer of Indians from one reserve to another would set a precedent, and “applications would come from all quarters for similar changes if these were allowed.”54

The department informed Inspector McColl in May 1883 that it was “undesirable that Indians connected with one treaty should be allotted land within the precincts of another Treaty,” although suitable agricultural land should be provided whenever possible. It was proposed to offer land at Birch River within Treaty 5 for the Cumberland Band, and McColl was instructed to bring the matter before the band after examining the locality.55

Survey of IR 20 at Cumberland Lake in Treaty 5
Concurrent with their requests to be allowed to move to Fort à la Corne, the Cumberland Band expressed its opposition to having a reserve surveyed at Cumberland Lake as promised by treaty. In September 1881, Agent MacKay reported that the Cumberland Band did not want its reserve surveyed in the locations promised by treaty, since many wanted to leave “that place.”56

Superintendent James Graham made a similar report that year, stating that

54 Indian Office to the Minister, November 24, 1882, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1, p. 60).
56 A. MacKay, Indian Agent, Treaty No. 5, to SGIA, September 6, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881*, 74 (ICC Exhibit 1, p. 22). MacKay's reference to “these places” is ambiguous, since, in the same report, he refers to the “Cumberland district” and the “vicinity of Cumberland,” and to The Pas and Cumberland band members wanting to “leave their reserves.”
several reserves had not been surveyed in Treaty 5, “owing to a number of the Indians of the Pas, Cumberland and Che-ma-wah-win Bands being desirous to have their reserves in another locality.”

Although Superintendent Graham was apparently aware of the Cumberland Band’s wishes, he instructed Dominion Land Surveyor (DLS) W.A. Austin on July 6, 1882, to survey a reserve for the Cumberland Band at “Cumberland.” On August 9, 1882, Austin arrived at Cumberland House and met with the Chief and two councillors the same day, where he was told that the Chief

has often presented the petition of his people to get land suitable, and had never yet obtained it his people were poor, very poor, often starving ...

... neither he or his people wanted to remain here, all trusted in the goodness of their Grand Mother (the Queen) to fulfill all her promises i.e. to procure good land for them so that they might be able to till it and not starve.

Nevertheless, Austin inspected Cumberland Island and, finding “some unoccupied land that might be given to Indians,” began the survey of it the next day, based on his understanding that “there was a number of the Band who did not desire to leave the Cumberland Reserve.” He also visited an island nearby where the Chief and a number of band members lived and named it Chief’s Island. Both islands were situated on what he called “Cumberland or Pine Island Lake.”

Soon after Austin began this work, the Chief called him to a council with a number of the band members. They informed him that

they had had a meeting amongst themselves and that they had come to the conclusion that they would have no Reserve laid out in this section. He then asked me if he could have 50 miles square laid out for himself and Band. ... he ended his speech by saying that he and his people would have no survey of a Reserve in this section of the country, and he informed me that for three years they had a promise of a Reserve up the Saskatchewan River, near Fort a la Corne.

57 James F. Graham, Indian Superintendent, to SGIA, December 31, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 60 (ICC Exhibit 1a, p. 6).

58 W.A. Austin, Dominion Land Surveyor (DLS), to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 159 (ICC Exhibit 1, p. 70).

59 W.A. Austin, DLS, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 160 (ICC Exhibit 1, p. 71).

60 W. A. Austin, DLS, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 160 (ICC Exhibit 1, p. 71).

61 Natural Resources Canada, Field book 132 CLSR, W.A. Austin, “Field Notes of Indian Reserves at Cumberland, Birch River, The Pas, Bear Island Lake, Chimawawin,” 1882 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 10c, p. 6).

When Austin objected, saying that the government wished to give them “the best land in their own Treaty,” the Chief answered: “Will the Government support us here? The fish have gone and the fowl are scarce, we want some place where we can have land to till, where we may be able to feed our cattle.”

Austin completed his work on Cumberland Island, noting that 289.36 acres were available for a reserve there. He did not, however, set aside any reserve at that time, “considering the Indian’s opposition to the survey of their Reserve.”

Soon after leaving Cumberland House, Austin met with Indian Agent Angus MacKay, who informed him that “he would arrange matters with the Band, and that the survey would have to be made.” In his annual report dated September 30, 1882, Agent MacKay reported that during his visit to Cumberland to make annuity payments, “I found out that the band had objected to the survey of their reserve by Mr. Austin, who had been sent to this place for that purpose. On my talking over the matter with them, they changed their mind and expressed a desire to have their reserves surveyed.”

Austin returned to Cumberland and began the survey of a reserve on Chief’s Island on October 9, 1882, setting aside 1,855.57 acres there, as well as 27.60 acres on two hay islands. He described the soil as being “generally No. 2” class and hard to work, although there were small patches of “class No. 1” soil and some good gardens. The reserve contained good timber and was surrounded by marshes. With an additional 289.36 acres surveyed on Cumberland Island, the total set aside for the Cumberland Band at that time was 2,172.53 acres.

In his report, Austin calculated that the Cumberland Band had an outstanding treaty land entitlement (TLE) of 8,867.47 acres, based on the Treaty 5 provisions of 160 acres per family of five (or 32 acres per person).
With a population of 345, the Cumberland Band was entitled to 11,040.00 acres under this formula.\textsuperscript{70}

Austin reported that the Cumberland Band also wished to have a survey of seven islands “where portions of the Band are already located,” about 25 miles from Cumberland House, as well as locations at “three different Sturgeon Rivers,” one of which was 50 miles away. All these locations were outside the Treaty 5 area.\textsuperscript{71} He commented:

\begin{quote}
I cannot see any other way of supplying them with land. The people are already located at these places, and there is not a sufficient quantity of land cultivatable near Cumberland for nearly one half of the band. Apart from Chief’s Island, already surveyed, one or two small islands and a piece of the shore is all that I know that can be used.\textsuperscript{72}
\end{quote}

The “Plan of Part of Cumberland Indian Reserve Shewing Chief’s Island and part of Cumberland Island,” dated May 1883, calculates the area of IR 20 as 6.29 square miles, or 4,025.6 acres.\textsuperscript{73} No additional lands were surveyed for the Cumberland Band at this time.\textsuperscript{74}

Following the survey of IR 20 at Cumberland Lake, there were repeated references to its poor quality of land. In reference to the recent survey, Agent MacKay commented that the reserve was “altogether a poor place for either farming, hunting or fishing.”\textsuperscript{75} In the Department of Indian Affairs Annual Report for 1884, Prime Minister and Superintendent General of Indian Affairs John A. Macdonald referred to the reserve “at Cumberland” as a “miserable tract of sterile land.”\textsuperscript{76}

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70 W.A. Austin, DLS, to SGIA, April 1883, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883}, 167 (ICC Exhibit 1, p. 78); Natural Resources Canada, Field book 132 CLSR, W.A. Austin, “Field Notes of Indian Reserves at Cumberland, Birch River, The Pas, Bear Island Lake, Chimawarin,” 1882 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 10c, p. 6).

71 W.A. Austin, DLS, to SGIA, April 1883, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883}, 167 (ICC Exhibit 1, p. 78).

72 W.A. Austin, DLS, to SGIA, April 1883, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883}, 168 (ICC Exhibit 1, p. 79).

73 Natural Resources Canada, Plan 237 CLSR, W.A. Austin, DLS, “Plan of Part of Cumberland Indian Reserve Shewing Chief’s Island and part of Cumberland Island,” March 1883 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 10d).

74 While not an issue in this inquiry, Austin’s survey report and the final survey plan reflect a discrepancy in the area of IR 20. There is no record of Austin returning to survey additional land at IR 20.

75 A. MacKay, Indian Agent, Beren's River Agency, to SGIA, September 13, 1884, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884}, 77 (ICC Exhibit 1a, p. 24).

76 John A. Macdonald, SGIA, to the Governor General, January 1, 1885, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884}, xli (ICC Exhibit 1a, p. 30).
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CONDITIONS AT FORT À LA CORNE, 1883–92

Creation of the Pas Agency in Treaty 5, 1883
In the report of the Department of Indian Affairs for 1883, Superintendent General of Indian Affairs (SGIA) John A. Macdonald reported that the Treaty 5 Agency had been divided into two new agencies: The Pas Agency, for the bands on the Saskatchewan River, including the Cumberland Band; and the Beren’s River Agency, for the other Treaty 5 bands. He noted:

In previous winters the Indians at distant points in the agency have suffered greatly from sickness and from actual starvation without the Agent having been aware of it; and owing to the distances, even if he had known of the distress, he could not have had supplies transported soon enough to meet many of the cases. 77

The division of the Agency was expected to solve this problem, since the Agent would be closer to the bands under his supervision. 78 Joseph Reader, a minister residing at The Pas, took up his duties as Agent for the newly created Pas Agency in February 1884. 79

Department Permits Move to Fort à la Corne, 1883
In late 1883, the department reversed its view and decided to grant permission for the Cumberland Band to move to Fort à la Corne. The survey of IR 20 for the Cumberland Band, at Cumberland Lake in Treaty 5, had been completed only a year earlier. This change came about after Lawrence Vankoughnet, the DSGIA, met with the Cumberland Band during his visit to the North-West Territories earlier that year. On his return, he reported to the Superintendent General:

An objection existed with the change asked for from the fact that Carrot River is within the territory embraced in Treaty No. 6, in which the Indians of Cumberland are not interested and it was feared that complications might arise owing to Indians connected with one Treaty being located upon territory within another Treaty. Such strong representations were however made to the undersigned upon his recent visit to the North-West by the Cumberland Indians at the point referred to, and owing to statements made to him by other residents in that section of country as to the utter uselessness for agricultural purposes of the land in the Reserve at

77 John A. Macdonald, SGIA, to the Governor General, January 1, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, xlvii (ICC Exhibit 1, p. 111).
78 John A. Macdonald, SGIA, to the Governor General, January 1, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, xlvi (ICC Exhibit 1, p. 111).
79 Joseph Reader, Indian Agent, to SGIA, July 14, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884, 71 (ICC Exhibit 1a, p. 13).
Cumberland, the undersigned was led to reconsider the application made by the Cumberland Indians, and in view of the strong desire expressed by them to settle in the locality of the Carrot River for the purpose of cultivating the land and supporting themselves and families, he considers that the point of objection referred to might be waived in this instance, and that the distinction between these Indians and those of Treaty 6 would be probably maintained sufficiently were this Band, if allowed to remove to Carrot River and take up land there, were always designated and known as the “Fort a la Corne Band of Treaty No. 5.”

A marginal notation on the letter instructed Vankoughnet to “communicate with Department of Interior as to the land sought for.”

### Movement from Cumberland to Fort à la Corne, 1883–86

Against this background of repeated requests for a reserve at Fort à la Corne, a migration of some Cumberland and The Pas band members to that place had already begun. The first instance is recorded on the August 1882 paylist for the Cumberland Band at Cumberland House, which shows that Charles and Alexander Fiddler had “left reserve and gone to La Corne – Treaty No. 6.” In February 1883, Agent MacKay reported that, “last summer, I noticed that several Indians had left their Reserves, and on enquiring ascertained that they had left and were receiving payment in Treaties 4 and 6.”

In reference to MacKay’s report that Treaty 5 Indians were leaving their reserves, Superintendent Graham advised the SGIA that they “should not be paid in any other Treaty” because they had left their reserves without permission. A draft letter to Indian Commissioner Edgar Dewdney requests that he “instruct the Agents of the Treaties to which these Indians have removed to inform the Indians that they must return to Treaty No. 5, and that until they do they cannot be paid.”

The Cumberland Band’s paylist for 1883 shows nine families absent; they were later paid at Fort à la Corne in 1885 on the James Smith Band’s paylist.

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81 Marginal notation dated December 1, 1883, written by John A. Macdonald to Lawrence Vankoughnet on letter from L. Vankoughnet, DSGIA, to John A. Macdonald, SGIA, November 23, 1883, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 98).
83 A. MacKay, Indian Agent, to James F. Graham, Indian Superintendent, February 6, 1883, LAC, RG 10, vol. 3634, file 6441 (ICC Exhibit 1, p. 67).
84 James F. Graham, Indian Superintendent, to SGIA, April 17, 1883, LAC, RG 10, vol. 3634, file 6441 (ICC Exhibit 1, p. 81).
85 Unidentified author to Edgar Dewdney, Indian Commissioner, May 8, 1883, LAC, RG 10, vol. 3634, file 6441, (ICC Exhibit 1, p. 89).
and included the Brittains, Fiddlers, and Peter Chapman. None of the families absent from Treaty 5 in 1883 were paid on a Treaty 6 paylist that year, as advised by Graham, although three of the families received arrears for 1883 when they were first paid at James Smith in 1885.  

On July 17, 1883, an individual living near the south branch of the Saskatchewan River wrote to Inspector of Indian Agencies T.P. Wadsworth regarding a recent meeting with “the Cumberland Indians” at Fort à la Corne. His letter communicated their requests for

the same privileges as any other British subject, to live on an arable land there and raise food out of the ground. ... [and] that your Government will pity them and allow them to join their brethren, Mr. John Smith and Mr. James Smith’s Reserves, where there is land fit for cultivation. And to grant them means to break up the land.  

On November 30, 1883, Inspector McColl reported that the Chief of the Cumberland Band, “on behalf of thirty families,” asked for permission to move to Fort à la Corne, “where nine of their number had already settled.” Chief Albert Flett repeated the request in a letter to Inspector McColl in January 1884, following the department’s decision to allow the “Cumberland Indians” to “remove to Carrot River and take up land there.”

Having talked the matter over with some of my mind ... I beg that you will extend to me and the whole of the Indians on Pine Island and in the immediate vicinity of Cumberland Fort, the privilege Mr. Vankoughnet [has] already given to twenty families of moving to Fort La Corne.

Not having seen the members of any band residing at distant points, I am unable to say what their intentions are, but I have reason to believe that they are satisfied with their present position.

This letter seems to indicate the wishes of those residing immediately in the area of IR 20 to join those who had already moved to Fort à la Corne. Chief Flett does not appear to be speaking on behalf of those members of the


87 J. Settee, St James, to Inspector Wadsworth, July 17, 1883, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 95–96).

88 E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to SGIA, November 30, 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 141 (ICC Exhibit 1, p. 102).


90 Chief Albert Flett, Cumberland Band, to E. McColl, Indian Superintendant, January 14, 1884, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 113).
Cumberland Band “residing at distant points” outside the immediate Cumberland House area. However, his comment is somewhat unclear, since he refers to these people as “members of any band.” It is not certain if he is referring to other sections of the Cumberland Band living outside the immediate “Cumberland Fort,” or Cumberland House area, or to other bands in the Pas Agency.

Five months later, in June 1884, Indian Agent Reader reported the requests of some Cumberland band members for land at various points within the Pas Agency. Councillor Philip Canada and “about 10 families who for some time have farmed at Pine Island Bluff some twenty miles northwest of Cumberland House” asked for a reserve in that location. Henry Budd also asked that he be allowed “to settle on a piece of land good for farming between Cumberland and Birch River Reserves.” Reader specified that these requests were distinct from the 30 families who want to move to Fort à la Corne.

That same month, Indian Agent J.A. Macrae of the Carlton Agency reported that “several families from Treaty No. 5” had apparently already joined James Smith’s Band at Fort à la Corne. John Constant of The Pas Band had also moved to Fort à la Corne by this time, and Macrae communicated his request for a reserve there “for himself and about 30 families.” A similar request from the Cumberland Band was reported in July 1884 by Agent Reader. Agent Macrae commented: “Whilst Constant mentions 30 families as the numbers that he expects to leave Cumberland and the Pas this summer, many more would probably wish to follow in their footsteps.” It was also around this time in 1884 that Dominion Land Surveyor A.W. Ponton completed the survey of IR 100 for the James Smith Band on the Saskatchewan River near Fort à la Corne.

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92 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 12, 1884, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 131).
93 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 12, 1884, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 131).
94 J. Ansdell Macrae, Indian Agent, Carlton Agency, to unidentified recipient, June 11, 1884, LAC, RG 10, vol. 3576, file 553 (ICC Exhibit 1a, pp. 11–12).
95 Joseph Reader, Indian Agent, to SGIA, July 14, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884, 72 (ICC Exhibit 1a, p. 14).
97 Order in Council PC 1151, May 17, 1889, p. 52 (ICC Exhibit 4a).
In September 1884, Agent MacKay confirmed that “several families” had already moved to Fort à la Corne “during the last three years.”98 The 1884 paylist for the Cumberland Band paid in Treaty 5 shows that five families who had been at Fort à la Corne the previous year returned to IR 20 to be paid, and received arrears for 1883. The other four families did not return.99 In September 1885, Indian Agent J.M. Rae reported that 20 families “from Cumberland” were residing near James Smith and had “spent last year’s treaty money” breaking 60 acres and making improvements.100 A sketch accompanying his report shows the settlement of Cumberland people east of the James Smith IR.101

In November 1885, 14 families from the Cumberland Band and one family from The Pas Band in Treaty 5 were paid on the James Smith Band’s Treaty 6 paylist. The families all appear grouped at the end, and 11 have the notation “Cumberland” entered beside their names. Most were paid under their original Treaty 5 ticket numbers, although a few are not designated with any ticket number.102

During the fall of 1885, the Cumberland Band reportedly had a successful potato crop and “good fall fishing,” and therefore experienced fewer cases of destitution.103 Only a few months later, however, Inspector L.W. Herchmer reported that 17 families from Cumberland were residing near James Smith, and he expected 30 additional families “next summer, as both fish & [musk]rats have completely failed below.”104 The annual report for 1886 reports only 55.5 acres of cultivated land in the entire Pas Agency.105

**Setting Aside Land for IR 100A, 1883–85**

The differences between Treaties 5 and 6 have already been noted, especially the significant disparity between the two regarding the amount of land

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100 J.M. Rae, Indian Agent, to the Indian Commissioner, September 8, 1885, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 168–69).
101 J.M. Rae, Indian Agent, to the Indian Commissioner, September 8, 1885, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 170).
103 E. McColl, Inspector and Superintendent of Indian Agencies, Manitoba Superintendency, to SGIA, December 1, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1885*, 133 (ICC Exhibit 1a, p. 35); J. Reader, Indian Agent, Pas Agency, to SGIA, July 2, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886*, 74 (ICC Exhibit 17, p. 6).
104 L.W. Herchmer, Inspector of Indian Agencies, to the Indian Commissioner, February 3, 1886, LAC, RG 10, vol. 3741, file 28985 (ICC Exhibit 1, p. 195).
105 John A. Macdonald, SGIA, to the Governor General, January 1, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886*, xlvii (ICC Exhibit 17, p. 3).
entitlement. These differences seem to have been a large factor in the department’s resistance to allowing the Cumberland people to move to Fort à la Corne, since it was outside the area of their own treaty territory. The department’s concern over this issue is demonstrated by its instructions not to pay treaty annuities to those outside Treaty 5 territory.106

Regarding the reserve eventually set aside at Fort à la Corne, it is not entirely clear what basis the department relied upon to calculate the amount of land. The surveyor, John C. Nelson, did not make any reference to how the amount of land to be set aside was calculated. However, it appears that the 1882 population of the Cumberland Band at “Cumberland” in Treaty 5 was used to calculate how much land to allocate at Fort à la Corne; it also appears that the Treaty 6 land entitlement formula may have been used to approximate the amount of land required, based on that population.

On December 6, 1883, DSGIA Lawrence Vankoughnet wrote to the Department of the Interior to inquire about “securing a reserve on the Carrot River near Fort à la Corne for the Cumberland Band of Indians in exchange for the Reserve or part thereof occupied by them at Cumberland.” He went on to explain: “The population of the Cumberland Band is 345, and under the Treaty with them they are entitled to 160 acres for every five persons, consequently the quantity of land that would be required for the Reserve would be 44,160 acres.”107 It should be noted that according to the Treaty 5 formula of 160 acres per family of five, the correct entitlement would be 11,040 acres. However, marginal notations on a draft copy of Vankoughnet’s letter use the Treaty 6 formula of 640 acres per family of five to calculate an entitlement of 44,160 acres. Another marginal notation points out that the figure “[s]hould be 11,040 not 44160.” There is no indication as to who made either the calculations or the marginal notation.108

Surveyor Austin used the same base population of 345 to calculate the Cumberland Band’s treaty land entitlement in his 1883 survey report regarding IR 20 at Cumberland Lake.109 This population corresponds to the number paid on the Treaty 5 paylist for the “Cumberland Band paid at Cumberland Reserve” in 1882.110

106 James F. Graham, Indian Superintendent, to SGIA, April 17, 1883, LAC, RG 10, vol. 3634, file 6441 (ICC Exhibit 1, p. 81).
107 L. Vankoughnet, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, December 6, 1883, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, pp. 105–6).
108 Marginal notations written on draft letter from L. Vankoughnet, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, December 6, 1883, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 108).
109 W.A. Austin, DLS, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 167 (ICC Exhibit 1, p. 78).
Map 2  Cumberland IR 100A and James Smith IR 100

Based on Sketch found in Bennett McCordle, "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)
Reginald Rimmer later surmised that the reserve at Fort à la Corne was most likely set aside on the basis of 345 people and that the Treaty 6 formula for land entitlement was used, instead of the Treaty 5 formula.\textsuperscript{111} This opinion is discussed later in more detail.

From the time of Vankoughnet’s first inquiry in 1883 regarding a possible reserve location, it took almost two years to secure the land desired by the Cumberland people for a reserve near Fort à la Corne. There was a great deal of confusion among department officials regarding exactly which land was desired, and a number of options were considered.

Inspector McColl initially requested one and a half townships for the reserve, located northwest of the future James Smith IR 100, although the land he specified was later discovered to be unavailable.\textsuperscript{112} In April 1884, Inspector Wadsworth reported that he expected only about “30 families,” or “150 souls,” to make the move, rather than the entire Cumberland Band. On this basis, he calculated that 150 persons would be entitled to 4,800 acres under Treaty 5 (a correct calculation according to the Treaty 5 formula of 32 acres per person), and suggested a reserve of 10 sections south of Chakastaypasin’s reserve, totalling 6,400 acres.\textsuperscript{113} The department applied for this land,\textsuperscript{114} and accepted the Department of the Interior’s offer for only five sections (or 3,200 acres) as sufficient.\textsuperscript{115} In response to the offer, Agent Reader received a letter from Chief Flett explaining that

he had interviewed the Indians with respect to the offer made to them by the Government, but that there are none of them who wish to go. They say the reason is that they have spent so many pounds in getting the land at Fort a La Corne broken, and they do not wish to go to this other place.\textsuperscript{116}

In addition, Chief Flett explained that the land at Fort à la Corne was better able to provide a means of subsistence while they were getting established in farming, since the area was rich in timber, fish, and game. Reader reported: “Those who were at La Corne are of the same opinion, having in addition

\textsuperscript{111} Memorandum, Reginald Rimmer, Law Clerk, Department of Indian Affairs, to unidentified recipient, May 18, 1899, LAC, RG 10, vol. 5736, file 27580 (ICC Exhibit 1, pp. 541–42).
\textsuperscript{112} John R. Hall, Secretary, Department of the Interior, to L. Vankoughnet, DSGIA, February 9, 1884, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 114–15).
\textsuperscript{113} T.P. Wadsworth to the Deputy Minister, April 22, 1884, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 122–23).
\textsuperscript{114} R. Sinclair for DSGIA, to A.M. Burgess, Deputy Minister of the Interior, April 29, 1884, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, pp. 125–26).
\textsuperscript{115} L. Vankoughnet, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, July 23, 1884, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, pp. 137–38).
\textsuperscript{116} J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, March 25, 1885, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 154).
improved and incurred expenses on the land they settled on.” An alternative offer of land at Pas Mountain within Treaty 5 territory was refused as well.

In late 1884, Indian Commissioner Edgar Dewdney wrote to the Superintendent General to clarify that “the Indians from Cumberland” wanted the two townships immediately south of James Smith’s reserve, in townships 46 and 47, range 20, west of the 2nd meridian (W2M). This information was communicated to Inspector McColl in June 1885, at which time he was instructed “to ascertain definitely whether this is the locality in which the Cumberland Indians wish to have a Reserve made for them.”

In the interim, A.M. Burgess, the Deputy Minister of the Interior, reported to Vankoughnet on June 30, 1885, that the desired townships were available for Indian reserve purposes, later clarifying that the reserve was “for the Cumberland band of Indians.” Agent Reader confirmed on August 26, 1885, that this was indeed the land desired by the “Cumberland Band.”

On October 2, 1885, Vankoughnet accepted the two townships offered by the Department of the Interior, stating that the land would be set aside “as a reserve for the Indians of Cumberland.” The Indian Commissioner and Inspector McColl were informed the following month.

The North-West Rebellion and the Cumberland Band

The North-West Rebellion (or Riel Rebellion) broke out in March 1885. During and after the conflict, government officials took steps to institute greater controls over the movements and the activities of treaty Indians. One
of these measures was the pass system, introduced as a temporary measure during the uprising.\textsuperscript{125}

Following the cessation of unrest, Assistant Indian Commissioner Hayter Reed suggested that the pass system be continued as a means of dealing with “rebel” Indians. His July 29, 1885, memorandum on the “future management of Indians” recommended that “no rebel Indians should be allowed off the reserves without a pass signed by an [Indian Department] official.”\textsuperscript{126} By October 1885, DSGIA Vankoughnet had agreed to the wider application of the system to all treaty Indians. In response to Hayter Reed’s recommendations, Vankoughnet replied, instead, that the system “should be introduced as far as practicable in the loyal Bands as well,” but that it “should not be insisted upon as regards loyal Indians” if they resisted on the basis of their treaty rights.\textsuperscript{127} The pass system was a means of reinstating and strengthening government control over Indian movements and whereabouts after the rebellion. Indian Agents received books of passes in 1886 and the system was strictly enforced, especially in the years immediately following the rebellion.\textsuperscript{128}

It is uncertain whether the pass system prevented a greater migration from the Cumberland district to Fort à la Corne, although a few people did make the move in the years immediately after the rebellion. Cumberland House Cree Nation elder Pierre Settee says that when land became available at Fort à la Corne, and some Cumberland band members moved there to begin farming, “it became more difficult for our people to come and go as time went on. This may have been due to the past [sic] system that was put in place by the government; for many years we needed permission to leave our reserve.”\textsuperscript{129}

**Scrip Offered at Cumberland**

In 1885–86, the government offered scrip (a set amount of cash or land) to those who wished to withdraw from treaty. Indian Agent Reader first reported on the matter when referring to a December 1885 visit to Cumberland, noting

\textsuperscript{125} Circular letter from E. Dewdney, Indian Commissioner, May 6, 1885, LAC, RG 10, vol. 3584, file 1130 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 163).

\textsuperscript{126} Hayter Reed, Assistant Indian Commissioner, to the Indian Commissioner, July 29, 1885, Glenbow Archives, Edgar Dewdney Papers, document M320, box 4, file 66, p. 1416 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 18a, p. 3).

\textsuperscript{127} L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, part 1B (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 202).


\textsuperscript{129} ICC Transcript, November 19, 2001 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12a, p. 14, Pierre Settee).
that only a few “availed themselves of the privilege to leave treaty.” However, by March 1886, the situation had changed remarkably. Agent Reader remarked:

The idea of leaving the Treaty and receiving scrip in compensation for annuity, when once it fairly took possession of some of the half-breeds in this Agency, spread almost like an epidemic. ... It was with difficulty that I could leave Cumberland on the 12th, owing to the number of applicants.

Later that same month, a number of additional Cumberland band members applied to the Agent for withdrawal from treaty. He reported that “[i]nasmuch as about one hundred families in this agency have withdrawn from treaty, [t]here has been a large exodus at Cumberland.” Indeed, the 1886 Cumberland band paylist for Treaty 5 shows that the band population was reduced by almost half due to the large number of withdrawals from treaty that year. Chief Albert Flett and one of his councillors were among those who took scrip that year. After Chief Flett’s withdrawal from treaty, the Cumberland Band elected Samuel Greenleaf in 1886 as the new Chief for a three-year term. Albert Flett re-entered treaty in 1887 and was re-elected for another three-year term as Chief in 1889, after Samuel Greenleaf’s term expired.

In the annual report for 1886, the Superintendent General of Indian Affairs reported a population of 929 in the Pas Agency, a decrease of 514 since the last census owing to the numerous withdrawals from treaty. A few Cumberland band members re-entered treaty over the next few years, but most chose not to do so. Of the Cumberland people living at Fort à la Corne, only three families chose to take scrip.

130 J. Reader, Indian Agent, Pas Agency, to SGIA, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886, 74 (ICC Exhibit 17, p. 6).
131 J. Reader, Indian Agent, Pas Agency, to SGIA, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886, 76 (ICC Exhibit 17, p. 8).
132 J. Reader, Indian Agent, Pas Agency, to SGIA, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886, 76 (ICC Exhibit 17, p. 8).
133 J. Reader, Indian Agent, Pas Agency, to SGIA, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886, 78 (ICC Exhibit 17, p. 10).
137 John A. Macdonald, SGIA, to the Governor General, January 1, 1887, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886, xvi (ICC Exhibit 17, p. 2).
Paylist for Cumberland Band at Fort à la Corne, 1886
In September 1886, the “Cumberland Band Paid at Fort la Corne” received its own paylist, labelled “Treaty No. 6.” Seventeen families appeared on the list, although two were said to have withdrawn from treaty and were not paid. These 17 families include all 14 of those families originally from the Cumberland Band in Treaty 5 which were paid with James Smith’s Band in 1885, as well as John Constant from The Pas Band. In addition, two new families from the Cumberland Band in Treaty 5 arrived at Fort à la Corne in 1886 and were paid on this first paylist.139

Other Treaty 5 Bands at Fort à la Corne
It is possible that there were, originally, more families from The Pas resident near Fort à la Corne. Some were eventually paid with the James Smith Band or others, and some apparently returned to their original reserves at The Pas because of the instability caused by the 1885 North-West Rebellion. Indian Agent Reader of the Pas Agency reported in 1885 that “some Pas Mountain Indians, who, I believe, had been living at or near Fort à la Corne, fled back to the mountain, not wishing to join the Rebellion.”140 However, John Constant remained at Fort à la Corne, and his family was the only one from a different Treaty 5 band to be paid with the Cumberland Band on the new paylist. The family remained there from 1886 until 1890,141 before transferring to John Smith’s Band to join other relatives.142

Survey of IR 100A, 1887
Dominion Land Surveyor John C. Nelson went to Fort à la Corne in July 1887 “to lay out a reserve for the contingent of the Cumberland Band and such other Indians as may be assigned locations therein.”143 On his arrival, he discovered that the “Cumberland band” had a settlement outside of

140 John A. Macdonald, SGIA, to the Governor General, January 1, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1885, xxxvii (ICC Exhibit 1a, p. 39).
142 Treaty annuity paylist, “Cumberland Band Paid at Reserve,” 1891, no file reference available (ICC Exhibit 9a, p. 16); Consent of Band to Transfer, June 4, 1890, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1a, p. 110); Consent of Band to Transfer, August 8, 1890, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1a, p. 111).
143 John C. Nelson, DLS, In Charge of Indian Reserve Surveys, to SGIA, December 30, 1887, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1887, 274 (ICC Exhibit 17, p. 34).
townships 46 and 47, along the east side of James Smith’s IR 100 and extending north to the HBC reserve in township 48. Surveyor Nelson explained to Peter Chapman that he had no authority to mark off this settlement because it was outside townships 46 and 47. However, he laid out a temporary reserve in the area, saying that “possibly the Department might secure it for them.” He then proceeded to mark out the reserve in townships 46 and 47, noting the rich soil, “luxuriant herbage,” stands of poplar for timber, many lakes and swamps, and “small prairies of rich soil.” The survey report concludes by stating: “The reserve is well watered by Carrot River and Goose Hunting Creek and contains an area of about 65 square miles.”

Nelson’s field notes refer to IR 100A as being “for Indians of the Cumberland District.”

On June 21, 1888, the Department of Indian Affairs forwarded a tracing of the IR100A plan of survey “for the Cumberland Band of Indians on the Carrot River near Fort à la Corne” to the Department of the Interior. The accompanying letter explained that the temporary reserve surveyed by Nelson was occupied by five “heads of families of the Cumberland contingent under Chapman, and if available for Indian Reserve purposes should form part of the Reserve.”

The Department of the Interior approved the request on July 9, 1888. IR 100A was confirmed by Order in Council on May 17, 1889, “[f]or the Indians of Cumberland District (of Treaty No. 5),” including the extra 2.4 square miles adjacent to the east side of the James Smith reserve.

**Department Support for Agriculture at Fort à la Corne**

The original intention of the Cumberland band members who moved to Fort à la Corne was to settle and take up farming as a new way of life, and it appears that the department granted the reserve at IR 100A in order to facilitate their wishes in this regard. DSGIA Vankoughnet wrote in 1884: “This Department is most anxious to accommodate the Cumberland Indians with a Reserve, as they...**

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145 Natural Resources Canada, Field book 151 CLSR, John C. Nelson, DLS, “Treaty No. 6, North West Territories, Field Notes of the survey of the Boundaries of Indian Res. No. 100a (for Indians of the Cumberland District) at Carrot River,” July–August 1887 (ICC Exhibit 4b, p. 2).
146 R. Sinclair, for DSGIA, to A.M. Burgess, Deputy Minister of the Interior, June 21, 1888, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, pp. 279–81); see also W.A. Austin, for Deputy Minister of Indian Affairs, to Mr McNeill, June 15, 1888, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 277–78).
147 P.B. Douglas, Assistant Secretary, Department of the Interior, to L. Vankoughnet, DSGIA, July 9, 1888, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 284).
are, for Indians, progressive and industrious, and it is important to encourage them as much as possible.”

The Cumberland members at Fort à la Corne took up the challenge of breaking land and attempting to farm with enthusiasm, but there was little support to encourage them. Indian Agent Rae reported in September 1885 that the Cumberland people were hard working and had already broken 60 acres of land and put up 30 tons of hay, and that they hoped to receive a few oxen and a farming instructor from the department to assist them. Six months later, Inspector Herchmer reported that 50 acres of the broken land had grown over, and again communicated the Cumberland contingent’s request for assistance, “as they understand very little about Farming.” He recommended that an instructor be provided for the James Smith Band and the Cumberland contingent at Fort à la Corne, because they could not live entirely by hunting. Instructor Goodfellow was hired in April 1886 for a term of six months, and the department issued six oxen and seven cows to “Peter Chapman” of the “Cumberland Band” that summer, more than the amount provided for by either Treaties 5 or 6.

At the end of the year, however, Inspector Wadsworth felt that the result of the season’s work at Fort à la Corne did not warrant the expense of a farming instructor and recommended against having the Bands there devote all their time to agriculture to the exclusion of the hunt. He recommended instead that Goodfellow be appointed as “sub-agent” for the Fort à la Corne Bands. This proposal was rejected, and Goodfellow was never reappointed as farm instructor. In a marginal note to Wadsworth’s letter, Assistant Indian Commissioner Hayter Reed wrote that “it would be injudicious to endeavour to make those Indians who can obtain not a little fur and thus a fairly good

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152 L.W. Herchmer, Inspector of Indian Agencies, to the Indian Commissioner, February 3, 1886, LAC, RG 10, vol. 3741, file 28985 (ICC Exhibit 1, p. 196).
153 Hayter Reed, Assistant Indian Commissioner, to the Acting Indian Agent, March 29, 1886, LAC, RG 10, vol. 1591 (ICC Exhibit 1, p. 201).
living … to turn their attention to agriculture to the same extent as others differently situated.”

From 1887 until 1893, local agents and inspectors repeatedly emphasized the need for a farming instructor for the bands at Fort à la Corne. In September 1889, Indian Agent R.S. McKenzie reported that “a farmer is very much required for Bands No. 100 & 100A in fact there is no two reserves in the Agency that requires an instructor worse than these two bands.” Again, in 1890, the agent reported that the Fort à la Corne bands were taking a greater interest in farming and needed an instructor. Assistant Indian Commissioner A.E. Forget refused, stating that there would be no use in such an expenditure since he did not really believe that the bands intended to settle down and give up the hunt. Hayter Reed’s instructions to the agent in October 1890 may reflect some of the reasons for the reluctance to provide an instructor for the Fort à la Corne bands. He wrote:

The time has arrived when the result of the large expenditure upon Indians for years past, must be shown by throwing in a large measure the burden of their maintenance upon themselves, and so considerably decreasing expenditure. … I hear from all sides of a very plentiful supply of game, so that you should be able to take a number off the ration list altogether for a time, especially among the Indians at James Smith’s and at La Corne.

Thus, while the department originally granted the reserve at Fort à la Corne for the Cumberland Band to take up farming, the lack of support from local department officials made it extremely difficult for the people to have any success in this new way of life. Without instruction, their endeavours in agriculture were not very successful, and many therefore relied on hunting for their main source of support.

Cumberland Band Movement, 1887–91
During the period from 1887 to 1891, there was still movement between the reserves at Cumberland House and at Fort à la Corne. The 1887 paylist for the

156 Marginal notation written by Assistant Indian Commissioner Hayter Reed on letter from T.P. Wadsworth, Inspector of Indian Agencies, to Edgar Dewdney, Indian Commissioner, December 3, 1886, LAC, RG 10, vol. 3773, file 35764 (ICC Exhibit 1, p. 228).
159 Hayter Reed, Indian Commissioner, to R.S. McKenzie, Indian Agent, Duck Lake Agency, October 28, 1890, LAC, RG 10, vol. 1596 (ICC Exhibit 1, p. 351).
“Cumberland Band Paid at La Corne” shows that two more families moved to IR 100A that year and were added to the paylist there.\(^\text{160}\) At least two additional families went to Fort à la Corne in 1887, but never received annuities on the IR 100A paylist. One of those families returned to Cumberland House in 1888 and was paid annuities for 1888 and arrears for 1887. The other family disappeared and did not return to Cumberland House.\(^\text{161}\)

In 1888, Agent Reader wrote to inquire whether those who still wished to leave “the Reserve at Cumberland” and settle at 100A could do so, as he believed that “the desire to leave this district, and settle on the new Reserve is on the increase.”\(^\text{162}\) In January of the following year, on a letter from Inspector McColl to the Superintendent General of Indian Affairs, a marginal note states that “any members of the Cumberland Band may remove to the reserve referred to.”\(^\text{163}\)

Later that year, however, local officials seemed to be expressing a different sentiment. In a letter regarding the transfer of four families from Cumberland to Fort à la Corne, Assistant Indian Commissioner A.E. Forget instructed Agent McKenzie “that in [the] future, you will try to discourage these changes, especially those from another Agency.”\(^\text{164}\)

According to the Treaty 5 Cumberland band paylists, at least three families moved to Fort à la Corne between 1888 and 1890. In 1888 and 1889, Nancy Friday and her son Jeremiah Friday were recorded on the Treaty 5 Cumberland band paylist as being “absent” at Fort à la Corne, and they subsequently “transferred to La Corne” in 1890. However, they were both paid at Cumberland House in 1891, along with arrears for the previous three years, and never appeared on the Cumberland 100A paylist. Jacob Flett Sr is also marked on the same 1890 paylist as being “transferred to La Corne”; he similarly returned to Cumberland House to be paid in 1891, along with arrears for 1890. The notation by his name states that he had returned, “not being allowed in the La Corne Band (Reserve).”\(^\text{165}\) One other person was

\(^\text{160}\) Treaty annuity paylist, “Cumberland Band Paid at La Corne,” 1887, no file reference available (ICC Exhibit 9a, p. 3).


\(^\text{162}\) J. Reader, Indian Agent, Pas Agency, to E. McColl, Inspector of Indian Agencies, October 4, 1888, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 303).

\(^\text{163}\) Marginal notation signed “L.V.” on letter from E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to SGIA, January 4, 1889, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 304).

\(^\text{164}\) A.E. Forget, Assistant Indian Commissioner, to the Indian Agent, Duck Lake Agency, July 9, 1889, LAC, RG 10, vol. 1592 (ICC Exhibit 1, p. 322).

absent at Fort à la Corne in 1890 and 1894, but she was paid with the Cumberland Band in Treaty 5 in other years.\textsuperscript{166}

\textbf{Return to the Cumberland District, 1886–91}

The oral history of Cumberland House Cree Nation elders suggests that many of those who initially moved to Fort à la Corne later returned.\textsuperscript{167} Cumberland House elder Thomas Laliberte says that people from the Cumberland Band originally moved to take up farming and gardening, “but it didn’t work out and they came back, many of them.”\textsuperscript{168} Cumberland House elder Marcel McGillivary explained that those who moved to take up farming did not receive the “materials ... for farming” that they needed in order to be successful.\textsuperscript{169} Other families returned to Cumberland House, or chose not to leave at all, “because they didn’t want to become farmers.”\textsuperscript{170}

\textbf{Leadership of Cumberland Band at Fort à la Corne, 1886–92}

There is some evidence that Peter Chapman, originally a headman of the Cumberland Band in Treaty 5, was informally acknowledged as the leader of the Cumberland contingent at Fort à la Corne by the Department of Indian Affairs. However, this practical recognition was never formalized. Beginning in 1886, Assistant Indian Commissioner Hayter Reed and the local Indian Agent (in addition to a few other officials) consistently referred to IR100A as “Peter Chapman’s” reserve and to the Cumberland band members living at IR100A as “Peter Chapman’s Band.” They continued to do so until around the time of Peter Chapman’s death in 1892.

Although the designation of the group as such was not entirely consistent or without confusion, it is clear that local department employees and officials most commonly referred to the group in this way. In 1887, Surveyor John C.

\textsuperscript{166} Treaty annuity paylist, “Cumberland Band Paid at Cumberland,” 1890–95, no file reference available (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 8, pp. 57, 60, 63, 68, 73, 79). See ticket no. 115, Emily Ballendine.

\textsuperscript{167} ICC Transcript, November 19, 2001 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12a, p. 44, Thomas Laliberte; p. 54, Marcel McGillivary; p. 91, Lena Sarah Stewart; pp. 105, 107, 112, Rodney Settee); ICC Transcript, June 27–28, 2001 (ICC Exhibit 18a, p. 30, Robert Constant); ICC Transcript, June 26, 2002 (ICC Exhibit 18c, p. 20, Delbert Brittain).

\textsuperscript{168} ICC Transcript, November 19, 2001 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12a, p. 44, Thomas Laliberte).

\textsuperscript{169} ICC Transcript, November 19, 2001 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12a, p. 54, Marcel McGillivary); see also ICC Transcript, November 19, 2001 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12a, p. 44, Thomas Laliberte; p. 80, Pierre Settee; p. 91, Lena Sarah Stewart; pp. 105, 107, 112, Rodney Settee); ICC Transcript, June 27–28, 2001 (ICC Exhibit 18a, p. 30, Robert Constant); ICC Transcript, June 26, 2002 (ICC Exhibit 18c, p. 20, Delbert Brittain).

\textsuperscript{170} ICC Transcript, November 19, 2001 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12a, p. 80, Pierre Settee); ICC Transcript, June 27–28, 2001 (ICC Exhibit 18a, p. 30, Robert Constant); ICC Transcript, June 26, 2002 (ICC Exhibit 18c, p. 20, Delbert Brittain).
Nelson reported that Peter Chapman was “looked upon as chief of the band” by the Cumberland people living at Fort à la Corne, although the Department of Indian Affairs report for that year stated that the “100a Cumberland Indians” had “no regular chief.”\(^{171}\) When Agent McKenzie referred to the Cumberland contingent as “Peter Chapman’s Band” in one of his 1888 monthly reports, there was some confusion in Ottawa. The department wrote to the Assistant Indian Commissioner to clarify the matter, saying that, “[a]s respecting the Band designated by Mr. McKenzie as ‘Peter Chapman’s,’ the Department has no knowledge of them under that designation.”\(^{172}\) Reed replied that the group referred to was the “section of the Cumberland Band, whose Reserve is adjoining that of James Smith.”\(^{173}\)

**Request for Separate Leadership at IR 100A, 1888**

In 1888, the Cumberland contingent at Fort à la Corne requested department permission to appoint their own Chief and councillors, separate from those of the Cumberland Band at Cumberland House. The Indian Commissioner denied their request, with this reasoning:

This Band is a fragment of the Cumberland Band of Treaty No. 5, which has already the number of Chiefs and Councillors allowed a Band, to whom, under the provisions of the Treaty, the annuities and other privileges enjoyed by such office bearers can be accorded.

It would therefore be only possible to allow of the appointment of a Chief and Councillors, who would be composed of appointees, willing to act without the annuities and privileges given the Chief and Councillors of the Cumberland Band; but one serious objection to the adoption of such an arrangement is that they would not for long remain contented with it, and would soon come to regard the withholding of payment and privileges from their office-bearers, in the light of a standing grievance.\(^{174}\)

It should be noted that Peter Chapman was never paid as either Chief or headman on the Cumberland 100A paylists. However, the Cumberland people living at IR 100A viewed him as their leader, as Surveyor Nelson observed

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\(^{172}\) Unidentified author to Hayter Reed, Assistant Indian Commissioner, February 23, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 254).

\(^{173}\) Hayter Reed, Assistant Indian Commissioner, to SGIA, April 16, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 270).

when he surveyed the reserve there in 1887. James Smith elder James Burns said that “the old people regarded him as being, when he got to ... Prairie Creek country, as a chief, a leader of his people.”

Other stories suggest that he may have been a trader or an Anglican missionary or church leader. The Cumberland House Cree Nation stories say Peter Chapman was never Chief, although he may have been a member of the Cumberland Band. They also maintain that there was never a separate leadership for the Cumberland people at Fort à la Corne, apart from the Chief and council already present at Cumberland House.

**BAND MEMBERSHIP**

**Department Practice for Transfers of Band Membership**

In late 1888 and early 1889, ongoing correspondence between Indian Commissioner Hayter Reed and department officials led to the establishment of a procedure for the transfer of membership between bands. On November 12, 1888, a discussion began within the department regarding band amalgamations and membership transfers. In a letter to the SGIA on that date, DSGIA Lawrence Vankoughnet expressed his general opposition to amalgamations, on the basis of his feeling that “the more Indian Bands are kept separate from one another the better, and more especially is this the case where the Bands are divided in religious sentiment.”

He did, however, make an exception in cases where at least one party was “small and unprogressive and might be benefitted.” He explained that his general reservations were based on experience in “the older Provinces,” where the practice has almost invariably been productive of very serious complications ... causing bitterness of feeling among the members of the respective Bands in regard to their rights upon the Reserve on which they had been jointly located. ... As a rule, when a Band has been allotted a Reserve, it should be kept strictly to that Reserve, and ...

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175 ICC Transcript, November 20, 2001 (ICC Exhibit 18b, p. 25, James Burns); ICC Transcript, June 27–28, 2001 (ICC Exhibit 18a, p. 56, Robert Constant).
176 ICC Transcript, June 26, 2002 (ICC Exhibit 18c, pp. 15–16, Delbert Brittain).
177 ICC Transcript, November 19, 2001 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12a, pp. 15, 59, 63, Pierre Settee; p. 96, Lena Sarah Stewart; p. 112, Rodney Settee).
178 L. Vankoughnet, DSGIA, to E. Dewdney, SGIA, November 12, 1888, LAC, RG 10, vol. 3806, file 52332 (ICC Exhibit 1a, p. 90).
179 L. Vankoughnet, DSGIA, to E. Dewdney, SGIA, November 12, 1888, LAC, RG 10, vol. 3806, file 52332 (ICC Exhibit 1a, p. 91).
no other Indians than the members of the Band should be allowed to locate thereon.\textsuperscript{180}

Two weeks later, on November 23, 1888, Vankoughnet informed Indian Commissioner Hayter Reed that “it is contrary to the law” to “transfer” anyone to another band, except in cases where a woman marries into it.\textsuperscript{181} Reed disagreed with the department’s thinking on this point. He argued that the \textit{Indian Act} should be amended to allow “transfers” of membership when necessary, noting that “it has been our endeavour, in the past, to prevent, as much as possible, the removal either permanent or temporary of Indians from one reserve to another; but there were occasionally cases where a judicious discretion had to be exercised.”\textsuperscript{182} In support of this proposal, he noted as an example “the breaking up of some of the reserves in the north after the late rebellion, and the consequent scattering of the Indians among other reserves” – a situation that “necessarily” created a large number of applications for transfer.\textsuperscript{183}

In response, the department argued that, if transfers of membership were allowed, there would likely be much confusion regarding land and treaty rights, especially for those joining a band within a different treaty area.\textsuperscript{184} Furthermore, it was stated that the \textit{Indian Act} was designed to protect the rights of Indians owning particular reserves, and, based on experience,

\begin{quote}
[n]o end of complicat[ed] questions have arisen in connection with the ownership of land and the treaty rights of Indians who were in years gone by irregularly admitted to the membership of Bands in the older Provinces of which they had not originally been members and whose rights and those of their descendants to membership and ownership were subsequently disputed by the original members of the Band.\textsuperscript{185}
\end{quote}

Reed persisted in his attempt to have the department reconsider its position, bringing attention to cases that would benefit from a change in policy. He suggested, as a possible mechanism for such transfers, that a
written statement of the person desiring transfer, as well as the consent of the Chief and council of the receiving band, should be required.\footnote{186} The department seems to have acquiesced to Reed’s suggestions. In a letter dated March 18, 1889, it was conceded that, in exceptional cases, transfers should be allowed. However, the circumstances connected with any case of transfer should be of the most exceptional nature to justify the same, and it should be done in the most formal manner, viz. the person whom it is proposed to transfer should be allowed to do so by a vote of the majority of the Indians voting members of the Band to whom this Indian to be transferred belonged, and a paper expressing their consent to his or her being transferred should be signed by the Chief & Headmen [illegible] also the party to be “transferree” should in like manner be admitted only upon a vote of the majority of the voting members of the Band to which he or she is to be transferred consenting to the same and after full explanation [having] been given to the Band that the Indian who it is proposed shall join that Band shall be entitled to share in all land and other privileges of said Band and a document signifying that such consent has been given should be signed by the Chief & Headmen of the Band to which the applicant has been admitted and should be certified by the Agent.\footnote{187}

The procedure for handling such transfers – requiring the written consent of a majority of the voting members of both the originating and the receiving bands – appears to be what was to become department practice.

**Settlement of Chakastaypasin Band Members at Fort à la Corne, 1885–91**

Chief Chakastaypasin and four headmen, including Kahtapiskowat (also known as Big Head), signed Treaty 6 in August 1876 near Fort Carlton, at the same time as the James Smith Band.\footnote{188} IR 98 was first surveyed in 1878 for the Chakastaypasin Band on the south branch of the Saskatchewan River, near John Smith’s reserve and the settlement of Prince Albert.\footnote{189}

Following the outbreak of the North-West Rebellion in 1885, the Chakastaypasin Band scattered. A number of Chakastaypasin band members initially fled to the Stoney Creek and Carrot River valley areas, one of their

\footnotesize{\textsuperscript{186} Hayter Reed, Indian Commissioner, to DSGIA, March 14, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1a, p. 106).}

\footnotesize{\textsuperscript{187} [L. Vankoughnet, DSGIA], to the Indian Commissioner, March 18, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1, pp. 310–11). Text is as it appears on the document, with “Indians” and “party to be” struck out.}

\footnotesize{\textsuperscript{188} 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), 5–6 (ICC Exhibit 2b, pp. 5–6).}

\footnotesize{\textsuperscript{189} Order in Council PC 1151, May 17, 1889, p. 50 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 6b).}
traditional territories. The Carrot River runs through the northern portion of what would later become IR 100A, and Stoney Creek was located farther south. James Smith band elders say that Chief James Smith invited the Chakastaypasin people to camp on IR 100 until the fighting was over. At the end of 1885, six Chakastaypasin families, including Kahtapiskowat and his extended family, received their annuities on the James Smith band paylist.

One of the important outcomes of the North-West Rebellion for the Chakastaypasin Band was the department’s characterization of the entire band in 1885 as “rebels.” This generalization led to the department’s efforts to “break up” the band and depose Chief Chakastaypasin. Shortly thereafter, in 1886, a distinction was made: a portion of the band, led by Chief Chakastaypasin, continued to be viewed as “rebels,” while the remaining portion of the band, led by Kahtapiskowat, came to be viewed as “loyal.” As early as 1886, the department ordered that the Chakastaypasin band members living near Fort à la Corne be “amalgamated” with the James Smith Band. Assistant Indian Commissioner Hayter Reed later commented that the Chakastaypasin Band had consented “to join Peter Chapman’s Band,” but there is no record of this agreement.

It is difficult to determine exactly where Chakastaypasin band members were living during the years 1885–87. However, it is known that some stayed in the vicinity of Fort à la Corne, some returned to IR 98, and others either disappeared or joined other bands. Some Chakastaypasin members may have planted gardens in 1887 at or near IR 100A (surveyed that year), but returned to IR 98 for the winter. However, the surveyor made no mention of


194 E. Dewdney, Indian Commissioner, to Acting Indian Agent, May 25, 1886, LAC, RG 10, vol. 1591 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 234); Statement of “Chiefs and Head Men of Chakastaypasin’s and John Smith’s Bands,” c. February 1889, no file reference available (ICC Exhibit 1a, pp. 104–5).

195 Acting Indian Agent, to George Goodfellow, Farm Instructor, June 17, 1886 [LAC, RG 10, vol. 9098, book 1, p. 82] (ICC Exhibit 1a, p. 53).

196 Hayter Reed, Assistant Indian Commissioner, to SGIA, April 14, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 268).

197 Hayter Reed, Assistant Indian Commissioner, to SGIA, April 14, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 268).
Chakastaypasin band members located at IR 100A within his survey report that year.\(^{198}\)

At the beginning of 1888, a portion of the Chakastaypasin Band (including Kahtapiskowat and his family) were living at IR 98, and at least some of the other members were living at Fort à la Corne.\(^{199}\) In January 1888, Indian Agent R.S. McKenzie reported that some of those living at Fort à la Corne had requested the department to “take back the Reserve on the South Branch, and give them a Reserve near James Smith’s at La Corne.”\(^{200}\) The department agreed in February 1888 that this exchange should be done.\(^{201}\) Agent McKenzie subsequently met with Kahtapiskowat at IR 98 in March 1888 and reported that “Big Head and his men” were prepared to relinquish the reserve at any time and join Peter Chapman’s Band, but that they expected something for so doing no matter how small.\(^{202}\) On May 23, 1888, McKenzie reported that “Big Head and his band” had left IR 98 earlier that month and moved to Fort à la Corne to “join Chapman’s Band.”\(^{203}\)

The October 1888 Cumberland 100A paylist shows six Chakastaypasin families grouped at the end according to their Chakastaypasin ticket numbers and marked with an “A.” The notations beside these names on the paylist state that they were “now transf[erre]d” or “transf[erre]d from Chakastaypasin.”\(^{204}\) A seventh family, “transferred” that year from the James Smith Band to the Cumberland 100A paylist, was likely a former Chakastaypasin family, paid under Chakastaypasin ticket no. 13 from 1876 to 1880.\(^{205}\) The corresponding Chakastaypasin band paylist for October 1888 states that six families had “transferred to the Cumberland Band.”\(^{206}\) As noted above, the department


\(^{206}\) Treaty annuity paylist, Chakastaypasin Band, 1888, no file reference available (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 12a, p. 219).
mechanism for such “transfers” was not formalized until 1889. Furthermore, section 140 of the *Indian Act*, which provided the statutory basis for such membership transfers, did not come into force until 1895.

In 1889, the Chakastaypasin band paylist was discontinued. The annuities of Chief Chakastaypasin and his grandson, Neeosopahitawein, were reinstated that year (after having been withheld since 1885 from those identified by the department as “rebels”). Both men received their annuities on the Cumberland 100A paylist that year under new ticket numbers (rather than their old Chakastaypasin band ticket numbers). Chief Chakastaypasin was no longer recognized as chief and did not receive the extra annuity associated with that position, while Kahtapiskowat continued to be recognized as a headman and received the associated extra annuity. On October 23, 1889, Agent McKenzie reported that the Chakastaypasin Band “is now thoroughly broken up” and its members settled with the One Arrow, James Smith, and Cumberland Bands.

Although Chakastaypasin members appeared on the Cumberland 100A paylist in October 1888, it is not certain when they settled at IR 100A. However, the historical record suggests that at least some Chakastaypasin band members were settled on the southwest corner of IR 100A by 1889. Even then, former Chief Chakastaypasin and some followers continued to winter south of IR 100A near Stoney Creek. In August 1890, Indian Agent McKenzie and Inspector of Indian Agencies Alexander McGibbon reported that Kahtapiskowat and Chakastaypasin were settled at the “extreme South West corner” of IR 100A, engaged in farming and putting up houses.

In May 1891, Indian Commissioner Hayter Reed reported that 26 Chakastaypasin band members had been “amalgamated” with the

207 Treaty annuity paylist, Chakastaypasin Band, 1889, no file reference available (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1a, p. 221).
211 See, for example, R.S. McKenzie, Indian Agent, Duck Lake Agency, to Hayter Reed, Indian Commissioner, April 30, 1889, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 516); R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Indian Commissioner, August 31, 1890, LAC, RG 10, vol. 3793, file 46008 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 571).
“Cumberland Band.” In October 1891, the Chakastaypasin members were given new ticket numbers on the Cumberland 100A paylists.

Transfers to Cumberland Band, 1891

By 1889, it appears that most of the Cumberland band members were settled on the northern portion of IR 100A, while most of the Chakastaypasin band members chose to settle separately on the southern portion. For their own convenience and administrative purposes, however, local department officials reported jointly on the activities and agricultural progress of both groups at IR 100A.

On September 4, 1891, Chakastaypasin and Cumberland band members, described as “members of the Band owning the Reserve ... known as Cumberland Reserve No. 100A,” signed a Consent to Transfer for Nanequaneum from Beardy's Band, which stated:

We the undersigned Councillors and members of the Band of Indians owning the Reserve situated in treaty No. 6 and known as the Cumberland Reserve No. 100A 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 4th day of September 1891, granted leave to “Nanequaneum” No. 35 of Beardy's Band No. 97 to be transferred from said band to this our Band of Indians owning the Reserve as situated at Fort a la Corne in Treaty No. 6 and known as

Cumberland Reserve to which transfer, we the undersigned hereby give our consent.\textsuperscript{218}

The consent contains the signatures of five Cumberland band members and two Chakastaypasin band members, George Sanderson and “Big Head per G. Sanderson.”\textsuperscript{219} The department approved the transfer of Nanequaneum to “Peter Chapman’s Band” on October 20, 1891,\textsuperscript{220} and Nanequaneum appeared the next year as ticket no. 105 on the 1892 paylist for “Big Head’s Band 100A.”\textsuperscript{221}

The October 13, 1891, Cumberland 100A paylist shows that a grandson of Kahtapiskowat moved from the James Smith Band to the Cumberland Band 100A that year and received his own ticket number, following his marriage into one of the Chakastaypasin families.\textsuperscript{222} No Consent of Band to Transfer form was signed for his admission to the Band.

**Death of Peter Chapman, 1892**

Peter Chapman died on April 29, 1892.\textsuperscript{223} Around this same time, there was a shift in terminology, as the Cumberland contingent began to be more commonly referred to as the Cumberland Band or some variation of Cumberland Band No. 100A. This usage was fairly consistent until 1902.

**Paylists for Big Head and Cumberland Bands at IR 100A, 1892–96**

An important departmental effort to distinguish between the Cumberland and Chakastaypasin band members living at IR100A began in 1892, but lasted for only four years. In May 1892, on the instructions of DSGIA Vankoughnet, who was concerned with maintaining the distinction of the Cumberland Band’s Treaty 5 status,\textsuperscript{224} Commissioner Hayter Reed instructed the Indian Agent to keep the Cumberland people separate from all others on the paylists and returns. He conceded that this distinction might be difficult, since “a portion of the Chekastaypaysin’s Band, and possibly some other Indians of Treaty Six

\begin{itemize}
\item \textsuperscript{218} Consent of Band to Transfer, September 4, 1891, LAC, RG 10, vol. 3862, file 83104 (ICC Exhibit 1, p. 356).
\item \textsuperscript{219} Consent of Band to Transfer, September 4, 1891, LAC, RG 10, vol. 3862, file 83104 (ICC Exhibit 1, p. 356).
\item \textsuperscript{220} Unidentified author and recipient, October 20, 1891, LAC, RG 10, vol. 3862, file 83104 (ICC Exhibit 1a, p. 150).
\item \textsuperscript{221} Treaty annuity paylist, Big Head Band, 1892, no file reference available (ICC Exhibit 9b, p. 2). See ticket no. 105.
\item \textsuperscript{222} Treaty annuity paylist, “Cumberland Band Paid at Reserve,” 1891, no file reference available (ICC Exhibit 9a, p. 2). See ticket no. 100, “Qwatwaywayweein, or James.”
\item \textsuperscript{223} “Register of Indian Deaths for Band 100A,” entry for April 29, 1892, LAC, RG 10, vol. 9995 (ICC Exhibit 25e, p. 35).
\item \textsuperscript{224} [L. Vankoughnet, DSGIA], to Hayter Reed, Indian Commissioner, April 22, 1892, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 359–60).
\end{itemize}
are merged with them.”

That year, a new paylist was created for “Big Head’s Band,” and the Agent’s tabular statements list the “100A Big Head’s” and the “100A Cumberland” Bands separately.

Commutation of Annuity, 1892
On March 11, 1892, a “Consent of Band to Commutation of Annuity” for Mrs Albert Ballendine was signed by “Chiefs and Councillors of the Cumberland (No. 100a) Band of Indians owning the reserve situated at Fort à la Corne.”

This form was signed entirely by Cumberland band members: Peter Chapman, William Head, James Head, Fredrick Okeekeep, Samuel Brittain, Patrick Brittain, and Edwin Brittain.

Transfers into Big Head’s Band, 1892–95
During the existence of the Big Head band paylist at IR 100A from 1892 to 1896, there were a number of transfers into Big Head’s Band by various methods.

In September 1891, Chief Chakastaypasin’s daughter (“Paskoostequan’s widow”) and two of her children entered treaty with Big Head’s Band, although they did not appear on the paylist until the following year.

In 1894, her son moved from the One Arrow paylist to her ticket on the Big Head band paylist.

No Consent to Transfer forms were signed for his admission to the Band.

On March 26, 1894, a Consent to Transfer form was signed for the admission of Yellow Quill member Mah-sah-kee-ask to “Big Head’s Band No. 100A.” The consent states:

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225 Hayter Reed, Indian Commissioner, to the Indian Agent, Duck Lake Agency, May 7, 1892, no file reference available (ICC Exhibit 1a, p. 151).
226 Treaty annuity paylist, Big Head Band, 1892, no file reference available (ICC Exhibit 9b, pp. 1–2); see, for example, Statement of Farming Agencies and Indian Reservations: Approximate return of grain and roots sown and harvested, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1892, 332–33 (ICC Exhibit 17, pp. 120–21); Statement of Farming Agencies and Indian Reservations: Approximate return of grain and roots sown and harvested, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1893, 387 (ICC Exhibit 17, p. 136); Number and whereabouts of Indians in the North-West Territories, 1893, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1893, 399 (ICC Exhibit 17, p. 138); Number and whereabouts of Indians in the North-West Territories, 1895, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895, 400–3 (ICC Exhibit 17, pp. 186–89).
227 Consent of Band to Commutation of Annuity, March 11, 1892, LAC, RG 10, vol. 3871, file 88885 (ICC Exhibit 1, p. 358).
228 Consent of Band to Commutation of Annuity, March 11, 1892, LAC, RG 10, vol. 3871, file 88885 (ICC Exhibit 1, p. 358).
229 Treaty annuity paylist, Big Head Band, 1892, no file reference available (ICC Exhibit 9b, p. 2). See ticket no. 107. See also Sturgeon Lake First Nation, “Families of the Chakastaypasin Band: Remarks on Homik’s Tracing Study from the Perspective of the Sturgeon Lake First Nation,” revised May 1997 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 17c, pp. 44, 46).
We the undersigned Chiefs and Councillors of the Band of Indians owning the Reserve situated in Treaty No. 6 and known as Big Head’s Cumberland Reserve No. 100A, 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 twenty-sixth day of March, 1894, granted leave to Mah-sah-kee-ask No. 84 of Yellow Quill’s Band to join our said Band 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.231

Three Big Head band members signed the consent – George Sanderson, John Sanderson, and Big Head – along with two members of the Cumberland Band 100A.232 The Yellow Quill Band signed the corresponding consent for the transfer on July 16, 1894.233 The DSGIA subsequently approved the “transfer” on October 1, 1894.234

The final transfer into Big Head’s Band executed during this period was for the admission of Muskochepaketimit of Yellow Quill’s Band into “Big Head’s Band 100A” residing at “Cumberland 100A Indian Reserve.” The wording on the Consent form is the same as that on the Consent for the transfer for Mah-sah-kee-ask, except for the identification of signatories. This form states that the transfer is approved by the “Chiefs and Councillors of the Band of Indians owning the Reserve situated in Treaty No. 6 and known as Cumberland 100A Reserve.” It was signed entirely by members of Big Head’s band, including Kahtapiskowat, who signed as headman.235 The department approved the “transfer” in October, 1894.236

**Farm Instructor Appointed, 1893**

In 1893, an instructor was finally appointed for the James Smith, Big Head, and Cumberland Bands at Fort à la Corne.237 However, there does not appear to have been any significant change at this time in how the Fort à la Corne Bands earned a livelihood. In 1895, Agent McKenzie commented that “the Indians of these Bands cannot be looked upon as being farmers … Hunting is

231 Consent of Band to Transfer, March 26, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1a, p. 153).
232 Consent of Band to Transfer, March 26, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1a, p. 153).
233 Consent of Band to Transfer, July 16, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1a, p. 155).
234 Acting DSGIA to Assistant Indian Commissioner, October 1, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1a, p. 155).
235 Consent of Band to Transfer, September 25, 1894, LAC, RG 10, vol. 3936, file 119588 (ICC Exhibit 1a, p. 159).
236 Acting DSGIA to Assistant Indian Commissioner, October [15], 1894, LAC, RG 10, vol. 3936, file 119588 (ICC Exhibit 1a, p. 161).
the main source of earnings of these bands.”

This comment does not present the whole picture, as some progress had been made. Cattle raising became the focus of agricultural efforts on the James Smith and Cumberland 100A reserves, as the land there was suited to it, and some crops were grown as well. In 1895, Big Head’s Band and the Cumberland Band 100A each had 20 acres cultivated – one quarter more than the amount of the previous year.

Surrender of 640 Acres at IR 20, 1894

In 1892, a petition from 21 “Half-breeds of Cumberland” living near the HBC settlement at Cumberland House asked that the portion of IR 20 occupied by them be withdrawn from the reserve. On December 6, 1892, Surveyor T.D. Green wrote a memorandum to the Deputy Minister of Indian Affairs regarding this proposal. He recommended that the surrender be taken “in view of the fact that the Indians of Cumberland District have 65 sq. miles of good farming lands reserved for them on the Carrot River near Fort à la Corne.” In 1894, a surrender of 640 acres at IR 20 was accepted by Order in Council 3147. On a 1902 “List of surveys pending in Manitoba and the N.W.T.,” it can be seen that an addition of 640 acres to the “Cumberland House Indian Reserve” in the Pas Agency was planned for that year. The addition, approved by Order in Council of January 25, 1902, was “in lieu of 640 acres surrendered in 1894.” There is no available evidence regarding whether the Cumberland band members at IR 100A were informed of this surrender or whether they participated in any vote.

Creation of Section 140 of the Indian Act, 1895

Lawrence Vankoughnet retired from his position as Deputy Superintendent General of Indian Affairs in 1893 and was succeeded by Hayter Reed. As a department official, Vankoughnet had been instrumental in having land set

238 R.S. McKenzie, Indian Agent, to SGIA, July 15, 1895, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895, 81 (ICC Exhibit 17, p. 165).
240 H.T. Vergette, Head of Land Titles Section, DIAND, to Acting District Supervisor, Prince Albert Indian District, February 4, 1970, no file reference available (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 4).
241 T.D. Green, Department of Indian Affairs, to Deputy Minister, Department of Indian Affairs, December 6, 1892, no file reference available (ICC Exhibit 1, p. 365).
242 Letter from H.T. Vergette, Head of Land Titles Section, DIAND, to Acting District Supervisor, Prince Albert Indian District, February 4, 1970, no file reference available (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 4).
aside for the Cumberland Band at Fort à la Corne. He also pushed to maintain the
distinction of separate treaty status for the Cumberland band members
living at IR 100A, as evidenced by the 1892 separation of the Big Head Band
and the Cumberland Band 100A paylists. In contrast, while he was an official
in the Indian Commissioner’s office, Hayter Reed generally treated the
Cumberland people at IR 100A as their own band. He also pushed for the
establishment of a procedure for band membership transfers, as noted
previously.

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 was 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 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.244

Requests for Transfer from Cumberland House, 1896

By 1896, the large expected migration of Cumberland band members from
Treaty 5 had not materialized. On May 6, 1896, Inspector McColl inquired “if
any of the Cumberland Band who desire to remove to Fort la Corne may still
be allowed to do so.”245 He reported that Albert Greenleaf and his family
wished to make the move and “that there are others also who will shortly
make the same request.”246 In response, Hayter Reed, Deputy Superintendent
General of Indian Affairs, instructed Indian Commissioner A.E. Forget that
“the Department will allow a few who can and will work, to transfer” to Fort à
la Corne “in order to better their condition.”247

On May 27, 1896, E.H. Paget, writing for the Indian Commissioner,
informed the Indian Agent at Duck Lake of Albert Greenleaf’s application “for
transfer to the Cumberland Reserve at a la Corne” and enclosed blank
Consent forms “for his admission thereto.” The letter also states that

244 Indian Act, RSC 1886, c. 43, s. 140, as amended by SC 1895, c. 35, s. 8 (ICC Exhibit 24a, p. 59).
245 E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to the Indian Commissioner, May 6, 1896,
LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 441).
246 E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to the Indian Commissioner, May 6, 1896,
LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 441).
247 Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, May 23, 1896, LAC, RG 10, vol. 3736, file 27580
(ICC Exhibit 1, p. 466).
applications of others from Cumberland House would be permitted “if the Bands concerned make no opposition thereto.” On June 10, 1896, six “members of the Band of Indians owning the Reserve situated in Treaty No. Six and known as the Cumberland (No. 100A) Reserve” signed the transfer form granting Albert Greenleaf “leave to ... join our said band.” However, he never appeared on the paylist at IR 100A, and no others from the Cumberland Band in Treaty 5 applied for transfer or appear on the paylists at IR 100A at this time.

Transfer of Chakastaypasin Members to Cumberland Band 100A, 1896

Sometime before the fall of 1895, Thomas M. Daly, the SGIA and Minister of the Interior, visited the North-West Territories and took notice of the “very fine tracts of land” within the “unoccupied and unused” Chakastaypasin and Young Chipeweyan reserves. On October 18, 1895, he instructed his Deputy Minister, A.M. Burgess, to “open a correspondence with Mr. Reed as to these reserves being surrendered.” Soon after, on November 9, 1895, DSGIA Hayter Reed wrote to Indian Commissioner A.E. Forget and inquired whether the members of Chacastapasin Band were formally transferred to the other Bands with which they become amalgamated, and if not to request that the formal application for such transfer and consent of the Bands concerned to receive applicants may be obtained without delay – and transmitted to the Dept.

Reed wrote again to Forget in January 1896, asking him whether “action has been completed relative to the formal transfer” of the Chakastaypasin members to other bands. He explained that the Department of Indian Affairs intended to hand control of the Chakastaypasin reserve over to the Department of the Interior, “but desires assurance in the direction indicated before proceeding.”

249 Consent of Band to Transfer, June 10, 1896, LAC, RG 10, vol. 1594 (ICC Exhibit 1, p. 468).
250 J. McTaggart, Dominion Lands Agent, to T. Mayne Daly, Minister of the Interior, October 12, 1895, LAC, RG 15, Series D-II-1, vol. 724, file 390906 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 717).
251 Marginal note written on letter from J. McTaggart, Dominion Lands Agent, to T. Mayne Daly, Minister of the Interior, October 12, 1895, LAC, RG 15, Series D-II-1, vol. 724, file 390906 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 717).
252 DSGIA to A.E. Forget, Indian Commissioner, November 9, 1895, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 164).
On February 3, 1896, Commissioner Forget instructed the Indian Agent at Duck Lake to immediately “obtain the consent of the councils of the several Bands into which these Indians have gone, to their formal admission thereinto,” since it appeared that “no formal transfer of these Indians to the Bands with which they subsequently amalgamated has apparently ever been obtained.”

In a letter to Forget dated February 8, 1896, Hayter Reed confirmed that the department intended to use the provisions of section 140 to obtain control of the Chakastaypasin reserve. He wrote that “the Department does not propose to take any surrender of the Chakastaypasin Reserve ... and it is largely on that account that it desires to have the transfer to other Bands, by which the original owners have forfeited all rights in the Reserve set apart for them, formally completed.” In subsequent communications with the Agent, Forget instructed that all Chakastaypasin members should be transferred to the “Cumberland Band No. 100a”, and Big Head’s Band should be “done away with.” In addition, Forget instructed that all the former Chakastaypasin members being paid with the James Smith Band should be transferred to Cumberland Band 100A as well, since they had “never formally transferred” to James Smith. 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.

While the Indian Agent and the Indian Commissioner were attempting to organize the formal transfers of Chakastaypasin members, the Department of the Interior continued to press Hayter Reed for “early action” in transferring control of the Chakastaypasin and Young Chipeewayan reserves.

Immediately following this communication from the Department of the

255 Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, February 8, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 172).
257 F. H. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, April 27, 1896, LAC, RG 10, vol. 1594 (ICC Exhibit 1a, p. 175).
259 J. Hall, Secretary, Department of the Interior, to Hayter Reed, DSGIA, April 22, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 755).
Interior, Reed wrote to Forget asking him to instruct the Agent “not to allow any evitable delay” in completing the formal transfers.  

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

On May 18, 1896, Indian 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 admitting 16 Big Head band families (on 15 forms) and seven James Smith families into the Cumberland Band 100A. He explained that a number of the names on the Consent forms had never appeared on the Chakastaypasin paylists, but that “these people are descendants or have become members since 1888 and have never been legally transferred to any band, even although some of them have been paid Treaty with James Smith’s Band.” Some of those referred to by McKenzie were Chakastaypasin members who had moved to the James Smith band paylists before the Rebellion in 1885. Others were not former Chakastaypasin band members, but they had family connections to members of the band. A notation on the Consent forms for these individuals states that they wished “to be transferred to Cumberland Band with the remnant of Chakastaypasin 98.” An additional Consent to Transfer form admitting one former Chakastaypasin member into the James Smith Band was also forwarded at this time, making 23 Consent forms in total.

The Consent to Transfer forms admitting the Chakastaypasin band 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,

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263 Consents of Band to Transfer, May 10, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 456–61, 465); see also Sturgeon Lake First Nation, “Families of the Chakastapaysin Band: Remarks on Homik’s Tracing Study from the Perspective of the Sturgeon Lake First Nation,” revised May 1997 (ICC, James Smith Cree Nation Chakastaypasin IR98 Inquiry, Exhibit 17c, pp. 46–7, 107–10). The members referred to were Paskoostequan’s widow (Baldhead), Alexander Baldhead, Ooppeepequannahisweewaywake (Hard Sounding Flute), Quatwaywayweeinn, William Hard Sounding Flute, Mahsakask, and Maskochepatemit.

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.265

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 members with an X mark.266 Although the Consent to Transfer forms were evidently signed by Cumberland members, Delbert Brittain says that the elders do not remember having a meeting to accept the Chakastaypasin members into their band.267

In his covering letter forwarding the Consent forms, McKenzie explained that

the reason the Cumberland Band did not give their consent sooner was because they wished to know if by so doing they would be allowed to appoint a Chief and Councillors. However, after I explained to them that I did not expect this privilege would be extended to them but that I would submit their desire to the Department, I got them to sign the papers without any difficulty.268

A marginal note signed by “F.H.P.” for the Indian Commissioner states that “[t]he Agent will be asked to inform the band that their request cannot be granted.”269 McKenzie reported, however, that the Chakastaypasin members had not yet consented to join the Cumberland Band because “they do not wish to give up their claim to their Reserve.”270

In his covering letter to the DSGIA, forwarding these Consent to Transfer forms and McKenzie’s letter, Commissioner Forget commented that “it will be seen that these Indians either do not comprehend the full effect of their

267 ICC Transcript, June 26, 2002 (ICC Exhibit 18c, p. 46, Delbert Brittain).
transferring themselves to another Band or have only accepted the same conditionally.”

Reed replied:

With regard to the unwillingness of the members of the Chakastaypasin Band to surrender their title to the Reserve which they have left ... the Agent should be instructed to tell them that since by admission to other Bands they share all privileges with the Bands concerned, including the right to the Reserves, they can not, in the opinion of the Department, expect any compensation for relinquishing their own Reserve, and have in fact already done so by leaving it and taking up permanent abode upon others.

They should be reminded that it is somewhat late for them to set up such a claim after they have been virtually members of other Bands for years, which they joined entirely of their own accord, the Department refraining from making any objection; and they should be told, moreover, that in order to complete the transfers and make the privileges accorded them by the other Bands secure they should make no delay with regard to formal application for admission.

The Agent should be further instructed to act promptly in this matter, as the longer time the Indians have to think about and talk it over, and to be influenced by others, the more unreasonable they are likely to become.

By May 10, 1896, the department had obtained the consent of the Cumberland Band 100A to the admission of the Chakastaypasin members into their Band, but it did not yet have the consent of the Chakastaypasin members themselves for the transfers.

Applications for Admission to Cumberland Band 100A and James Smith Band

On June 5, 1896, Commissioner Forget instructed Agent McKenzie to obtain an application from each Chakastaypasin head of family for admission “into membership in the Band which has consented to receive them,” even though consent for their admission to IR 100A had already been obtained on May 10, 1896. Forget noted that this procedure was “necessary” “in the absence of the customary consent of band to release members applying for transfer, which cannot in this case be procured as the whole band or remnant thereof, is being transferred.”

He wrote: “No time should be lost in having the work completed and the papers forwarded, for the longer the matter is allowed to

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273 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1a, p. 178).
stand open the more chance there is of the present tendency to opposition
developing into a pronounced refusal, and this it is desired to avoid.” He also instructed the Agent to tell the Chakastaypasin Band that admission into other bands entailed

all the privileges including the right to lands, which they enjoyed as members of a separate band, and for this reason they cannot expect compensation where no loss is sustained. ... In any case they have practically relinquished all claim to their old reserve by abandoning it and taking up their abode on others and after years of practical membership in such other bands, which was not opposed by the Department, it is now somewhat late to set up any claims to lands ... They might also be informed that in order to definitely assure themselves of the privileges now offered them in connection with other bands, they had better, in their own interests, make no unnecessary delay in accepting the offer while it remains open.”

On receipt of these instructions, Agent McKenzie called a meeting “of the members who were not absent” on June 12 and made an unsuccessful attempt to get their signatures on an application for transfer. He reported that “they flatly refuse unless they are allowed something for the Checastapasins Reserve” and that, in any case, only a few members were present. He suggested that “the only time it will be possible to get the Band together will be at Treaty payments and I am in hopes by that time to induce them to sign the document but I cannot say positively that I shall be able.”

DSGIA Reed reluctantly agreed to this plan of action, commenting to Commissioner Forget that “apparently nothing can be done in the matter pending the fresh effort to be made by the Agent later on, but you will see that it is not lost sight of.” However, he instructed that, “should the Agent find it less difficult to get the Indians to make individual applications,” he should pursue that course rather than trying to get all the signatures on a single application. Forget communicated these instructions to the Agent, informing him that since it was

274 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1a, p. 178).
275 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1a, p. 179).
“useless” to approach the Chakastaypasin members as a whole, “except in making the trial you suggest at the approaching treaty payments,” the Agent should “take the members individually and endeavour to win them over one by one, obtaining their signatures as occasion offers.”

On October 15, 1896, at the time of the treaty payments, 27 former Chakastaypasin families applied for admission to the Cumberland Band at IR100A, and another family applied for admission to the James Smith Band. 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. Chakastaypasin and James Smith elders do not recall stories of a meeting or a vote to transfer to another band or any talk of “becoming one band.” It is unclear from their statements whether the elders were referring to the 1896 transfer to the Cumberland Band or the 1902 amalgamation with the James Smith Band.

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.

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

No annuity payments are recorded on the paylist for “Big Head’s Band Paid at Fort à la Corne,” dated October 14 and 15, 1896. Each name has a note

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284 Surrender for sale of Chakastaypasin IR 98, June 23, 1897, no file reference available (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 899).
beside it stating that the ticket had been “transferred to Cumberland Band No. 100A,” and referencing the Indian Commissioner’s letter dated June 5, 1896, as the authority for the transfer.285 As mentioned previously, this letter contained instructions from Forget to Agent McKenzie, instructing him to “obtain the signatures of each head of family or adult member thereof, to an application to be transferred to and admitted into membership in the Band which had consented to receive them.”286 The paylist shows that 17 families containing 48 people were transferred from Big Head’s Band to the Cumberland Band 100A at that time.287

The paylist for the “Cumberland No. 100A Band, Paid at Reserve Fort à la Corne” on October 14 and 15, 1896, reflects the transfers of the 17 families transferred from the Big Head band paylist. In addition, 10 families (28 people) from the James Smith Band also appear on this paylist, with a note stating that they were now “transferred” to the Cumberland Band and a reference to the Commissioner’s letter dated June 5, 1896. In all, 27 families (with 76 people) transferred to the Cumberland Band 100A at that time.288 The James Smith band paylist also notes the transfer of one person from Big Head’s Band to the James Smith Band on the same date, citing the same Commissioner’s letter as the authority for the transfer.289

Although all 27 Chakastaypasin families who applied for admission to the Cumberland Band on October 15, 1896, were added to the Cumberland 100A paylist and said to be “transferred,” it was noted that Consent forms had been obtained for the transfer of only 24 of these families. Some confusion was caused by variant spellings of names on the Consent forms and the application for admission, but it was finally determined that four additional Consents to Transfer and one application for admission were required to complete the formal transfers. The Indian Commissioner instructed the Agent on December 10, 1896, to obtain them “with as little delay as possible.”290 By March 27, 1897, all the necessary Consents to Transfer and applications for admission had been obtained, and the formal transfer of 27 Chakastaypasin

286 F. Paget, for Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1a, p. 178).
families to the Cumberland Band 100A and one family to the James Smith Band under section 140 of the Indian Act was complete.\(^\text{291}\)

In the end, the department opted to obtain a formal surrender of Chakastaypasin IR 98, one that was allegedly carried out on June 23, 1897.\(^\text{292}\)

**EVENTS AT FORT À LA CORNE, 1897–1902**

In 1896, Agent McKenzie began reporting jointly on the “James Smith and Cumberland Reserves, Nos. 100 and 100A,” noting that “these reserves adjoin one another and are dealt with together.”\(^\text{293}\) He continued with this practice in all his subsequent annual reports until 1902.

After his transfer from the Chakastaypasin to the Cumberland 100A paylists, Kahtapiskowat retained his position as headman, given to him at the time of treaty. Accordingly, he received the increased headman’s annuity on the IR 100A paylists, both in 1888–91 before the creation of separate Big Head band paylists, and from 1896 to 1902 following his formal transfer to the Cumberland Band 100A under section 140 of the Indian Act. No other individual was ever paid as headman or chief on the Cumberland 100A paylists.

On an 1897 “Statement of Chiefs and Councillors” for the Duck Lake Agency, the entry for the Cumberland Band 100A lists Kahtapiskowat, with his position unspecified.\(^\text{294}\) On a similar statement dated 1899, Kahtapiskowat is designated as “councillor” for the Cumberland Band 100A, appointed in September 1876 “for Life or Resignation.”\(^\text{295}\) According to the oral history passed on to Delbert Brittain by elders, Kahtapiskowat was never accepted by the membership as either a chief or a headman. Instead, it was felt that his leadership was imposed by the department.\(^\text{296}\)

292 Surrender for sale of Chakastaypasin IR 98, June 23, 1897, no file reference available (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, pp. 897–90).
Surrender and Exchange of 960 acres at IR 100A, 1899

In July 1898, Agent McKenzie requested that the department exchange a portion of land at the southern part of IR 100A for another area at the northern end.\(^{297}\) He reported that the south end of the reserve was of little use because it was so dry, and that during the previous two or three years, an area just outside the northern part of the reserve had been used for wintering cattle because “there is no good water on the reserve.”\(^{298}\) Elder James Burns describes this area as a “petawikan” – a place for wintering cattle where the creek flowed year round.\(^{299}\)

In a memorandum to the Secretary, Chief Surveyor Samuel Bray suggested that the exchange be done by an order in council rather than by a surrender. He also pointed out that the reserve was originally set aside under Treaty 5 “for the Indians of the Cumberland District,” and thus the current area of 65 square miles was enough for 1,300 people.\(^{300}\)

It was decided to obtain a legal opinion on the matter from law clerk Reginald Rimmer, and his report was delivered on May 18, 1899. He recommended that a surrender be carried out for the proposed exchange. In response to Bray’s observation regarding the size of the reserve, he noted:

> Although the size of the reserve is out of all proportion to the requirements of the persons residing thereon and although this disproportion may have arisen from a grave error in calculation shown on file, it is also shown on file that the Department of the 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 [and] to some extent the correspondence on file supports this view.\(^{301}\)

Rimmer observed that a reserve size of 65 square miles is sufficient for 325 persons under Treaty 6. Furthermore, given that the population of the Cumberland Band in 1883 was 345 persons, the combined area of IR 20 and IR 100A (amounting to 71.69 square miles) is “very little in excess of the

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\(^{297}\) R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Secretary, Department of Indian Affairs, July 22, 1898, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 503).

\(^{298}\) R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Secretary, Department of Indian Affairs, July 22, 1898, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 503).

\(^{299}\) ICC Transcript, November 20, 2001 (ICC Exhibit 18b, p. 52, James Burns).

\(^{300}\) S. Bray to the Secretary, March 15, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 537–38).

\(^{301}\) Reginald Rimmer, Law Clerk, Department of Indian Affairs, to unidentified recipient, May 18, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 541).
proportion of land required” for a population of 345 under Treaty 6.\textsuperscript{302} He went on to state:

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, supports 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.\textsuperscript{303}

In light of Rimmer’s opinion, Samuel Bray recommended to the Secretary that a surrender be taken “from the Indians residing on the Reserve” – presumably IR 100A.\textsuperscript{304}

On June 5, 1899, Agent McKenzie was instructed to take a surrender “in accordance with the Indian Act” and to have the affidavit signed by a chief or a headman.\textsuperscript{305} The surrender, dated June 17, 1899, was made by the “Chief and Principal men of the Cumberland Band of Indians resident on our Reserve No. 100A” for the exchange of 960 acres at the southwest corner of IR 100A for “a portion of land of equal area situated at the North end of our said Reserve.”\textsuperscript{306} Three out of nine signatories to the surrender were former Chakastaypasin members, including Kahtapiskowat, who by this time had been transferred by the department to the Cumberland Band 100A under section 140 of the \textit{Indian Act}. Kahtapiskowat signed the surrender document as “Headman.”\textsuperscript{307} The affidavit of execution was signed by Kahtapiskowat and Indian Agent McKenzie on June 21, 1899,\textsuperscript{308} and Order in Council PC 1683 accepted the surrender on August 12, 1899.\textsuperscript{309} There is no evidence that the Cumberland Band in the Pas Agency was informed of this surrender or participated in the vote.

Almost two years after the surrender, Agent Jones reported that the addition to the reserve had not yet been surveyed and warned: “This section of

\begin{itemize}
  \item Reginald Rimmer, Law Clerk, Department of Indian Affairs, to unidentified recipient, May 18, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 541–42).
  \item Reginald Rimmer, Law Clerk, Department of Indian Affairs, to unidentified recipient, May 18, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 542).
  \item S. Bray to the Secretary, Department of Indian Affairs, May 19, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 543).
  \item DSGIA to R.S. McKenzie, Indian Agent, Duck Lake Agency, June 5, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 545).
  \item “Cumberland Band of Indians,” Surrender for exchange, June 17, 1899, LAC, RG 2, vol. 532 (ICC Exhibit 1, pp. 549–51).
  \item “Cumberland Band of Indians,” Surrender for exchange, June 17, 1899, LAC, RG 2, vol. 532 (ICC Exhibit 1, p. 551).
  \item Affidavit of Robert Sutherland McKenzie, Indian Agent, and “Kah ta pis co wat,” Headman, June 21, 1899, LAC, RG 2, vol. 532 (ICC Exhibit 1, p. 552).
  \item Order in Council PC 1683, August 12, 1899, no file reference available (ICC Exhibit 1, p. 561).
\end{itemize}
country I expect will be very soon thickly populated, as the Canadian Northern [Railway] is coming close to it[, ] it is well to guard against encroachment by outsiders.”

**Petition for Councillor, 1900**

In March 1900, a petition from “the Chief and Councillors on James Smith’s Reserve Fort-a-la-Corne” was submitted to the Superintendent General, Clifford Sifton. They wrote that since the resignation of their headman Henry Smith in 1893,

> we have been without one councilor although there was an election for the vacancy but the successful candidate was not put in office. We humbly beg that the money due our reserve for this office be given … and hereafter we shall have a councilor to fill the office which is at present vacant.

Interestingly, the petition is signed by members of all three groups at Fort à la Corne: the James Smith Band, former Chakastaypasin band members (now transferred by the department to the Cumberland Band 100A), and original Cumberland band members. For the James Smith Band, Chief James Smith and his three councillors — Bernard Constant, Jacob McLean, and Chekoosoo — signed. Samuel Brittain and Michael Okeekeep, as well as former Chakastaypasin band members George Sanderson and Neesoopahtawein, signed for the Cumberland Band 100A.

In response to the petition, Agent McKenzie reported in May that an election had been held to replace the councillor, Henry Smith, “but the Department did not approve of the man so elected and ordered me not to countenance any such meeting as it was not the intention of allowing any more Councillors to be elected, as there were already four Councillors at La Corne.” Furthermore, McKenzie concluded that “the Indians do much better, and are much more thrifty and less difficult to handle” without chiefs and councillors, since they are the ones to “put mischief into the Indians heads.”

With respect to Agent McKenzie’s statement that “there were already four Councillors at La Corne,” it might be noted that the James Smith Band had

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310 W.E. Jones, Indian Agent, Duck Lake Agency, to the Secretary, Department of Indian Affairs, February 4, 1901, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 605).
three recognized councillors, and the Cumberland Band 100A had one councillor (Kahtapiskowat) recognized by the department at this time.\textsuperscript{314}

**Commutations of Annuity, 1900**

Two commutations of annuity were signed by the Cumberland Band in 1900. On July 10, 1900, a “Consent of Band to Commutation of Annuity” for Eliza MacKay (née Fox) was signed by the “members and Councillors of the Cumberland Band No. 100A … composing a majority of the members and Councillors of the said Band.” The consent was signed by three band members, all original Chakastaypasins, who by this time had been formally transferred to the Cumberland Band 100A under section 140 of the *Indian Act*: Kahtapiskowat, George Sanderson, and Neesoopahtawein. Each signed on the lines entitled “Councillors,” while the line for “Chief” was blank and crossed out.\textsuperscript{315} This is the first official Cumberland band document signed only by former Chakastaypasin band members.

The following month, on August 30, 1900, a commutation of annuity for Lydia Cook (née Brittain) was signed by the “Chief and Councillors of the Cumberland Band of Indians.” The Consent was signed by four band members: Michael Okeekeep, an original Cumberland Band member, and “Big Head Kahtapiskowat,” George Sanderson, and Neesoopahtawein. All designations for “Chief” and “Councillor” are crossed out, except next to the name of Big Head, who is designated as a councillor.\textsuperscript{316}

**Requests for Transfer from Cumberland House, 1900**

On July 12, 1900, Indian Commissioner David Laird informed Agent McKenzie of a recently received request for the transfer of three individuals from “the Cumberland Band, in the Pas Agency” to the “Fort a la Corne Band.” He wrote:

> Mr. Peter Turner, of Fort a la Corne, has applied to the Department through Mr. T.O. Davis, M.P., for the transfer of Jeremiah Friday, David Tea Boy and Andrew Tatispask from the Cumberland Band, in the Pas Agency, to the Fort a la Corne Band. ... if the Fort a la Corne Band is willing to receive them in their Reserve, obtain its consent on the forms herewith enclosed. In the meantime I will ascertain

\begin{footnotes}
\footnotetext[314]{List of Indian Chiefs and Councillors, Canada. *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899*, 581 (ICC Exhibit 17, p. 259).}
\footnotetext[315]{Consent of Band to Commutation of Annuity, July 10, 1900, LAC, RG 10, vol. 3953, file 135540-9 (ICC Exhibit 1, p. 599).}
\footnotetext[316]{Consent of Band to Commutation of Annuity, August 30, 1900, LAC, RG 10, vol. 3953, file 135540-9 (ICC Exhibit 1, p. 601).}
\end{footnotes}
from Mr. Agent Courtney whether these men desire to be transferred and if so obtain the consent of the Cumberland Band. 317

The only available evidence regarding the identity of Peter Turner is an application made in 1898 for a licence to trade on “the Indian Reserve at Fort a la Corne” during the annuity payments that year, a request that was approved by the Agent. 318

The Cumberland Band 100A signed Consent to Transfer forms for David Tea Boy, Andrew Tatispask, and Jeremiah Friday on August 30, 1900. The forms were signed by three original Cumberland members (Joseph Head, James Head, and Michael Okeekeep) and three former Chakastaypasin members (Kahtapiskowat, George Sanderson, and Neesooopahtawein), all of whom were by this time formally transferred by the department to the Cumberland Band 100A under section 140 of the Indian Act. Kahtapiskowat signed as “Councillor.” 319

Apparently, none of these families actually moved to IR 100A. Both Jeremiah Friday and David Tea Boy continued to receive annuities with the Cumberland Band at IR 20, and never appeared on the IR 100A paylists. 320

David Laird explained later:

In 1900, application was made by a Mr. Peter Turner at Fort a la Corne writing to Mr. T.O. Davis, M.P. asking leave for three families to remove from Cumberland House band to the La Corne reserve. ... Both bands were asked to consent to the removal. The Band of reserve 100A gave their consent in 1900, but when the Band at Cumberland House were asked for their consent to the transfer in 1901 by Mr. Agent Courtney, the reply was that there was no such man as one of those named, and Mr. Courtney reported that “the Councillor replied on behalf of David Teaboy and Jeremiah Friday, saying that they did not wish to be transferred. In the event of their desire to be transferred a vote was taken which was unanimous in refusing to give their consent.” 321

317 David Laird, Indian Commissioner, to the Indian Agent, Duck Lake Agency, July 12, 1900, LAC, RG 10, vol. 1599 (ICC Exhibit 1, p. 600).
318 Peter Turner to R.S. McKenzie, Indian Agent, September 27, 1898, LAC, RG 10, vol. 9994 (ICC Exhibit 25a, p. 43).
319 Consents of Band to Transfer, August 30, 1900, LAC, RG 10, vol. 1596 (ICC Exhibit 1, pp. 602–4).
ALLEGED SURRENDER AND AMALGAMATION, 1902

Events Preceding
On January 30, 1902, C.S. Lowrie, a resident of Kinistino, a town about 5 kilometres to the west of the southern township of IR 100A, sent a letter to T.O. Davis, a local Member of Parliament. Regarding IR 100A, he wrote:

When in Prince Albert last I intended speaking to you ... about trying to get the Southern Township of the Indian Reserve lying between here and Melfort opened up for settlement, this is a great eyesore having the reserve running so far South and the Indians all on the North part. ... If this could be done it would be a great benefit to both this settlement and also to the Indians.322

This is the only document on the record demonstrating public pressure for a surrender of township 46 of IR 100A. It is not known if there were other such letters, but there is evidence that Davis himself was involved in bringing pressure to bear on the department for a surrender. A note on a departmental memorandum regarding the reserve states that “Mr. Davis has called attention two or three times to the desirability of throwing a portion of the Reserve 100A into the market.”323 Davis was a strong promoter of the Liberal government’s efforts to promote settlement through immigration, and he spoke favourably of the change brought about by the settlement of a former Indian reserve near Prince Albert.324 Davis also purchased lands in the sale of IR 98 in 1901 and the sale of IR 100A in 1903.325

Secretary McLean forwarded Lowrie’s letter to Indian Commissioner Laird on March 6, 1902, noting that T.O. Davis delivered the letter to the department. McLean explained:

The reserve to which Mr. Davis refers is the Cumberland Indian Reserve No. 100A. It was set apart for the Indians of Cumberland House and District. Only a small number of these Indians removed from the vicinity of Cumberland House to occupy the new reserve, and consequently it is much larger than necessary for the requirements of the present occupants.

322 C.S. Lowrie to T.O. Davis, Member of Parliament, January 30, 1902, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, p. 628).
323 Marginal note written by Secretary J.D. McLean to the Deputy Minister on a memorandum from W.A. Orr to the Secretary, June 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 672).
324 “Mr. T.O. Davis’ Speech in the House of Commons on the New Settlers of the West,” Prince Albert Advocate, April 29, 1901, 5 (ICC Exhibit 15f, document 5).
325 “Research on ‘Davis Group’ and ‘Prendergast Group’: Final Historical Report,” prepared by Public History Inc., November 2000 (ICC Exhibit 15f); see also Federation of Saskatchewan Indian Nations (FSIN), Transcript of an interview with Angus Burns, April 14, 1972 (ICC Exhibit 23, pp. 1, 7).
I think it would be well to have the matter looked into ... with the view of ascertaining if the Indians will surrender the southern portion to be sold for their benefit.\textsuperscript{326}

Laird replied on June 19, 1902, with a proposal regarding the matter. He reported:

I have looked into this matter and so far as I am able to ascertain at present there is very little prospect of further emigration of Indians from the vicinity of Cumberland House to settle on this reserve. The population of the reserve at the last payments was only 122 souls, and as the area of the reserve is 65 square miles it is much larger than required for the number of Indians settled thereon. Before taking action to consult the Indians about the surrender ... it will be necessary to be in a position to state the terms the Department is prepared to offer as an inducement for them to give up the land.\textsuperscript{327}

He suggested that a small cash payment and expenditure of 10 per cent of the expected sale proceeds on implements, provisions, and such would be an appropriate “inducement.” He went on to make a further proposal:

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. ... 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.\textsuperscript{328}

In response to Laird’s letter, W.A. Orr, an official in the Lands and Timber Branch of the Department of Indian Affairs, recommended that the surrender and amalgamation should be carried out as proposed, “in view of the representations made by the Commissioner.” Interestingly, he notes that James Smith IR 100 and Cumberland IR 100A were both “set aside under Treaty No. 6.”\textsuperscript{329} A marginal note on Orr’s memorandum, signed “JAS DM” and presumably from Deputy Minister James A. Smart, inquired whether it was intended to sell the surrendered land and if there had yet been a survey.\textsuperscript{330}

\textsuperscript{326} J.D. McLean, Secretary, to David Laird, Indian Commissioner, March 6, 1902, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, p. 635).
\textsuperscript{327} David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, June 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 668).
\textsuperscript{328} David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, June 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 668).
\textsuperscript{329} W.A. Orr to the Secretary, June 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 672).
\textsuperscript{330} Marginal note written by DSGIA James A. Smart on memorandum from W.A. Orr to the Secretary, June 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 672).
On July 4, 1902, James A. Smart, DSGIA, wrote to David Laird, enclosing forms of surrender and granting approval to Laird’s proposals. He said: “Your suggestion as to the offering of a bonus of 10 per cent of proceeds of sale to be expended in implements &c., as well as suggestion as to amalgamation of James Smith and Cumberland Bands, meets with approval.”

Laird wrote to Indian Agent W.E. Jones shortly thereafter with his plans for carrying out his proposals. He informed him: “It is my intention to meet you and the Indians of James Smith and Cumberland Reserves at the payments on the 24th instant.” He went on to say, “I have been instructed by the Deputy Minister to endeavor to obtain a surrender of the southern township of the Cumberland Reserve, and I think it would be better that I should discuss the question with them before you begin payments.”

Alleged Surrender and Amalgamation, July 24, 1902
On July 24, 1902, Kahtapiskowat and George Sanderson signed a surrender of the southern township of IR 100A. On the same date, the James Smith Band and Cumberland Band 100A signed an amalgamation agreement, merging the membership, lands, and assets of the two Bands. The surrender, affidavit, and amalgamation agreement, as well as two very brief reports by David Laird, are the only contemporaneous documents in the evidentiary record that deal directly with the day’s events.

Documentary Evidence
The surrender document itself reads as follows:

Know all men by these Presents That We, the undersigned Chief and Principal men of The Cumberland Band of Indians resident on our Reserve No. 100A in the Province of Saskatchewan and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, his Heirs and Successors forever, All and Singular, that certain parcel or tract of land and premises, situate, lying and being in the said Reserve 100A, Province of Saskatchewan containing by admeasurement Twenty-Two Thousand and eighty acres be the same more or less and being composed of this southern township of the said Reserve, Township 46, Range 20, W.2 [I.]M. excepting thereout Sec. 6 and S ½ Sec. 7.

331 James A. Smart, DSGIA, to David Laird, Indian Commissioner, July 4, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 675).
To Have and to Hold the same unto His said Majesty The King, his Heirs and Successors forever, in trust to sell the same to such person or persons, and upon such terms as the Governor of the Dominion of Canada may deem most conducive to our welfare and that of our people.

And upon the further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed to the credit of the amalgamated Bands James Smith and Cumberland.

And We, the said Chief and Principal men of said Cumberland Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of the said land and the disposal of the moneys derived from such sale.

Stipulating, however that as soon as convenient after the money is received from the sale of the land, ten per cent thereof shall be paid to the amalgamated Band in implements, wagons, harness and other useful articles.

In witness whereof, we have hereunto set our hands and affixed our seals this Twenty fourth day of July in the year of Our Lord one thousand nine hundred and two.

Two men signed the surrender on behalf of the Cumberland Band 100A: “Headman” Kahtapiskowat and the “Headman’s son,” George Sanderson. The document is witnessed by Donald Macdonald as interpreter, Angus McLean, and A.J. McKay. David Laird appears to have initialled various changes to the original document, but did not sign it himself.

The affidavit attesting to the validity of the surrender document was made before Indian Agent W.E. Jones as Justice of the Peace “in and for the North West Territories” on the same day at Fort à la Corne. The document reads as follows:


And the said Hon. David Laird for himself saith:

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Cumberland Reserve 100A of the full age of twenty-one years then present.

333 “Cumberland Band of Indians,” Surrender for sale, July 24, 1902, DIAND Indian Land Registry, Instrument no. X10691 (ICC Exhibit 1, pp. 677–79). Text is as it appears on the surrender document, with “Chief and” struck out.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to its Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council and heard such assent given.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in said Release or Surrender.

And the said Kh-ta-pis-kowat says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the Cumberland Reserve 100A of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to its Rules, and held in the presence of the said.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in said Release or Surrender.

That he is a Chief Headman of the said Band of Indians and entitled to vote at the said meeting or council.

Sworn before me by the Deponents Hon. David Laird & Kh tapiskowat at Fort à la Corne District of Saskatchewan this twenty fourth day of July, A.D. 1902. 335

This affidavit is the only documentary evidence indicating that the statutory requirements of surrender were fulfilled.

As noted above, an agreement to amalgamate the James Smith Band and Cumberland Band 100A was also signed on July 24, 1902. The agreement reads:

THIS AGREEMENT made in duplicate and entered into this Twenty fourth day of July in the year of our Lord one thousand nine hundred and two, between the owners of James Smith's Indian Reserve No. 100, in the Provisional District of Saskatchewan, in the North West Territories and Dominion of Canada, as represented by their Chief and Headmen, hereinafter called the Parties of the First Part; and the owners

335 Affidavit of Kh-ta-pis-kowat, Headman, and David Laird, Indian Commissioner, July 24, 1902, DIAND Indian Land Registry, Instrument no. X10691 (ICC Exhibit 1, p. 687). Text is as it appears on the document, with “Chief” struck out.
of Cumberland Reserve No. 100A, also in the said Provisional District, as represented by their Headmen, 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 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-soo & Jacob McLean, Headmen of Reserve 100 and Kh-ta-pis-kowat, 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.336

Agent W.E. Jones, Angus McLean, interpreter Donald Macdonald, and another whose identity is uncertain acted as witnesses. David Laird did not sign. It might be noted that Bernard Constant, one of the James Smith Band councillors, signed his own name, while the others signed with an X.337 This is consistent with oral evidence suggesting that Bernard Constant could read and write in English and always signed his own name, rather than using an X.338

Testimony of Elder Angus Burns

In 1972, James Smith Band elder Angus Burns was interviewed regarding his recollection of the events that took place at IR 100 and IR 100A on July 24, 1902. The transcript of this interview is included in our record of inquiry. Angus Burns was 20 years old at the time of these events and a member of the James Smith Band.339 He recalls that, on the day of surrender, David Laird,
farm instructor Andrew MacKay, Angus McKay (from the HBC), and a teacher named D. Parker were at the reserve. He also recalls that Chief James Smith and his three headmen — Bernard Constant, Jacob McLean, and Chekoosoo — were present. Burns recalls that they had meetings “a lot of times” before the surrender was taken because “the Indians didn’t want to sell this land, nobody was eager to sell.” According to his description, there was a final meeting of the “old men,” apparently including the councillors and Chief. When the agreement was made, the Chief called everyone into the old school house, where the meeting was being held, to witness the signing of the surrender document. The following excerpt gives Burns’s account of what happened:

... 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 all ready a mature young man, this was in Nineteen O Two, what I’m telling about. ... A big meeting, these were the men that were sitting there. Now they were going to sell now, this school, the old school that used to stand here, this was where the meeting was held. ... 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 [you] 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. ... There were a lot of interpreters, you know Angus MacKay, and a Andrew MacKay, Macdonald, they were chosen for this purpose for them to talk so they could be understood when they talked. ... The 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 [sic] 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. ... Yes, virgin land that is what it is worth this is what I will promise you, but I will try to

340 FSIN, Transcript of an interview with Angus Burns, April 14, 1972 (ICC Exhibit 23, p. 1).
341 FSIN, Transcript of an interview with Angus Burns, April 14, 1972 (ICC Exhibit 23, pp. 1–2).
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.  

Angus Burns recalled that only Councillor Bernard Constant could sign his name, and the others “were held to the pen.” Aside from Angus Burns’s recollections, as related by himself and Delbert Brittain, there is very little oral history regarding the surrender. The only other stories regarding these events come from elder Violet Sanderson. She recalls that her grandfather William Head, and her husband’s father and grandfather, were “in council” and involved in discussions about the sale of part of IR100A.  

**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 documents 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 annuity paylist for the Cumberland Band 100A notes that 115 people, including 29 men, were paid annuities “at James Smith’s reserve.” The James Smith band paylist indicates that 107 people were paid annuities that day, including 28 adult men. Agent Jones’s annual report for that year notes 25 men in the James Smith Band and 27 in the Cumberland Band 100A.

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.
Laird's Report on the Alleged Surrender and Amalgamation

On August 1, 1902, David Laird reported to James Smart, the Deputy Superintendent General of Indian Affairs,

that pursuant to instructions contained in your letter of the 4th July ultimo ... I proceeded to Indian Reserve No. 100A last week, and on the 24th of the said month obtained a surrender of Township 46 ... and also effected an amalgamation of James Smith's Band of Reserve 100 with the Cumberland Band of Reserve 100A.349

In his later annual report for the year, Laird gave another, very similar account.350 Indian Agent W.E. Jones's annual report, dated August 15, 1902, does not refer to either the surrender or the amalgamation and speaks of “two bands” living at IR 100 and IR 100A.351 However, Agent Jones's 1903 annual report for “James Smith Band No. 100” states: “This reserve includes part of the reserve formerly held by the Cumberland band, 100A; the latter band surrendered part of its reserve and then joined with James Smith’s band, making one band with one reserve now known as the ‘James Smith Band, No. 100.’”352 No other report was made by Agent Jones regarding the events of July 24, 1902, with regard to the surrender or the amalgamation.

Acceptance of Surrender by Order in Council

On August 19, 1902, Clifford Sifton, the Superintendent General of Indian Affairs, submitted the surrender to the Governor General in Council for approval.353 The accepting Order in Council reads as follows:

On a Memorandum dated 19th August, 1902, from the Superintendent General of Indian Affairs, submitting herewith, a surrender in duplicate made by the Cumberland Band of Indians in the North West Territories, of 22,080 acres, being composed of Township 46 of the said Reserve, Range 20 West 2nd Initial Meridian, excepting thereout Section 6 and South ½ of Section 7, in order that the land may be disposed of for their benefit on such terms as the Superintendent General may consider necessary in their interests.

349 David Laird, Indian Commissioner, to James A. Smart, DSGIA, August 1, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 710).
351 W.E. Jones, Indian Agent, Duck Lake Agency, to SGIA, August 15, 1902, Canada, Annual Report of the Department of Indian Affairs, 1902, 143 (ICC Exhibit 1, p. 712).
352 W.E. Jones, Indian Agent, Duck Lake Agency, to SGIA, August 25, 1903, Canada, Annual Report of the Department of Indian Affairs, 1903, 162 (ICC Exhibit 1, p. 906).
353 Clifford Sifton, SGIA, to the Governor General in Council, August 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 714).
The Minister recommends, the surrender having been authorized, executed and attested in the manner required by the 39th Section of the *Indian Act* that the same be accepted by the Governor General in Council, and that the original thereof be returned to the Department of Indian Affairs and the duplicate kept of record in the Privy Council Office.

The Committee submit the same for approval.\(^{354}\)

The Order in Council, PC 1510, is dated October 14, 1902.

**Status of James Smith Band Leadership, Post-1902**

Some of the oral history evidence casts doubt on the presence of leadership in the James Smith Band at the time of these agreements. Angus Burns spoke of James Smith dying “before this was finished.”\(^{355}\) At the same time, records kept in the Agency record the death of Chief James Smith on November 20, 1902, after the time of the events in question.\(^{356}\)

Following the death of Chief James Smith, Assistant Indian Commissioner J.A.J. McKenna recommended in June 1903 that Agent Jones select a new Chief for the amalgamated Band.\(^{357}\) James Head, formerly of the Cumberland Band 100A, was appointed as the new Chief of the James Smith Band on July 24, 1903.\(^{358}\) Notably, the 1903 James Smith band paylist indicates that Kahtapiskowat continued to be paid as a headman after his transfer to that Band. He received the additional headman’s annuity until his death, sometime between 1906 and 1907.\(^{359}\)

**Church Official Questions Surrender**

On November 12, 1902, a series of correspondence commenced between department officials and J.A. MacKay, the Archdeacon and Superintendent of Indian Missions in Saskatchewan. MacKay wrote on that day that he had discovered the surrender of part of IR 100A on a recent visit to Fort à la Corne, although he did not indicate the source of his information. He pointed

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\(^{354}\) Order in Council PC 1510, October 14, 1902, LAC, RG 2, vol. 593 (ICC Exhibit 1, pp. 745–46).

\(^{355}\) FSIN, Transcript of an interview with Angus Burns, April 14, 1972 (ICC Exhibit 23, pp. 4–5).

\(^{356}\) Register of deaths, James Smith Band No. 100, entry for November 20, 1902, LAC, RG 10, vol. 9995 (ICC Exhibit 25e, p. 27). See also ICC Transcript, October 29–30, 2002 (ICC Exhibit 5a, p. 162, Oliver Constant).

\(^{357}\) J.A. McKenna, Assistant Indian Commissioner, to the Secretary, Department of Indian Affairs, June 17, 1903, LAC, RG 10, vol. 3940, file 121989-9 (ICC Exhibit 1, p. 885).


out to the Superintendent General that “the transaction is certainly not to the advantage of the Indians.”

He explained:

The land which has been surrendered belongs to the Cumberland Indians. Now it is quite clear that the Indians at present occupying this Reserve are not entitled by the terms of the Treaty to the amount of land which it comprises, but the land was reserved for any of the Indians of Cumberland district who might wish to settle on it. There is a large number of Indians in Cumberland district and there is scarcely any land for agricultural purposes. The Indians live by fishing and hunting, but the population is too large for the resources of the district, and how they are to subsist will be a very serious question in the near future. ... although only a comparatively small number had arrived so far, the land will be required by immigrants from Cumberland district in the future. At the present time there is no movement of the Cumberland Indians in this direction, but this is simply due to an exceptional state of things in the district. The number of muskrats, which afford the Indians abundant food during the hunting season as well as a profitable article of barter. This source of subsistence cannot last long, and, when it fails, the Indians will be reduced to greater straits than before.

I beg therefore to implore the Department to reconsider its actions in this matter, because the land will be required by the Cumberland Indians in the future, and supposing it is not required by the Indians for their own actual use, it surely is in their interest that the land should not be sold until it commands a higher price than is likely to be obtained for it at present.

On November 24, 1902, David Laird wrote to the Superintendent General of Indian Affairs to defend the department’s actions. Regarding the justification given for the surrender – that little further emigration from Cumberland House was expected – he reported that the 1891 paysheets showed 28 families, or 83 people, present at IR 100A who had removed from Cumberland House. Since that time, he was not aware of any who had actually made the move. To illustrate this point, he reviewed the various applications from Cumberland House members at IR 20 to move to IR 100A during the years 1896 to 1900 and the outcomes of each. Recalling the opposition of those at Cumberland House to the transfers requested in 1900, he argued:

360 J.A. MacKay, Archdeacon and Superintendent of Indian Missions in Saskatchewan, to SGIA, November 12, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 753).
If all the band only last year were unanimous against transfers, it is not very probable that in the near future any of them will consent to be transferred to Reserve 100A at Fort a la Corne, consequently it appears to me that the Department would not be justified in keeping land locked up an indefinite number of years for a migration of Indians which they may never be willing to make.\(^\text{364}\)

In reply to MacKay’s assertion that the present prosperity in the “Cumberland District” would not last, Laird replied:

I ask why should muskrats become less abundant? For the last few years the floods have been so destructive in the Cumberland region that scarcely any hay could be saved for the Indians cattle. To all appearance, therefore, for the next half century it will be more of a rat country than one for white settlers, in which case the Indians will probably be undisturbed in a hunt which yields them a means of subsistence which they highly appreciate.\(^\text{365}\)

There is nothing to indicate that Laird consulted the Cumberland Band at Cumberland House to ascertain its wishes or intentions in the matter.

Archdeacon MacKay wrote to the department again at the end of the year, noting that “in Cumberland district itself, that is in the Pas Agency,” only 60 square miles of practically valueless land was set apart for nearly 1,200 treaty Indians. He explained the situation of the Treaty 6 Lac La Ronge and Montreal Lake Bands, who were given a large reserve at Little Red River because little good land could be found for them in their original location, and compared it to that of the Cumberland Band. MacKay noted that the Little Red River reserve had only three or four families living on it, while IR 100A had 125 residents. He argued that “any reason that may be advanced against depriving the Lac La Ronge Indians of their reserve on the Little Red River, applies much more strongly to the case of the Cumberland Indians and their reserve at Fort a la Corne.”\(^\text{366}\)

On January 29, 1903, Samuel Bray prepared a memorandum for the DSGIA, attaching Archdeacon MacKay’s letters dated November 12 and December 29, 1902, and David Laird’s letter dated November 24, 1902. In his covering memorandum, Mr Bray wrote: “The Department made full enquiry and was advised to the effect that there was no prospect of any more of the Cumberland Indians removing to the Reserve 100A, and consequently the

\(^{364}\) David Laird, Indian Commissioner, to SGIA, November 24, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 760).

\(^{365}\) David Laird, Indian Commissioner, to SGIA, November 24, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 759–60).

surrender was asked for and [obtained] from the Indians residing on the Reserve.”  

A marginal note on this memorandum, initialled by DSGIA Frank Pedley, stated: “I see no reason why the intention of Dept should not be carried out by sale of Reserve as surrendered.”  

On February 2, 1903, Pedley reiterated his conclusions in a short letter to Archdeacon MacKay.  

Archdeacon MacKay responded to Pedley’s letter on March 3, 1903. He commented that the advice received by the department stating that no further immigration was expected “must have been based solely on a view of the conditions that exist at the present time in the Cumberland district, and not on any long experience of the state of things in the past.” He argued that the current conditions in the Cumberland district were “exceptional,” but that “the time must come when there will be more need than ever” for the lands at IR 100A. The annual reports for the Pas Agency during this period uphold Archdeacon MacKay’s observations regarding conditions in that agency.  

MacKay went on to inquire whether the matter had been placed before “the Indians of the Cumberland District” and submitted that this should be done “in order to make the surrender equitable.” Finally, he brought it to the attention of the department that if it was determined to go ahead with the sale, “it is not in the interest of the [Indians] that the land should be placed on the [market] at the present time or in the near future, as it must rise in value with settlement of the country, and there is still abundance of land in Saskatchewan” open for “homesteading and purchase.”  

Pedley replied to Archdeacon MacKay’s concerns in a final letter, dated March 19, 1903, stating: “As the eighty-three individuals now on the reserve are only entitled to 10664 acres there is a balance of 8896 acres, which would be sufficient for sixty-nine individuals. There is, therefore, a wide margin for any other Indians of the Cumberland district who might wish to remove to the reserve.”  

It is interesting to note that Pedley’s calculations
are based on the Treaty 6 land entitlement formula, rather than that for Treaty 5. In addition, the number paid on the IR 100A paylists in 1902 was 115, rather than 83 people (the number paid in 1891). Both figures include a number of former Chakastayapasin band members, in addition to the Cumberland band emigrants.

Community Understanding of Events of 1902

It is unclear what information those at Cumberland House had with respect to the events occurring at Fort à la Corne. Indian Agent Joseph Courtney’s 1902 annual report for the Pas Agency, written two days after the surrender, makes no mention of the surrender at IR 100A. And, although Archdeacon MacKay advocated on behalf of Cumberland band members living in the Cumberland district, it is unclear from whom he learned of the surrender, and whether he communicated with the Cumberland Band at IR 20 on the matter.

There is no evidence on the record to suggest that the Cumberland Band at Cumberland House had any knowledge of the alleged surrender and amalgamation, or that it participated in any meeting or vote. The oral history shared by Cumberland House Cree Nation elders is emphatic that “nobody ever sold that land from here.” Those who remember the reserve at Fort à la Corne understand that the reserve there is still their land. Joseph Laliberte says that they still refer to the former Cumberland band members living with the James Smith Band as “Cumberland people,” or “Waskiganihk,” the same name they use to refer to themselves.

James Smith Cree Nation elders seem to agree that there was no real understanding of what the surrender meant, and no one recalls a vote being held to sell the land at IR 100A. James Burns speaks of the people being surprised to discover white settlers breaking the land on the southern township of the reserve and then being told by Indian Agent “Pond Smith” that they had sold the land, although no one could remember the meeting happening. There is no record of an Indian Agent by the name of Pond


376 Joseph Courtney, Indian Agent, Pas Agency, to SGIA, July 26, 1902, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902, 85 (ICC Exhibit 17, p. 307).

377 ICC Transcript, November 19, 2001 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12a, p. 94, Lena Sarah Stewart).


Smith in the Duck Lake Agency in the years following the surrender. However, an Indian Agent named Charles Pantaleon Schmidt was assigned to the Duck Lake Agency from October 1912 until December 1936.381

The oral history of the James Smith Cree Nation does not reflect any memory of the amalgamation agreement signed on July 24, 1902, or how such an arrangement came about. Most of the elders say that there has always been a distinction among the communities within the James Smith Cree Nation and a common understanding of which lands belong to each Band.382 Violet Sanderson testified that “there’s never been a time that they considered themselves as one band ... they were three separate bands.”383 None of the oral history makes reference to a meeting, a vote, or any type of consent being given to amalgamate, or bring together into one Band, the separate communities living at IR 100 and IR 100A.384

On February 3, 1905, Indian Agent J. Macarthur reported that Chief James Head requested “a statement showing how much of the Band’s money has been expended and what was the balance on hand.”385 The following year, on March 8, 1906, David Laird reported that

at a meeting of the Indians of James Smith’s Band held on the 19th ultimo it was resolved to ask the Department to inform them as to how much of the money realized from the sale of that portion of Indian Reserve No. 100A, which was disposed of in 1903, had so far been spent for their benefit, and what balance remains on hand. They also desire to know whether they are not entitled to draw the interest yearly.

... They also ask for a copy of the surrender and agreement of amalgamation ...386

386 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, March 8, 1906, LAC, RG 10, vol. 6664, file 109A-9-IA (ICC Exhibit 1, p. 1048).
This is the only piece of evidence suggesting that the James Smith Band had any knowledge of the amalgamation agreement. In response, the Secretary furnished David Laird with an itemized statement of the James Smith Band’s capital and interest accounts, covering the period from July 1, 1904, until March 13, 1906.  

Establishment of Trust Fund and Expenditure of Land Sale Proceeds  
Trust account no. 293 for the “Cumberland Reserve, N.W.T.” was established in the fiscal year 1902/3. It seems clear that the account was established for the “Cumberland Reserve” at Fort à la Corne, since revenue from both the Chakastaypasin IR 98 and the Cumberland IR 100A land sales was deposited in the capital account that year, and management fund and survey fees relating to the sale of IR 100A were disbursed. An Order in Council dated March 7, 1903, authorized that the costs for the subdivision survey of township 46 be charged to the capital account of the “Cumberland Indians.” Following the alleged amalgamation of the James Smith Band and the Cumberland Band 100A, David Laird recommended that their trust accounts be combined as well. He was notified on July 2, 1903, that the separate accounts had been combined into account 293, the number originally belonging to the Cumberland Band 100A. It was known as the “Cumberland (James Smith) Band” account until 1918, when the name was changed to the “James Smith Band” account 293.

Most of the 10 per cent share of the proceeds from sale, promised in the surrender document to be used for “implements, wagons, harness and other useful articles,” became available in 1904 and was spent on agricultural implements, oxen, a threshing machine, and miscellaneous other items.
It is also important to note that Kahtapiskowat received a pension from January 1904 to January 1906, which totalled $183. These payments are reflected in the statement provided to David Laird in response to the James Smith Band’s request for an accounting of the proceeds and expenditures from the sale of the surrendered portion of IR 100A. Big Head died sometime between 1906 and 1907. The last-known pension payment to Kahtapiskowat was made on January 10, 1906. He was the only person to receive this type of payment from the trust account.

The IR 100A Strip

When the lands in townships 46 and 47, range 20, W2M, were originally offered for reserve purposes in 1885, the Department of Indian Affairs was informed that township 46 had not yet been surveyed. In 1892, some years after the initial survey of IR 100A, the townships surrounding the reserve were surveyed according to the Dominion Lands system.

The first plan of township 46, range 19, W2M, located directly to the east of the reserve, is dated June 24, 1893. It shows a slight encroachment of IR 100A on the western boundary of the township, as well as road allowances at the southern and eastern boundaries of the reserve. The 1894 plan of township 46, range 20, W2M shows the Indian reserve lying slightly north and east of the township boundaries. That is confirmed by the field book for the survey of township 45, range 20, W2M, located directly south of township 46. The field notes show that the Indian reserve boundary lies slightly north of the


397 The IR 100A Strip is also referred to in some reports as “No Man’s Land.”


400 Department of the Interior, Topographical Surveys Branch, Survey Plan of Township No. 46, Range 20, West of Second Meridian, approved June 26, 1894 (ICC Exhibit 14b).
line separating townships 45 and 46, and slightly east of the western boundary line separating ranges 20 and 21. 401

Following the surrender, DLS J. Lestock Reid was instructed, on September 13, 1902, to subdivide the surrendered township for sale. 402 He was already engaged in resurveying the boundaries of IR 100 and IR 100A at that time. 403 On September 19, Reid reported that he was encountering a problem with the survey. He explained that he had started running boundaries, on the assumption that the township and Indian reserve boundaries were the same, but he soon discovered Indian reserve markers located out of line with the township boundaries. 404

After studying current township plans, he noted that small portions of township 46 at the south and west were not included in the reserve. He also found that a small strip of the reserve extended over into township 46, range 19. He concluded that alterations to the Dominion Land Surveys must have taken place since IR 100A was originally laid out in 1887. 405 In order to deal with this unforeseen complication, Reid proposed
to exchange with the Dominion Lands the strip along the east boundary of the Reserve for that on the west and south[.] [T]his would make the boundaries of the Reserve conform to the township [outlines] and include the whole of Township 46 Range 20 W2M in the Indian Reserve. 406

On September 22, Reid reported that, in addition to those irregularities already reported, a small strip of township 47 north of the 12th correction line was not included in the reserve. 407 He revised his previous proposal to suggest that the strip of reserve lying in township 46, range 19, should be exchanged for the three small strips not included in the reserve at the north, west, and south, noting: “This would make the surrendered portion agree

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401 Field Notes for the Survey of Township No. 45, Range 20, West of the Second Meridian, surveyed by P.R.A. Belanger, DLS, August 2–September 24, 1892, pp. 19–24 (ICC Exhibit 14h, pp. 5–8).
402 J.D. McLean, Secretary, to J. Lestock Reid, DLS, September 13, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 721).
403 J. Lestock Reid to the Secretary, Department of Indian Affairs, September 2, 1902, LAC, RG 10, vol. 3960, file 141977-7 (ICC Exhibit 1, p. 716).
404 J. Lestock Reid to the Secretary, Department of Indian Affairs, September 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 726–27).
405 J. Lestock Reid to the Secretary, Department of Indian Affairs, September 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 726–27).
406 J. Lestock Reid to the Secretary, Department of Indian Affairs, September 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 727).
407 J. Lestock Reid to the Secretary, Department of Indian Affairs, September 22, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 729).
with the township outlines and save innumerable complications.” 408

In summary, Reid discovered the following irregularities with the original survey of IR 100A:

- a strip of land along the southern boundary of township 46, range 20, W2M, was excluded from the reserve;
- a strip of land along the western boundary of township 46, range 20, W2M, was excluded from the reserve;
- a strip of land immediately north of the 12th correction line (the boundary between townships 46 and 47, W2M) was excluded from the reserve; and
- a strip of land along the western boundary of township 46, range 19, W2M, was included in the reserve.

Secretary McLean wrote to the Secretary of the Department of the Interior on September 25, 1902, regarding the matter. He noted that the Indian reserve “was surveyed with the intention of making its boundaries coincide with the boundaries of the said Township 46-20” and that

it would simplify matters very much ... if your Department could see its way to accept the narrow strip on the East, in exchange for the narrow strips ... on the West and South of the Reserve. In other words, to make the boundaries of the Indian Reserve the boundaries of T.46-20-W.2M. 409

He wrote again on October 1, 1902, to ask that the small strip between the correction line and township 46 be added to the reserve as well. 410 He instructed Surveyor Reid on the same day that “no harm” would be done if he proceeded with the survey “as if the said strips of land had been dealt with in the manner you suggest.” 411 The Surveyor General informed the Assistant

408 J. Lestock Reid to the Secretary, Department of Indian Affairs, September 22, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 730).
409 J.D. McLean, Secretary, to P.G. Keyes, Secretary, Department of the Interior, September 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 734–35).
410 J.D. McLean, Secretary, to P.G. Keyes, Secretary, Department of the Interior, October 1, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 737).
411 J.D. McLean, Secretary, to J. Lestock Reid, DLS, October 1, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 738).
Secretary for the Department of the Interior on October 18, 1902, that he had “no objection” to the proposal.\textsuperscript{412}

After much correspondence between the Department of the Interior and both the North-West Territories government and the Manitoba and North Western Railway Company, the lands in question were obtained and the exchange made.\textsuperscript{413} There is nothing to indicate that the James Smith Band was consulted regarding the adjustment of the reserve boundaries by the department.

Reid completed the subdivision of the surrendered portion in November and December 1902 and submitted his report in January 1903, along with subdivision plan 271 of township 46, field notes, and valuations of the different sections.\textsuperscript{414} This plan clearly shows the encroachment of the reserve into range 19, as well as the strips of land along the west and south that are not included in the reserve.\textsuperscript{415} Plan 273, dated October 1902, shows the retraced boundaries of IR 100 and 100A and includes a notation in township 46 that “[s]ubsequent to the making of this plan, it has been arranged with the Department of the Interior that the east, south and west boundaries of this surrendered portion of Reserve 100A are to conform with the township boundaries.” The small strip along the western portion of township 46, range 19, is visible on this plan.\textsuperscript{416}

Reid’s subdivision plan was subsequently revised to show the surrendered portion of the reserve as corresponding to the township boundaries. All references to the reserve’s encroachment into range 19 and misalignment with the township lines in range 20 have been removed, and the plan shows the quarter sections around the periphery as containing the full 160 acres.\textsuperscript{417}

\begin{itemize}
  \item Surveyor General to the Assistant Secretary, Department of the Interior, October 18, 1902, no file reference available (ICC Exhibit 1, p. 744).
  \item See, for example, Assistant Secretary, Department of the Interior, to William Whyte, Commissioner, Manitoba and North Western Railway Company, October 27, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 749); Assistant Secretary, Department of the Interior, to Deputy Commissioner of Public Works [Government of the North-West Territories], October 27, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 750); J.S. Dennis, Deputy Commissioner, November 6, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 751); W. Whyte, Agent, Manitoba and North Western Railway Company of Canada, November 8, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 752); P.G. Keyes, Secretary, Department of the Interior, to J.D. McLean, Secretary, Department of Indian Affairs, November 20, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 758).
  \item J. Lestock Reid, Department of Indian Affairs, to DSGIA, January 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 778–79); J. Lestock Reid to the DSGIA, January 15, 1903, LAC, RG 10, vol. 3960, file 141977-7 (ICC Exhibit 1, pp. 784–85).
  \item Natural Resources Canada, Plan 271 CLSR, “Plan showing sub-division of Portion of Indian Reserve No. 100A, Township 46 Range 20 W 2nd. M, Treaty No. 6, N.W.T.,” signed by J. Lestock Reid, DLS, February 1903 (ICC Exhibit 1a, p. 45).
  \item Natural Resources Canada, Plan 273 CLSR, “Plan showing the La Corne Indian Reserves No. 100 & 100A, Tps. 46, 47 & 48, R. 19, 20 & 21, W. 2nd. M., Treaty No. 6, N.W.T.,” surveyed by J. Lestock Reid, DLS, September–October 1902 (ICC Exhibit 1a, p. 44).
  \item Natural Resources Canada, Plan 7481 CLSR, “Plan showing sub-division of Portion of Indian Reserve No. 100A, Tps. 46, 47 & 48, R. 19, 20 & 21, W. 2nd. M., Treaty No. 6, N.W.T.,” surveyed by J. Lestock Reid, DLS, September–October 1902 (ICC Exhibit 4e, p. 2).
\end{itemize}
The notice of sale prepared in early 1903 indicated that all the available lands were within township 46, range 20, and it did not make reference to any fractional parcels.\textsuperscript{418} Successful purchasers were charged for the full 160 acres for most quarter sections on the periphery, except in cases of lands covered by water.\textsuperscript{419}

Events in later years suggest that, although the Departments of the Interior and of Indian Affairs undertook to shift the boundaries of the Indian reserve, this commitment was not at all clear to residents in the area. Uncertainty regarding the ownership of strips of land on all four sides of township 46 in range 20 persisted. In 1911, Reverend G.R. Turk applied to the Department of Indian Affairs to purchase a strip of land adjacent to lands already owned by his wife in the south half of section 4 and the northwest quarter of section 18, within township 46, range 20.\textsuperscript{420} These strips of land would have been at the south and west boundaries of the township, so it is possible that Reverend Turk was looking to purchase the lands at the south and west side in township 46 which were not originally part of the reserve. J.D. McLean, the Assistant Deputy and Secretary, replied that, “as the reserve land goes to the boundary line on both the south and west sides[,] there is no land available by this Department outside of said lines.”\textsuperscript{421}

Around the same time period, in 1911, the Department of the Interior resurveyed township 46, range 19, directly east of the surrendered portion of IR 100A. The survey plan shows the encroachment of IR 100A on the western boundary of the township; in addition, the east halves of sections 6, 7, 18, 19, 30, and 31 in range 19 are noted as containing less than the full 160 acres for each quarter section.\textsuperscript{422}

On January 8, 1912, the Department of the Interior wrote to the Department of Indian Affairs inquiring what action had been taken to make the boundaries of the reserve and township coincide.\textsuperscript{423} The Secretary replied...
that since there was a “small discrepancy” between the reserve and township surveys, “the matter was simply rectified by adopting your survey” and “[n]o further action was taken by this Department.”\(^{424}\) He later reiterated that changing the limits of the reserve simply required “adopting the townships lines as originally surveyed, thus eliminating some small strips of land.”\(^{425}\)

Between 1912 and 1927, actions were taken by the Departments of the Interior and Indian Affairs, as well as by the Saskatchewan government, to close various road allowances within the 100A Strip.\(^{426}\)

In July 1912, R.C. Purser, DLS, resurveyed township 46, range 19, W2M. His instructions state that since the reserve boundaries were changed in 1902, “there is now a strip along the west of township 46, range 19 which is Dominion lands and has not been surveyed,” and he was to establish the western boundary of the township.\(^{427}\) During his survey, he located the iron bars marking the eastern boundary of IR 100A approximately four chains (264 feet) east of the western boundary of township 46, range 19.\(^{428}\) The third edition of the plan of township 46, range 19, published in 1913 following Purser’s survey, shows fractional sections 6A, 7A, 18A, 19A, 30A, and 31A for the first time.\(^{429}\)

In February 1917, Walter H. Meyers, an agent for one of the landholders in the surrendered township, complained to the farm instructor at Fort à la Corne that squatters were living on a narrow strip of land immediately south of “your reserve” (presumably the unsurrendered portion of IR 100A). The strip, referred to as “No man’s land,” was described as being about 5 or 6 chains wide and 6 miles long. Meyers requested that the department have

\(^{424}\) J.D. McLean, Assistant Deputy and Secretary, to the Secretary, Department of the Interior, January 20, 1912, no file reference available (ICC Exhibit 14h, p. 20).

\(^{425}\) J.D. McLean, Assistant Deputy and Secretary, to P.G. Keyes, Secretary, Department of the Interior, April 2, 1912, no file reference available (ICC Exhibit 14h, p. 19).

\(^{426}\) Notice of Transfer by the Government of the Province of Saskatchewan, Department of Public Works, November 7, 1912, no file reference available (ICC Exhibit 1, p. 1152); Order in Council, August 15, [1916], no file reference available (ICC Exhibit 1, pp. 1260–61); Acting SGIA to the Governor General in Council, August 3, 1916, no file reference available (ICC Exhibit 14h, p. 25); E. Deville, Surveyor General, Department of the Interior, Topographical Surveys Branch, to the Assistant Deputy and Secretary, Department of Indian Affairs, July 12, 1916, no file reference available (ICC Exhibit 14h, p. 23); Saskatchewan Provincial Order in Council 574/18, April 12, 1918, no file reference available (ICC Exhibit 1, pp. 1284–85); Minister of Highways, Province of Saskatchewan, to the Lieutenant Governor in Council, March 8, 1918, no file reference available (ICC Exhibit 14h, pp. 28–29); H.S. Carpenter for Acting Chairman, Board of Highway Commissioners, Province of Saskatchewan, to the Secretary, Department of the Interior, October 18, 1916, no file reference available (ICC Exhibit 14h, p. 26); Order in Council PC 317, February 8, 1918, no file reference available (ICC Exhibit 1, p. 1285); Department of the Interior, Survey Plan of Township 46, Range 19, West of Second Meridian (fourth edition), approved October 2, 1918 (ICC Exhibit 14e, p. 53).

\(^{427}\) Surveyor General to R.C. Purser, DLS, June 27, 1912, no file reference available (ICC Exhibit 1, p. 1146).


\(^{429}\) Department of the Interior, Survey Plan of Township 46, Range 19, West of Second Meridian (third edition), approved November 20, 1913 (ICC Exhibit 14e, p. 52).
this narrow strip added to the reserve and a fence erected to keep out the squatters.\textsuperscript{430} Indian Agent Charles P. Schmidt forwarded the letter to the department and inquired about the ownership of the strip in question.\textsuperscript{431} The Secretary, mistaking the location of the land in question, replied that the land had all been sold owing to the adjustment made by the department.\textsuperscript{432}

The matter arose again in 1923, when the Agent was again asked to bring the matter to the department’s attention by the same landholder. Meyers confirmed that the strip of land lying south of the James Smith reserve and north of township 46, range 20, W2M, did not belong to him.\textsuperscript{433} Agent Schmidt commented that the strip in question was known in the neighbourhood as “No Man’s Land,” and was presently occupied by squatters.\textsuperscript{434} J.D. McLean replied on March 21, 1923, that the narrow strip between the northern boundary of township 46 and the southern boundary of “Reserve No. 100” had been added to the reserve. He commented that “all the land which is there which is not sold is Indian land,” and, therefore, the squatters were residing on the reserve. He also noted that a very small strip north of section 36 in township 46, range 20, had been designated as fractional section 36A and was under the jurisdiction of the Department of the Interior.\textsuperscript{435}

In 1958, the owner of sections 7 and 18 in township 46, range 19, inquired whether he could acquire ownership of a 3-chain-wide strip lying between his land and the lands in range 20, and known as fractional sections 7A and 18A. He mentioned that a title search indicated that the lands were still held by the Crown as an Indian reserve. W.C. Bethune, Chief of the Reserves and Trusts branch, replied that his department had been unable to determine the status of the land.\textsuperscript{436} Bethune referred the matter to the Chief Surveyor, commenting that “we are inclined to assume that the land was never part of

\textsuperscript{430} Walter H. Meyers, Real Estate Agent, to Mr. Rothwell, Farm Instructor, Fort à la Corne, February 28, 1917, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1277).

\textsuperscript{431} C.P. Schmidt, Indian Agent, Duck Lake Agency, to the Secretary, Department of Indian Affairs, March 28, 1917, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1278).

\textsuperscript{432} J.D. McLean, Assistant Deputy and Secretary, to C.P. Schmidt, Indian Agent, Duck Lake Agency, April 5, 1917, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1279).

\textsuperscript{433} C.P. Schmidt, Indian Agent, Duck Lake Agency, to the Secretary, Department of Indian Affairs, February 24, 1923, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1301).

\textsuperscript{434} C.P. Schmidt, Indian Agent, Duck Lake Agency, to the Secretary, Department of Indian Affairs, March 12, 1923, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1303).

\textsuperscript{435} J.D. McLean, Assistant Deputy and Secretary, to C.P. Schmidt, Indian Agent, March 21, 1923, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1305).

\textsuperscript{436} W.C. Bethune, Chief, Reserves and Trusts, to Cairns, Gale and Eisner, Barristers and Solicitors, July 28, 1958, no file reference available (ICC Exhibit 1, p. 1365).
the reserve and by some error was never brought under the provisions of the Land Titles Act of Saskatchewan."\(^{437}\)

After considering the matter, Surveyor General R. Thistlewaite replied that a search of the available records “does not enable us to answer conclusively.”\(^{438}\) He explained, however, that

we do recognize the possibility of an interest in these parcels on behalf of the Crown Canada by virtue of their having been included in I.R. 100A as set apart by P.C. 1151 of May 18, 1889, and not having been subsequently surrendered by the Indians, or sold by your Branch.\(^{439}\)

Furthermore, the eastern boundary of the reserve

is described by metes and bounds from a post and mound to a post and mound. It is apparent that the monuments referred to clearly define the east boundary, and while it was discovered later that this boundary did not coincide with the westerly boundary of Tp. 46-19-W2M, evidence of its position was recognized and recorded by subsequent surveys of that township.\(^{440}\)

He also noted that the fractional sections in range 19 had been surveyed as separate parcels rather than as part of the regular sections, with their eastern boundary being the boundary of the Indian reserve as surveyed by Nelson in 1887. Thistlewaite felt that legal advice was required to determine whether the adjustment made by the Department of Indian Affairs had the effect of changing the original and confirmed reserve boundaries. He also noted in his letter that, according to Department of Indian Affairs files, the land gained by the change had already been sold for the benefit of the Band.\(^{441}\)

In 1985, a survey of the 100A Strip was completed by Saskatchewan Land Surveyor Peter Wivcharuk. Plan 71582 of the “resurvey of the boundaries of the Cumberland Indian Reserve No. 100A in Township 46, Range 19, West of

\(^{437}\) W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, to R. Thistlewaite, Surveyor General, Department of Mines and Technical Surveys, July 30, 1958, no file reference available (ICC Exhibit 1, p. 1366).

\(^{438}\) R. Thistlewaite, Surveyor General, to W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, September 2, 1958, no file reference available (ICC Exhibit 1, p. 1367).


the 2nd Meridian” shows road allowances along the eastern and southern boundaries of the strip, although these were closed by Order in Council in 1918. Land within the strip is labelled “Cumberland Indian Reserve No. 100A.” No other significant roads or encroachments appear on this plan.\footnote{Natural Resources Canada, Plan 71582 CLSR, “Plan and Field Notes of re-survey of the boundaries of the Cumberland Indian Reserve No. 100A in Township 46, Range 19, West of the Second Meridian,” surveyed by P. Wivcharuk, Saskatchewan Land Surveyor, October 1985 (ICC Exhibit 14e, pp. 71a–87).}

As of 1992, according to the James Smith Cree Nation, there were 92.11 acres of encroachments on the 100A Strip, out of a total area of 191.33 acres.\footnote{John Hay, “James Smith Band, ‘No Man’s Land’ Claim: Residual Lands of the Cumberland I.R. 100A,” February 4, 1992 (ICC Exhibit 14c, pp. 20–21).} In response to an inquiry from the James Smith Band, the administrator for the Rural Municipality of Kinistino clarified on June 15, 1989, that the lands within the 100A Strip “have never been assessed or taxed but as you are aware the adjacent farmers have been farming the property.”\footnote{Larry W. Edeen, Administrator, Rural Municipality of Kinistino No. 459, to Delbert Brittain, James Smith Band, June 15, 1989, no file reference available (ICC Exhibit 14a).}


**IR 100A LAND SALES**

**Requirements of the Indian Act and Land Sale Regulations**

Section 41 of the 1886 Indian Act states that all sales of surrendered Indian lands shall be “managed, leased and sold as the Governor in Council directs,” subject to the provisions of the surrender and the Indian Act.\footnote{Indian Act, RSC 1886, c. 43, s. 41 (ICC Exhibit 24a, p. 21).} In 1887, “Regulations for the Disposal of Surrendered Indian Lands” were created pursuant to section 41 to govern the sale of these lands.\footnote{Order in Council, October 26, 1887, LAC, RG 10, vol. 2389, file 79921 (ICC Exhibit 24b, p. 1).} These regulations, consolidated on September 15, 1888, set out the following guidelines for sale:

- Buyers are limited to 640 acres of land each; at least one-fifth of the purchase price must be paid at the time of sale, and the balance paid in four equal annual instalments; 6 per cent interest is to be charged on instalments; settlement duties are required; and any violation of the terms of sale render land and moneys paid “forfeitable.”\footnote{Order in Council PC 1787, September 15, 1888, LAC, RG 2, vol. 400 (ICC Exhibit 15f, Document S1).}

As noted previously, the terms of surrender provide that “all moneys received from the sale ... shall, after deducting the usual proportion for expenses of management, be placed to the credit of the amalgamated Bands James Smith and Cumberland.” They also stipulate that “as soon as convenient after the money is received from the sale of the land,” 10 per cent of proceeds...
will be paid “to the amalgamated Band in implements, waggons, harness and other useful articles.” 448

Advertisement of Sale
Frank Pedley was appointed to be the new DSGIA on November 21, 1902, to replace James A. Smart, and he took the oath of office on November 26, 1902. 449 The previous day, November 25, he asked Secretary McLean about the status of the surrendered 100A lands “sub-divided last year … and how the matter now stands.” 450 On February 2, 1903, he ordered the department to go ahead with the sale of the surrendered lands, despite the objections that had been raised by Archdeacon MacKay.

On February 17, 1903, W.A. Orr recommended that the lands should be sold by tender and that the sale be advertised, with notices in the *Manitoba Free Press* (Winnipeg), the Prince Albert *Advocate*, and the Toronto *Globe*. Posters were also sent to postmasters in the district. 451 Pedley approved the plan on February 21. 452 The notice of sale, dated February 21, 1903, stated that tenders would be accepted until March 25, 1903, and that “[e]ach tender shall contain an offer at a rate per acre for not more than one quarter Section of land and shall be accompanied by a cash deposit or an accepted Cheque.” The terms for payment were one-fifth cash deposit, with the balance to be paid in four equal annual instalments with 5 per cent interest. The description provided in the notice of sale lists each section available for tender, namely “Sections 1, 2, 3, 4, 5, North Half 7, 8, 9, 10 ... Township 46 ...” 453 No minimum bid, or upset price, was set for the parcels of land.

Following publication of the sale notice, a number of newspapers requested insertion of the same notice in their own papers, some noting that they normally received these types of advertising contracts from the

448 Cumberland Band of Indians, Surrender for sale, July 24, 1902, DIAND Indian Land Registry, Instrument no. X10691 (ICC Exhibit 1, pp. 677–79).
450 Frank Pedley, DSGIA, to Mr. McLean, November 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 761).
451 W.A. Orr to the Deputy Minister, February 17, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 792).
452 Marginal notation initially by DSGIA Frank Pedley on memorandum from W.A. Orr to the Deputy Minister, February 17, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 792).
453 Sale advertisement, February 21, 1903, no file reference available (ICC Exhibit 1, p. 795); see also Draft sale notice signed by J.D. McLean, Secretary, Department of Indian Affairs, February 21, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 793).
Indian Claims Commission Proceedings

department. McLean sent letters to these newspapers stating that “it is not considered advisable to extend the publication of the advertisement ... beyond the papers already authorized to insert the same.”

Confusion was evident almost immediately. John Campbell of St Thomas, Ontario, wrote to the department to clarify the process for submitting a tender: “Do I understand from the advertisement that you will sell only [illegible] quarter section to one purchaser or will you sell the whole or any [illegible] over a quarter section to one purchaser?” J.D. McLean replied that “[e]ach tender must be for not more than one quarter section but a tenderer may submit tenders for as many quarter sections as he desires.” On March 10, David Laird wrote to the department to say that the description of lands for sale was misleading, explaining that “[i]ntending tenderers have asked here if only north half of all sections after 7 is for sale.” McLean replied the same day stating that the advertisement contained the correct description of lands, “all sections being full except seven which is described as north half.”

On March 20, a memorandum written to the Lands Branch indicated that the Minister desired changes to the terms of sale. New advertisements were run in the same three newspapers as the original notice, with the wording clarified slightly. The revised notice shows that the deadline for tenders was extended to May 6, 1903, and the terms of payment changed to one-tenth cash deposit, with the balance to be paid in nine annual instalments at 5 per cent.

454 Daily News, Chatham, ON, to J.D. McLean, Secretary, Department of Indian Affairs, February 28, 1903, LAC, RG 10, vol. 6664, file 109A-9-3 (ICC Exhibit 1, p. 800); Herald, Hamilton, ON, to J.D. McLean, Secretary, Department of Indian Affairs, March 4, 1903, LAC, RG 10, vol. 6664, file 109A-9-3 (ICC Exhibit 1, p. 809); Eganville Leader, Eganville, ON, to J.D. McLean, Secretary, Department of Indian Affairs, March 4, 1903, LAC, RG 10, vol. 6664, file 109A-9-3 (ICC Exhibit 1, p. 810); The Echo Printing Co. Limited, Amherstburg, ON, to to J.D. McLean, Secretary, Department of Indian Affairs, March 6, 1903, LAC, RG 10, vol. 6664, file 109A-9-3 (ICC Exhibit 1, p. 812); Galt Reformer, Galt, ON, to J.D. McLean, Secretary, Department of Indian Affairs, March 9, 1903, LAC, RG 10, vol. 6664, file 109A-9-3 (ICC Exhibit 1, p. 816); Haldimand Advocate, Cayuga, ON, to J.D. McLean, Secretary, Department of Indian Affairs, March 13, 1903, LAC, RG 10, vol. 6664, file 109A-9-3 (ICC Exhibit 1, p. 820); London News, London, ON, to J.D. McLean, Secretary, Department of Indian Affairs, March 13, 1903, LAC, RG 10, vol. 6664, file 109A-9-3 (ICC Exhibit 1, p. 821).

455 See, for example, J.D. McLean, Secretary, to A.C. Woodward, Daily News, March 7, 1903, LAC, RG 10, vol. 6664, file 109A-9-3 (ICC Exhibit 1, p. 814).


457 J.D. McLean, Secretary, to John Campbell, March 3, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 804).

458 David Laird to the Secretary, Department of Indian Affairs, March 10, 1903, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, p. 817).

459 J.D. McLean to David Laird, Indian Commissioner, March 10, 1903, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, p. 818).

460 J.D. McLean, Department of Indian Affairs, to Lands Office, March 20, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 827).
interest. These terms are similar to those in the sale of Roseau River lands taking place around the same time. There is no evidence that the James Smith Band was consulted regarding these changes.

Tenders for Land

The tenders were opened at the department between May 6 and 9, 1903, and notices were sent to successful purchasers on May 11, 12, and 13, 1903. All the surrendered IR 100A lands were purchased by three groups, or syndicates, commonly referred to as the Menary group, the Prendergast group, and the Mossom Boyd group. Aside from the three syndicates, only four other individuals tendered for the surrendered IR 100A lands, and two of these, T.O. Davis and H. Beliveau, were associated with the Prendergast group. Furthermore, the lands as a whole were sold for a sum significantly below their assessed value of $102,831.45 for all 138 parcels, an average of approximately $4.75 per acre. The amount actually bid by successful purchasers amounted to $58,147.49, or an average of $2.68 per acre.

It should be noted that many of the department files relating to the sale of IR 100A have disappeared. The files containing unsuccessful tenders, as well as the files relating to the Menary group sales for the period 1903–10, are among the missing items. The 1915 report of the Ferguson Commission, which investigated improper dealings of government officials—including DSGIA Frank Pedley and James A. Smart—in the sale of Indian and Dominion Lands and resources, was lost in a fire in 1916. The available information about this report comes from newspaper articles of the day, as well as the transcript of debates in the House of Commons on the day the report was tabled.

461 Undated marginal notations written on draft sale notice signed by J.D. McLean, Secretary, Department of Indian Affairs, February 21, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 793); Revised sale notice, J.D. McLean, Secretary, Department of Indian Affairs, March 20, 1903, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, p. 828).
463 Given the numerous gaps in the historical record, the summary of the evidence relating to the tenders and sales draws heavily on the analysis in the report written by Bennett McCardle, “Cumberland Indian Reserve 100A: Report on the Land Surrender of 1902 and Related Land Sales and Trust Fund Management Issues,” prepared for the FSIN, December 1984, with additions by Roland Wright, August 1985 (ICC Exhibit 6).
464 Bennett McCardle, “Cumberland Indian Reserve 100A: Report on the Land Surrender of 1902 and Related Land Sales and Trust Fund Management Issues,” prepared for the Federation of Saskatchewan Indian Nations, December 1984, with additions by Roland Wright, August 1985 (ICC Exhibit 6, pp. 60–61). Note that these figures have been adjusted to account for actual acreage sold rather than the original estimates.
Map 4
Land "Surrendered" in 1902
Showing Land Sales

- Prendergast Sales: 1-49
- Meany Sales: 54-135
- Mossom Boyd Sales: 50-53 and 126-138

LAND SURRENDERED IN 1902
(Township 46, Range 20, W2M)
Excepting sec. 6 and S-1/2 sec. 7, exchanged in 1889/1902
**Menary Group**

A.J. Menary, a stenographer with the Toronto law firm Marsh & Marsh, submitted tenders on May 4, 1903, for each of the quarter sections in the surrendered portion of IR 100A.\textsuperscript{465} She was ultimately successful in the purchase of 72 quarter sections (11,113.07 acres, or 51 per cent of the total land sold) for a total of $28,644.44. The lands had been assessed earlier by Reid at a value of $55,631.45.\textsuperscript{466} These purchases represent sales 54–125 in the land sale book.\textsuperscript{467}

Since the files containing all the unsuccessful tenders have disappeared, we have information relating only to those sales in which Menary was successful. According to Bennett McCardle’s research, Menary assigned her interests to A.C. Bedford-Jones of Toronto soon after the sale, although the date on which she did so is uncertain. On October 9, 1905, the Winnipeg firm Nares, Robinson and Black requested a statement of the lands purchased in 1903 and owned by A.C. Bedford-Jones, the representative of “an Eastern Syndicate.”\textsuperscript{468} In response, DSGIA Frank Pedley sent a statement of those lands belonging to “Mr. A.J. Menary” [sic] on October 17, 1905,\textsuperscript{469} although Secretary McLean had written to the firm only a few days earlier to say that “the Department has no record of Mr. Jones owning Land on this Reserve.”\textsuperscript{470}

On December 22, 1905, Pedley wrote to the Winnipeg firm Macdonald, Haggart and Whitla to acknowledge receipt of an assignment from A.C. Bedford-Jones to A.H. McLeod, and another from A.H. McLeod to Medley G. Siddall.\textsuperscript{471} The lands were later transferred to the Canada Land Company, although the date of assignment is not known.\textsuperscript{472} The available documents indicate the company’s involvement by October 26, 1910.\textsuperscript{473}


\textsuperscript{466} Bennett McCardle, “Cumberland Indian Reserve 100A: Report on the Land Surrender of 1902 and Related Land Sales and Trust Fund Management Issues,” prepared for the Federation of Saskatchewan Indian Nations, December 1984, with additions by Roland Wright, August 1985 (ICC Exhibit 6, p. 67). Note that these figures represent the adjusted acreage rather than the figure estimated at the time of sale.

\textsuperscript{467} Department of Indian Affairs, Land Sale Book, Cumberland IR 100A Land Sales, sales 54-125 (ICC Exhibit 15c).


\textsuperscript{469} Frank Pedley, DSGIA, to Nares, Robinson and Black, October 17, 1905, LAC, RG 10, vol. 6665, file 109A-9-11, part 1 (ICC Exhibit 1, pp. 1025–26).

\textsuperscript{470} J.D. McLean, Secretary, to Nares, Robinson and Black, October 11, 1905, LAC, RG 10, vol. 6665, file 109A-9-11, part 1 (ICC Exhibit 1, p. 1021).

\textsuperscript{471} Frank Pedley, DSGIA, to Macdonald, Haggart & Whitla, Barristers, December 22, 1905, LAC, RG 10, volume 5115 (ICC Exhibit 1, p. 1043).

\textsuperscript{472} Department of Indian Affairs, Land Sale Book, Cumberland IR 100A Land Sales, sales 54-125 (ICC Exhibit 15c).

\textsuperscript{473} J.D. McLean, Secretary, to J.R. Graham, Barrister, October 26, 1910, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1117).
When the final instalment on the sales came due in May 1913, $11,032.93, or about 40 per cent of the purchase price, was still owed in principal.\footnote{J.D. McLean, Assistant Deputy and Secretary, to C.W. Fawcett, May 6, 1913, LAC, RG 10, vol. 6664, file 109A-9-5, part 1 (ICC Exhibit 1, p. 1155).} In 1919, the department imposed a repayment schedule on the company, requiring a completion of the sale in three annual instalments at 7 per cent interest.\footnote{Repayment agreement between the Canada Land Company and the Department of Indian Affairs, April 30, 1919, LAC, RG 10, vol. 6664, file 109A-9-5 (ICC Exhibit 1, pp. 1289–90).} The lands were finally patented by the company on October 14, 1924.\footnote{DIAND, Indian Land Sales System – Posted Sales Abstract Report – Cumberland 100A, February 1995 (ICC Exhibit 15a).}

In 1915, it was revealed by the Ferguson Commission that the Menary tenders were actually submitted by DSGIA Frank Pedley, Deputy Minister of the Interior James A. Smart, and Department of the Interior Immigration Inspector W.J. White, represented by Toronto lawyer A.C. Bedford-Jones. This same lawyer represented these three men in the sales of the Moose Mountain and Chakastaypasin reserves in 1901. In those sales, forged tenders were submitted, and the lands purchased were soon assigned to Bedford-Jones and quickly resold for large profits.\footnote{Tyler and Wright Research Consultants, “The Alienation of Indian Reserve Lands during the Administration of Sir Wilfrid Laurier, 1896–1911; Addendum: The Royal Commission of Thomas Roberts Ferguson,” May 1977 (ICC Exhibit 5, pp. 4–5).} Since most of the records relating to these sales have disappeared, it is impossible to show that the pattern followed in the 100A sales exactly followed that of the other sales. However, the circumstances are strikingly similar. A Montreal Gazette article dated April 14, 1915, reporting on the findings of the Ferguson Commission, relates the involvement of Smart, Pedley, and White in the Moose Mountain and Chakastaypasin sales, as well as one other. The article describes how Bedford-Jones and A.S. [sic] Menary were involved in the sale of this other reserve, on which profits of approximately $18,000 were realized, and how Menary made out the tenders for “reserve 100.”\footnote{“Gov’t Officials Made a ‘Clean-up,’” Montreal Gazette, April 14, 1915, quoted in Tyler and Wright, “The Alienation of Indian Reserve Lands during the Administration of Sir Wilfrid Laurier, 1896–1911; Addendum: The Royal Commission of Thomas Roberts Ferguson,” May 1977 (ICC Exhibit 5, pp. Z5–Z7).} This report is obviously incorrect, since there was never a surrender or sale of IR 100. However, the circumstances point to the “other” reserve being IR 100A. Bennett McCcardle summarizes the evidence to this conclusion as follows:

- “The fact that A.J. Menary assigns her interest in the Cumberland 100A lands to A.C. Bedford-Jones, just as the other front men did” in the Moose Mountain and Chakastaypasin sales.
“The fact that A.J. Menary worked for the law firm of Marsh & Marsh, one of the partners of which was G.W. Marsh, one of the front men utilized by Bedford-Jones in the Moose Mountain sale.”

“The fact that Bedford-Jones, in selling the lands assigned to him by Menary, is said to represent an ‘Eastern Syndicate.’”

“The fact that the law firms which handle the sale of Bedford-Jones’ Moose Mountain land (Robinson & Hull, and Macdonald, Taggart & Whitla) also handle the sale of his Cumberland 100A land.”

“The fact that on October 17, 1905, Frank Pedley, at the request of the Winnipeg real estate firm Nares, Robinson & Black, sent to the firm a statement of the lands which A.C. Bedford-Jones of Toronto was interested in, which lands were purchased by A.J. Menary. Yet, when this statement was sent[,] the Department of Indian Affairs had not yet received any notice that Bedford-Jones was interested in these lands.”

**Prendergast Group**

This group of five men successfully acquired 49 quarter sections (7,840 acres, or 36 per cent of the total lands sold) for $23,322.25, although the assessed value of the land was $39,840.00. Members of the group included James E.P. Prendergast, J.H. Lamont, P.D. Tyerman, T.O. Davis, and A.W. Fraser. One of the men, T.O. Davis, was a Member of Parliament, as was W.S. Calvert, who obtained Fraser’s interest soon after the sale. Lamont was a Prince Albert attorney, and Prendergast was a judge in the North-West Territories. P.D. Tyerman was a Prince Albert physician, employed as a medical officer with the Department of Indian Affairs in the Carlton and Duck Lake Agencies from 1899 to 1901, and later in the Carlton Agency alone from 1902

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Two of these individuals, Davis and Lamont, had purchased lands in the Chakastaypas in reserve the previous year. Again, since departmental files are missing with regard to the IR 100A sales, not everything is clear with regard to what happened. However, it appears that at least two, and possibly four or more, tenders were submitted by this syndicate for IR 100A lands. Bennett McCardle has reconstructed a fairly detailed picture of what might have taken place, based on a complex analysis of available departmental letter registries and other records, as well as the limited documents that are still available. This evidence reveals the following points:

- On April 23, Secretary McLean wrote to James Prendergast, acknowledging the receipt of your letters of the 16th instant, relative to Tenders forwarded by you for lands on Indian Reserve No. 100A, and in reply to say that your request in latter letter to disregard your former communication has been noted.

  The money transmitted in letter submitting Tenders may, as proposed, be used as deposit as far as it will go, in connection with a subsequent Tender by you.

Bennett McCardle has deduced from departmental letter registries that this deposit cheque was in the amount of $187.31, from Prendergast, Lamont and Tyerman.

- The group submitted a bulk tender dated April 23, 1903, rather than single tenders, for each quarter section in the surrendered township.

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483 J.D. McLean, Secretary, to James E.P. Prendergast, April 23, 1903, LAC, RG 10, vol. 5025 (ICC Exhibit 1, p. 840).

although the bids for six parcels are crossed out. The prices tendered range from $1.05 to $3.55 per acre.\textsuperscript{485}

- Frank Pedley wrote to T.O. Davis on May 2, 1903:

  Referring to communication of the 23rd ultimo from Messrs. James E.P. Prendergast, J.H. Lamont and P.D. Tyerman, left by you at the Department yesterday, withdrawing Tender submitted for Indian lands on Reserve No. 100A, I beg to say that as the Tenders have not been opened, the deposit therewith cannot be returned, but it may be substituted by Tenderers as [illegible] another tender to take the place of the one [submitted].\textsuperscript{486}

- T.O. Davis later submitted his own bid for the six parcels crossed off the April 23 tender, all of which were rejected.\textsuperscript{487}

- An undated fragment of another tender for 46 parcels from James E.P. Prendergast, and possibly others, accompanied by a deposit in the amount of $561.92, was received by the department.\textsuperscript{488} This tender contains lower bids for each parcel than the April 23 tender.

- Another tender from Prendergast, Lamont, and Tyerman was received on May 6, 1903, the deadline for receipt of tenders.\textsuperscript{489}

- At some point before the tenders were opened, H. Beliveau withdrew his tender, and his cheque for $83.20 was therefore returned. His address was care of “Richard Co.,” the same firm that handled the sales for the Prendergast group.\textsuperscript{490} A cheque from Richard Co. was also counted towards the deposit for the accepted Prendergast tenders.\textsuperscript{491}

\textsuperscript{486} Frank Pedley, DSGIA, to T.O. Davis, MP, May 2, 1903, LAC, RG 10, vol. 5025 (ICC Exhibit 1, p. 843).
\textsuperscript{488} Tender, undated, LAC, RG 10, vol. 6665, file 109A-9-11, part 1 (ICC Exhibit 1, p. 842).
\textsuperscript{489} Bennett McCardle, “Cumberland Indian Reserve 100A: Report on the Land Surrender of 1902 and Related Land Sales and Trust Fund Management Issues,” prepared for the FSIN, December 1984, with additions by Roland Wright, August 1985 (ICC Exhibit 6, p. 75).
\textsuperscript{490} J.D. McLean, Secretary, to H. Beliveau, May 11, 1903, LAC, RG 10, vol. 6665, file 109A-9-11, part 1 (ICC Exhibit 1, p. 846).
\textsuperscript{491} J.D. McLean, Secretary, to the Accountant, May 11, 1903, LAC, RG 10, vol. 6665, file 109A-9-11, part 1 (ICC Exhibit 1, p. 844).
• McCardle notes that the department letter registry shows the accepted tender from Prendergast and others as being undated. If this is true, it would seem that neither of the available documents is the accepted tender for this group.\(^\text{492}\)

• On May 11, 1903, Secretary McLean sent a memorandum to the accountant with a list of the cheques to be credited on account of Prendergast, Lamont, Tyerman, Davis, and Fraser for the lands awarded to them. A total of nine cheques and one bank draft are listed, in the amount of $4,604.13, over twice the required 5 per cent deposit of $2,239.20. The cheques come from Fraser, Lamont, Tyerman, Prendergast, and Richard Co. It is uncertain who deposited the draft from the Bank of Ottawa.\(^\text{493}\)

In sum, Bennett McCardle notes that the presence of at least two tenders from this group could indicate that it expected officials to exert influence in its favour, possibly choosing the lower tender if it was higher than others. This happened in the case of at least one quarter section sold to the Mossom Boyd group.\(^\text{494}\) It should be noted, however, that the notice of sale states that “the highest or any Tender will not necessarily be accepted.”\(^\text{495}\)

It is interesting that, although tenders for 49 quarter sections were accepted from the Prendergast group on a bulk tender, the department refused the bulk tender of another prospective purchaser. In a letter to C.E. Hall of Winnipeg, the department explained that “the conditions of notice calling for Tenders required a separate Tender for each individual quarter section, which was not complied with by you, and your Tenders have not been accepted.” McLean also informed him that, in any case, his tenders were “not the highest.”\(^\text{496}\) Another tenderer, James J. Reilly, was rejected on the grounds that his deposit cheque was not marked “accepted” as required by the sale notice, although it was also noted that his tender was “not the highest.”\(^\text{497}\) Because the rejected tenders for this sale are no longer available, it is


\(^{493}\) J.D. McLean, Secretary, to the Accountant, May 11, 1903, LAC, RG 10, vol. 6665, file 109A-9-11, part I (ICC Exhibit 1, p. 844).

\(^{494}\) Tender book, May 1903, no file reference available (ICC Exhibit 1, pp. 863, 870).

\(^{495}\) Draft sale notice signed by J.D. McLean, Secretary, Department of Indian Affairs, February 21, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 793).

\(^{496}\) J.D. McLean, Secretary, to C.E. Hall, Winnipeg, May 11, 1903, LAC, RG 10, vol. 5027 (ICC Exhibit 1, p. 845).

\(^{497}\) Secretary to James J. Reilly, May 11, 1903, LAC, RG 10, vol. 5027 (ICC Exhibit 1, p. 847).
impossible to confirm whether the bids of successful purchasers were actually the highest.

On May 12, 1903, the department notified A.W. Fraser that tenders had been accepted for 49 parcels of land. It specified that the accepted tenders were submitted by Prendergast, Lamont, Tyerman, Davis, and Fraser, and a statement of the parcels and purchase prices was enclosed.498 A cheque refunding the overpayment was prepared and forwarded to T.O. Davis, on instructions of DSGIA Frank Pedley.499 In later years a dispute arose between Davis and Tyerman, in which it was claimed that Prendergast, Lamont, and Tyerman were the “original purchasers,” and that Davis and Fraser “became subsequently interested in it.”500 No information is available on the outcome of this dispute.

The payments on these sales went into arrears immediately, beginning with the second instalment. On December 7, 1904, nearly seven months after the second instalment became due, the Secretary wrote to A.W. Fraser, saying that “unless payment is made at once the Department will have to consider cancellation of the sale and forfeiture of the money paid.”501 Ten days later, Pedley wrote to Secretary McLean in reference to the letter sent to Fraser: “I wish that when any such letters are thought of being written they may be submitted to me before being sent out. In the meantime no further action to be taken on the subject matter of this letter for the present.”502

On October 30, 1905, Prendergast notified the department that the syndicate’s lands had been sold to Edward M. Robinson of Winnipeg.503 On November 27, 1905, the firm Robinson & Hull of Winnipeg forwarded assignments from A.W. Fraser to William S. Calvert, and from Calvert to E.M. Robinson. A Quit Claim deed from Prendergast, Lamont, Davis, and Tyerman to E.M. Robinson was also enclosed.504 The assignments were accepted by the department on December 19, 1906.505

500 McKay and Adam, Barristers, Solicitors, Notaries, to the Secretary, Department of Indian Affairs, February 15, 1911, LAC, RG 10, vol. 6665, file 109A-9-11, part 1 (ICC Exhibit 1, pp. 1125–26).
501 Secretary to A.W. Fraser, December 7, 1904, LAC, RG 10, vol. 6665, file 109A-9-11, part 1 (ICC Exhibit 1, p. 965).
Robinson apparently disposed of his interest quickly, because A.J. McPherson of Stratford, Ontario, wrote to MP George McIntyre on June 1, 1906, that, “while in Manitoba last month, a few of us purchased 7840 acres of land” in the former IR 100A. However, the assignment from Robinson to Alfred J. McPherson was not accepted at first because the department refused to make the change until the balance of the money due was paid.  

By June 1907, out of 49 sales, 32 parcels had only one instalment of payment recorded, 16 sales had four instalments paid, and one sale had been paid in full. W.A. Orr observed that, “[a]s this land has quadrupled in value since the sale I am sure there ought to be no difficulty, if the holder of the property would wish to pay the balance due,” and recommended cancellation of the sales if payment was not received within 30 days. Robinson was notified on June 17, 1907, that the sales would be cancelled if payment was not received. The assignment from Robinson to A.J. McPherson was accepted the following month without further mention of payment, and it was noted that the southeast quarter of section 5 had already been patented by Daniel G. Steinmann of Borden, Ontario. When the assignment was finally made, the balance had not yet been paid.

McPherson in turn divided his interest into 10 portions and sold each part to minor Ontario speculators. A number of disagreements within McPherson’s syndicate, lobbying by purchasers to get a change in payment terms and a reduction in price from the department because of the large amount of water covering the lands, and other delays led to the last patent not being issued for this block of lands until 1944. Only three sales were cancelled and new sales made, all between 1927 and 1933.
Mossom Boyd Group
Mossom M. Boyd and William T.C. Boyd successfully purchased 17 quarter sections (consisting of 2,720 acres, or 12 per cent of the total lands sold) for $6,180.80, slightly below the assessed value of $7,360.00.\textsuperscript{512} The Boyds were minor speculators from Peterborough, Ontario, who tendered under six other names, rather than under their own. Their tender book from May 1903 shows that, in some cases, the group submitted two tenders at different rates for the same parcels of land.\textsuperscript{513} In one case, the sale of the northwest quarter of section 12, the lower of two tenders was accepted by the department.\textsuperscript{514} Other notes from the tender book indicate that they owned other lands in the vicinity. All these sales were paid off by 1913, as required by the terms of sale.\textsuperscript{515}

Ferguson Commission
The T.R. Ferguson Commission, established in 1913 to investigate issues relating to Dominion and Indian lands, tabled a report in the House of Commons on April 14, 1915.\textsuperscript{516} Before that date, however, numerous newspaper articles had been published in which it was reported that “well known government officials” in the Department of the Interior would likely be charged with “graft” in connection with the disposal of “valuable lands and resources.”\textsuperscript{517} Frank Pedley tendered his resignation on October 11, 1913, soon after the first newspaper report was published, and his resignation was accepted by order in council “without prejudice to any action which the Crown may be advised to take against him.”\textsuperscript{518}

The transcript of the debates in the House of Commons refers to the involvement of James A. Smart, Frank Pedley, and William J. White in the sale of three Indian reserves, and it notes that the three “formed a company of some kind to acquire Indian lands”\textsuperscript{519} and employed A.C. Bedford-Jones to represent them.\textsuperscript{520} The report states that the men would have had access to data on the value of the lands and the tenders received, and that they then sent

\textsuperscript{513} Tender book, May 1903, no file reference available (ICC Exhibit 1, pp. 861–71).
\textsuperscript{514} Tender book, May 1903, no file reference available (ICC Exhibit 1, pp. 863, 870).
\textsuperscript{515} Department of Indian Affairs, Land Sale Book, Cumberland IR 100A Land Sales, sales 50–53, 126–38 (ICC Exhibit 15c).
\textsuperscript{516} Canada, House of Commons, Debates (April 14, 1915), 2539–601 (ICC Exhibit 1, pp. 1180–1243).
\textsuperscript{517} Tyler and Wright Research Consultants, “The Alienation of Indian Reserve Lands during the Administration of Sir Wilfrid Laurier, 1896–1911; Addendum: The Royal Commission of Thomas Roberts Ferguson,” May 1977 (ICC Exhibit 5, pp. 1–2, G1).
\textsuperscript{518} Order in Council, October 11, 1913, LAC, RG 10, vol. 3059, file 253792 (ICC Exhibit 1, p. 1158).
\textsuperscript{519} Canada, House of Commons, Debates (April 14, 1915), 2549, 2580 (ICC Exhibit 1, pp. 1191, 1222).
\textsuperscript{520} Canada, House of Commons, Debates (April 14, 1915), 2580 (ICC Exhibit 1, p. 1222).
partially filled-in tenders to Bedford-Jones in Toronto to complete. According to the transcript, “three or four hundred tenders” were submitted, “and all their tenders were accepted but eight or ten.”\textsuperscript{521} The group made a total profit of $84,000 on the sales of the three reserves.\textsuperscript{522} Moose Mountain is the only reserve mentioned by name in the debates, but reference to Chakastaypasin and “IR 100” is made in newspaper articles discussing the findings of the Ferguson Commission. As noted previously, the evidence suggests that IR 100A was the third reserve in which this syndicate purchased lands.

\textsuperscript{521} Canada, House of Commons, Debates (April 14, 1915), 2580 (ICC Exhibit 1, p. 1222).
\textsuperscript{522} Canada, House of Commons, Debates (April 14, 1915), 2560, 2580 (ICC Exhibit 1, pp. 1202, 1222).
JAMES SMITH CREE NATION — IR 100A INQUIRY

PART III

ISSUES

IR 100A SURRENDER AND BAND AMALGAMATION

Validity of Surrender Issues

1 What were Canada’s obligations in taking the 1902 surrender of IR 100A according to

   (a) Treaty 6;
   (b) Treaty 5;
   (c) the Indian Act; and
   (d) Canada’s fiduciary obligations? [a discussion of this issue will involve the matter of Canada’s pre-surrender fiduciary duties]

   The consideration of this issue may include the following related contested facts:

   (e) to whom were the obligations owed;
   (f) the alleged absence of Peter Chapman Band leadership at the time of surrender;
   (g) the alleged absence of appropriate parties to the surrender;
   (h) the 1902 amalgamation of the Peter Chapman Band and the James Smith Cree Band; and
   (i) the transfers to and from other bands.

2 Did Canada breach any obligation(s) which may arise under Issue 1?

3 Is the effect of any breach(es) such that it (they) invalidate(s) the surrender of IR 100A?
4 Is the effect of any breach(es) such that Canada owes outstanding lawful obligations?

**Validity of Amalgamation**

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

6 If yes, what obligations, if any, did Canada owe in carrying out the amalgamation? To whom were any such obligations owed?

7 If yes, did Canada breach any obligation owed in carrying out the amalgamation?

**Land Disposition Issues**

8 What were Canada’s obligations in disposing of IR 100A lands according to

   (a) Treaty 6;
   (b) the *Indian Act* and its Regulations;
   (c) Canada’s fiduciary obligations?

9 Did Canada, having accepted that it breached its lawful obligation to dispose of the surrendered lands for a reasonable price, to cancel sales of 72 quarters to its employee Pedley, and to cancel sales when payments were not made in a timely fashion, breach any further obligation which may arise under Issue 8 concerning the sale of the surrendered township? In considering this issue, the parties agree to address the following points:

   (a) the application of Indian Land Regulations;
   (b) allegations regarding the manipulation of the land-tendering process as regards the Prendergast and Menary group lands;
   (c) allegations of manipulation of the land-tendering process and fraud as regards the remaining quarters of the surrendered township that Canada asserts were properly sold and for which Canada has not accepted a breach of lawful obligation; and
   (d) the actions of Canada in the administration of the sales of the land.
10 Is the effect of any breach(es) such that it(they) invalidate(s) the surrender of IR 100A or otherwise gives rise to a claim for damages?

**IR 100A STRIP**

**Validity of Surrender Issues**

1 (a) Was there a surrender of the IR 100A Strip to Canada?
   (b) If no, what obligations did Canada owe to the Peter Chapman Band on the use of the IR 100A Strip?
   (c) If there was a surrender, then what were Canada’s obligations in taking the surrender of the IR 100A Strip according to
      (i) Treaty 6;
      (ii) the Indian Act; and
      (iii) Canada’s fiduciary obligations? [a discussion of this issue will involve the matter of Canada’s pre-surrender fiduciary duties]

The consideration of this issue may include the following related issues:

   (i) to whom were the obligations owed;
   (ii) the alleged absence of Peter Chapman Band leadership at the time of surrender;
   (iii) the alleged absence of appropriate parties to the surrender;
   (iv) the 1902 amalgamation of the Peter Chapman Band and the James Smith Cree Band; and
   (v) the transfer to and from other bands.

2 Did Canada breach any obligation(s) that may arise under Issue 1?

3 Is the effect of any breach(es) such that it(they) invalidate(s) the surrender of the IR 100A Strip?
4 Is the effect of any breach(es) such that Canada owes outstanding lawful obligations?

**Land Disposition Issues**

5 If there was a surrender, what are Canada’s obligations in disposing of the IR 100A Strip according to

(a) Treaty 6;
(b) the *Indian Act* and its Regulations;
(c) Canada’s fiduciary obligations?

6 Did Canada breach any obligation(s) which may arise under Issue 5?

7 Did Canada breach its obligations to the Peter Chapman Band by failing to sell the IR 100A Strip after surrender?

8 Is the effect of any breach(es) such that it(they) invalidate(s) the surrender of the IR 100A Strip or otherwise give(s) rise to a claim for damages?
PART IV

ANALYSIS

CUMBERLAND HOUSE CREE NATION INQUIRY FINDINGS

As stated in our introduction, there are issues in this inquiry that overlap with the ultimate issues in the Cumberland House Cree Nation Inquiry into IR 100A. For this reason and following discussions between both the Cumberland House Cree Nation (CHCN) and the James Smith Cree Nation (JSCN), the Commission conducted a single fact-finding process for the two inquiries. The result of this process is reflected in Part II of this report (and Part II of the Cumberland House Cree Nation: IR 100A Inquiry). Further, our findings on the facts in the Cumberland House Cree Nation Inquiry necessarily have an impact on our findings in this case. For this reason, we feel it is necessary to summarize briefly our findings in the Cumberland House Cree Nation before we set out our analysis of the issues in this case.

Based on the totality of evidence presented in both inquiries, we find that IR 100A was surveyed and set aside for the Cumberland House Cree Nation. At the time of its survey and throughout its administration of IR 100A, we find that Canada intended the Cumberland Band to be the lawful owners of IR 100A. Its residents included Cumberland Band members who chose to migrate from the Cumberland District to Fort à la Corne. At all relevant times, Canada administered IR 100A for the whole of the Cumberland Band, including those members resident at IR 20. At no time did a band, separate from the original Treaty 5 signatory Cumberland Band, evolve at IR 100A.

JAMES SMITH CREE NATION CHAKASTAPASIN IR 98
INQUIRY FINDINGS

In our view, there were no valid transfers of Chakastaypasin members into IR 100A at any relevant point in time. Before the introduction of section 140 of the Indian Act in 1895, something more than the administrative documents used by the Department of Indian Affairs to distribute treaty annuity payments
is required as proof of transfer. After the introduction of section 140, a valid transfer required the consent of the receiving band. In this case, the 27 Chakastaypasin individuals and families, including Big Head, required the consent of the whole of the Cumberland Band, including those resident at IR 20, as the receiving band at IR 100A. This consent of the Cumberland Band was neither sought nor obtained by Canada.

Given these findings, we will now turn to the issues in this inquiry. We begin with considering Issues 1 to 4, regarding the validity of the July 24, 1902, surrender of IR 100A.

**INDIAN RESERVE 100A**

**Issues 1–4validity of surrender**

1. What were Canada’s obligations in taking the 1902 surrender of IR 100A according to:
   (a) Treaty 6;
   (b) Treaty 5;
   (c) the *Indian Act*; and
   (d) Canada’s fiduciary obligations?

2. Did Canada breach any obligation(s) which may arise under Issue 1?

3. Is the effect of any breach(es) such that it (they) invalidate(s) the surrender of IR 100A?

4. Is the effect of any breach(es) such that Canada owes outstanding lawful obligations?

We will begin our analysis by first setting out the relevant surrender provisions of Treaty 5 and Treaty 6, as well as the relevant surrender provisions of the *Indian Act* operating in 1902. We will then briefly summarize the events leading up to July 24, 1902 — the date of the alleged surrender of 22,080 acres at IR 100A.

Treaty 5 states:

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as she shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or
otherwise disposed of by Her Majesty’s Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.\textsuperscript{523}

Treaty 6 adopts similar language and states:

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as she shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty’s Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.\textsuperscript{524}

Section 39 of the \textit{Indian Act}, RSC 1886, c. 43 states:

39. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:

(a) The release or surrender shall be assented to by a majority of male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question.

(b) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in Manitoba or the North-West Territories, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or in either case, before some other person or officer specially thereunto authorized by the Governor in Council for acceptance or refusal.\textsuperscript{525}

\textsuperscript{523} 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), 5 (ICC Exhibit 2a, p. 5).

\textsuperscript{524} 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 2b, p. 3).

\textsuperscript{525} \textit{Indian Act}, RSC 1886, c. 43, ss. 39(a) and (b).
We will now briefly review the events leading up to July 24, 1902 – the date of the alleged surrender of 22,080 acres, constituting the southern portion of IR 100A and representing more than half of the total acreage of IR 100A.

On January 30, 1902, C.S. Lowrie, a resident of Kinistino (a town about 5 kilometres west of IR 100A), sent a letter to his local Member of Parliament, T.O. Davis, requesting that the southern township of IR 100A be opened up for settlement. Lowrie’s letter was forwarded to Indian Commissioner David Laird on March 6, 1902, by Secretary J.D. McLean who noted:

The reserve to which Mr. Davis refers is the Cumberland Indian Reserve No. 100A. It was set apart for the Indians of Cumberland House and District. Only a small number of these Indians removed from the vicinity of Cumberland House to occupy the new reserve, and consequently it is much larger than necessary for the requirements of the present occupants.

I think it would be well to have the matter looked into ... with a view of ascertaining if the Indians will surrender the southern portion to be sold for their benefit.

Laird replied on June 19, 1902, with a proposal:

I have looked into this matter and so far as I am able to ascertain at present there is very little prospect of further emigration of Indians from the vicinity of Cumberland House to settle on this reserve. The population of the reserve at the last payments was only 122 souls, and as the area of the reserve is 65 square miles it is much larger than required for the number of Indians settled thereon. Before taking action to consult the Indians about the surrender ... it will be necessary to be in a position to state the terms the Department is prepared to offer as an inducement for them to give up the land.

In this same letter Laird first proposed the question of “amalgamating” the Cumberland Band 100A and the James Smith Band. The matter of amalgamation will be addressed later in this report when we will again return to Laird’s June 19, 1902, correspondence.

On July 4, 1902, DSGIA James A. Smart wrote to David Laird approving Laird’s surrender proposal and enclosing the surrender forms. Smart stated: “Your suggestion as to the offering of a bonus of 10 per cent of proceeds to sale to be expended in implements &c., as well as suggestion as to...”

527 J.D. McLean, Secretary, to David Laird, Indian Commissioner, March 6, 1902, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, p. 635).
528 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, June 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 668–69).
amalgamation of James Smith and Cumberland Bands, meets with approval.”

With the department’s approval of surrender proposal, Laird then sent instructions to Indian Agent Jones on how to proceed. He informed Agent Jones that

[i]t is my intention to meet you and the Indians of James Smith and Cumberland Reserves at the payments on the 24th instant ... I have been instructed by the Deputy Minister to endeavor to obtain a surrender of the southern township of the Cumberland Reserve, and I think it would be better that I should discuss the question with them before you begin payments.

The panel has been struck by the complete absence of documentation in the historical record relating to the events of July 24, 1902, beyond the surrender, affidavit, and amalgamation agreement and the two brief reports of David Laird. We are left, then, to consider the historical records available and to try to reach a conclusion based on the totality of this material, along with the community’s oral history evidence. The Commission did obtain a transcript of a 1972 interview with Angus Burns, a member of the James Smith Band in 1902, in which he recollects the events of July 24, 1902. As well, the panel heard the oral history evidence of many members of the James Smith Band, and we will refer to the transcript of this evidence later in this report.

The July 24, 1902, surrender document reads as follows:

KNOW ALL MEN by these Presents That We, the undersigned Chief and Principal men of the Cumberland Band of Indians resident on our Reserve No. 100A in the Province of Saskatchewan and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, his Heirs and Successors forever, All and Singular, that certain parcel or tract of land and premises, situate, lying and being in the said Reserve 100A, Province of Saskatchewan containing by admeasurement Twenty-Two Thousand and eighty acres be the same more or less and being composed of this southern township of the said Reserve, Township 46, Range 20, W.2[M]. excepting thereout Sec. 6 and S ½ Sec. 7.

To Have and to Hold the same unto His said Majesty the King, his Heirs and Successors forever, in trust to sell the same to such person or persons, and upon

529 James A. Smart, DSGIA, to David Laird, Indian Commissioner, July 4, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 675).
530 David Laird, Indian Commissioner, to W.E. Jones, Indian Agent, Duck Lake Agency, July 15, 1902, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, p. 676).
such terms as the Governor of the Dominion of Canada may deem most conducive to our welfare and that of our people.

And upon further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed to the credit of the amalgamated Bands James Smith and Cumberland.

And We, the said Chief and Principal men of said Cumberland Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of the said land and the disposal of the moneys derived from such sale.

Stipulating, however that as soon as convenient after the money is received from the sale of the land, ten per cent thereof shall be paid to the amalgamated Band in implements, waggons, harness and other useful articles.

In witness whereof, we have hereunto set our hands and affixed our seals this Twenty fourth day of July in the year of Our Lord one thousand nine hundred and two. 531

The surrender document was witnessed by Donald Macdonald as interpreter, Angus McLean, and A.J. McKay. On behalf of the Cumberland 100A Band, “K[a]h-ta-pis-kowat,” designated as a “Headman,” and “Geo. Sanderson,” designated “Headman’s son,” signed the surrender. David Laird did not sign the document himself.

The affidavit attesting to the validity of the surrender document was made on the same day at Fort à la Corne before Agent W.E. Jones as Justice of the Peace “in and for the North West Territories.” The document reads:


And the said Hon. David Laird for himself saith:

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Cumberland Reserve 100A of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to its Rules.

That he was present at such meeting or council and heard such assent given.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in said Release or Surrender.

And the said Kh-ta-pis-kowat says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the Cumberland Reserve 100A of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to its Rules, and held in the presence of the said.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in said Reserve or Surrender.

That he is a Chief Headman of the said Band of Indians and entitled to vote at the said meeting or council.

Sworn before me [David Laird] by the Deponents Hon. David Laird & Khtapiskowat at Fort a la Corne District of Saskatchewan this twenty fourth day of July A.D. 1902.

The surrender and affidavit are the only documents available giving evidence of the events of July 24, 1902. Unlike numerous other Prairie land surrenders inquired into by this Commission, there are no contemporaneous minutes of the July 24, 1902, proceedings, and there is no voters list or record of a vote, other than what is attested to in the affidavit. There are, however, other historical documents in the evidentiary record that are of assistance for the relevant period.

First, there are the annuity paylists of the James Smith Band and Cumberland Band 100A dated July 25, 1902, one day after the alleged surrender took place. The payment of annuities to these Bands was known to Indian Commissioner Laird prior to his visit to these reserves and was contemplated in his letter of July 15, 1902, to Agent Jones. On July 25, 1902, the two Bands were paid separately under their normal ticket numbers. The paylist for “No. 100A Cumberland Band Paid at James Smith’s Reserve”

532 Surrender Affidavit, July 24, 1902, DIAND Indian Land Registry, Instrument X10691 (ICC Exhibit 1, pp. 686, 688–89).
notes that 115 persons were paid in total, including 29 adult men.\textsuperscript{534} The James Smith paylist indicates that 28 adult men were paid that day, of a total of 107 people.\textsuperscript{535}

The second document is David Laird’s report to DSGIA James Smart. On August 1, 1902, Laird wrote

that pursuant to instructions contained in your letter of the 4th July ultimo ... I proceeded to Indian Reserve No. 100A last week, and on the 24th of the said month obtained a surrender of Township 46 ... and also effected an amalgamation of James Smith’s Band of Reserve 100 with the Cumberland Band of Reserve 100A.\textsuperscript{536}

Then, on August 19, 1902, Clifford Sifton, the Superintendent General of Indian Affairs, submitted the surrender to the Governor General in Council for approval.\textsuperscript{537} The accepting Order in Council, PC 1510, dated October 14, 1902, reads:

On a Memorandum dated 19th August, 1902, from the Superintendent General of Indian Affairs, submitting herewith, a surrender in duplicate made by the Cumberland Band of Indians in the North West Territories, of 22,080 acres, being composed of Township 46 of the said Reserve, Range 20 West 2nd Initial Meridian, excepting thereout Section 6 and South ½ of Section 7, in order that the land may be disposed of for their benefit on such terms as the Superintendent General may consider necessary in their interests.

The Minister recommends, the surrender having been authorized, executed and attested in the manner required by the 39th section of the Indian Act that the same be accepted by the Governor in Council, and that the original thereof be returned to the Department of Indian Affairs and the duplicate kept of record in the Privy Council Office.

The Committee submit the same for approval.\textsuperscript{538}

The only other direct evidence regarding July 24, 1902, is the 1972 transcript of an interview with James Smith band member Angus Burns. The James Smith paylist for 1902 indicates that Angus Burns was paid as a man that


\textsuperscript{536} David Laird, Indian Commissioner, to James A. Smart, DSGIA, August 1, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 710).

\textsuperscript{537} Clifford Sifton, SGIA, to the Governor General in Council, August 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 714).

\textsuperscript{538} Order in Council PC 1510, October 14, 1902, LAC, RG 2, vol. 593 (ICC Exhibit 1, pp. 745–46).
year and signed his own name to receive his annuity. He recounts that on the day of the surrender, David Laird, farm instructor Andrew MacKay, Angus McKay (from the HBC), an interpreter named Macdonald, and a teacher named D. Parker were at the reserve. He also recounts that Chief James Smith and his three headmen, Bernard Constant, Jacob McLean, and Chekoosoo, were present. He further recalls that there were meetings “a lot of times” before the surrender was taken, because “the Indians didn’t want to sell this land, nobody was eager to sell.” According to Mr Burns, there was a meeting of the “old men,” including James Smith’s Chief and councillors. When the agreement was made, the Chief called everyone into the old schoolhouse, where the meeting was being held, to witness the signing of the document. He recalls that only Councillor Bernard Constant could sign his name, and the others “were held to the pen.”

The only other oral history evidence related to the July 24, 1902, events is the evidence of JSCN elder Violet Sanderson. When she presented her evidence to this Commission on June 28, 2001, Mrs Sanderson spoke of her grandfather, William Head, and her husband’s father, Lazareth, as being involved in discussions about the sale of part of IR 100A. She did not speak of the details of these discussions or of her relatives’ involvement in or opinions on the matter. She did state, however, that she “never heard of a meeting or any kind of vote or anything in relation to ... people coming together.”

We will now turn to the parties’ respective arguments.

The Crown’s Obligations under Treaty 6
Let us say at the outset that, although the parties have presented the question of the Crown’s obligation in terms of both Treaty 5 and Treaty 6, the JSCN clarified for the panel, during the course of oral argument on January 14, 2004, that there is no distinguishing difference in the JSCN’s position regarding either treaty. The JSCN does, however, take the position that, because the “Peter Chapman Band” settled within the boundary of Treaty 6 and IR 100A was set aside and administered by the Indian Department within this treaty territory, Treaty 6 should frame this part of the panel’s analysis.

In our view, the question of which treaty – Treaty 5 or Treaty 6 – should frame our analysis is clouded by the historical events surrounding the establishment of IR 100A. As reported in our analysis in the Cumberland

540 FSIN, Transcript of an interview with Angus Burns, April 14, 1972 (ICC Exhibit 23, pp.1–3).
House Cree Nation: IR 100 A Inquiry, we concluded that IR 100A was surveyed and set aside for the whole of the Cumberland Band of Indians who had adhered to Treaty 5 in September 1876. Upon a careful review of the language of these two treaties, however, we can find no significant difference between them in the Crown’s obligation to seek the consent of the Indians when disposing of reserve land set apart under treaty. In our analysis and in the context of their treaty relationship, it is necessary only to answer the simple question of whether the Crown sought and obtained the consent of the Indians. In addition to inquiring into the matter of “consent” under treaty, what is equally significant is the Crown’s obligation to seek the consent “of the said Indians entitled thereto.” In this case, the panel must ask, regarding IR 100A, who were the “said Indians entitled thereto” sufficient for Canada to have properly disposed of any portion of IR 100A. In our view, this is the ultimate issue in this inquiry.

In the JSCN’s view, Canada breached its Treaty 6 obligations to the Peter Chapman Band because the surrender and sale were not for the use and benefit of the members of this Band and the consent of the Peter Chapman Band was not obtained.543

For Canada, however, neither Treaty 5 nor Treaty 6 creates obligations on the part of the Crown that are different from the obligations that existed under the Indian Act at the time of the 1902 surrender. In his written legal submissions to the panel, Canada’s counsel states: “The language in the Act is modeled on the language of the treaties and there are no obligations in the treaties which are separate or different than what was contained under the Act. As such, Canada limited its analysis of its obligations to the Indian Act arguing that an answer to its statutory obligations will, as a consequence, address any obligations arising under treaty pertaining to surrender.”544

In our view, a treaty right gives rise to a separate lawful obligation of the Crown. A treaty right does not owe its existence to the Indian Act. On the question of surrender, Treaties 5 and 6 expressly state:

[T]he aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty’s Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.”545

543 Written Submissions on Behalf of the Peter Chapman Cree Nation, August 30, 2003, p. 84, para. 245.
545 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) (ICC Exhibit 2a); 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) (ICC Exhibit 2b).
Thus, the treaty signatories, and their descendants, have today the right to consent prior to the disposition of their interest in their reserve under treaty. This right is today a constitutional right, protected by section 35 of the Constitution Act, 1982. Although the surrender provisions of the Indian Act give expression to the procedural rights of an Indian band to be consulted by the Crown, this statutory expression of consent may be subject to change over time. In contrast, the treaty categorically requires “with their consent first had and obtained.” Thus, we cannot accept Canada’s argument that fulfilling its statutory obligation defined by the Indian Act on the question of validity of surrender will, as a consequence, address its obligations arising under treaty. Canada cannot limit its analysis of surrender to the Indian Act, and not to the treaty, simply because they are different obligations.

We will now turn to our analysis of the Crown’s statutory obligations under the Indian Act.

The Crown’s Obligations under the Indian Act
The parties agree that the only contemporaneous evidence that has been produced regarding the alleged July 24, 1902, surrender is the surrender document and the surrender affidavit. For the First Nation, the deficiency of documents cannot be relied upon by Canada as a “virtue of proof.” In its view, “Canada has a duty as a fiduciary to document proceedings involving its fiduciary obligations and to maintain those records. It breaches its fiduciary, legal and public duties when it fails to document proceedings.”

For Canada, the surrender document and surrender affidavit are prima facie evidence that a surrender was taken in accordance with section 39 of the Indian Act. Canada admits that no voters list or other evidence to indicate who was present and voted at the surrender meeting has been located. Further, Canada argues, there is no evidence that the meeting was not called in accordance with the rules of the Band.

As we stated previously, Canada’s obligations in taking the 1902 surrender are governed by the relevant Indian Act at the time. In this case it was the 1886 Act, section 39. This section required the following:

546 Written Submissions on Behalf of the Peter Chapman Cree Nation, August 30, 2003, p. 86, para. 253.
a) assent “by a majority of male members of the band”;  
b) “of the full age of 21 years”;  
c) “at a meeting or council ... summoned for that purpose”;  
d) “according to the rules of the band”;  
e) “held in the presence of the Superintendent General” (or other “duly authorized” officer); and  
f) only those Indians who “habitually [reside] on or near and [are] interested in the reserve in question” shall be entitled to vote or be present at such council.  

In addition to the surrender, section 39 also required the following as regards the surrender affidavit:

a) “[t]he fact that such release or surrender has been assented to by the band shall be certified on oath by the Superintendent General,” or duly authorized officer;  
b) “and by some of the chiefs or principal men present thereat and entitled to vote”;  
c) “before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace.”

The JSCN has argued that, for a valid surrender to have taken place in 1902, there would have to have been compliance with the following requirements: proper notice of meeting and place of meeting; conduct of the meeting in accordance with the rules of the band, both in form and in participation; sufficient information to allow for informed consent; and a vote of a majority of eligible voters. In the First Nation’s view, none of these elements was complied with.

As previously stated, the surrender document was signed by two people: Kahtapiskowat (Big Head) and George Sanderson. The authority of these individuals to dispose of IR 100A lands has been directly challenged by the James Smith Cree Nation, and we will first begin with an analysis of this issue.

**Authority of Surrender Signatories**

According to Canada, Kahtapiskowat (Big Head) was formally transferred from the Chakastaypasin Band to the Cumberland Band (ticket no. 90) in 1896. He
was paid with the Cumberland Band until 1902, and was then paid with the James Smith Band (ticket no. 5) from 1902 to 1906, when he died. Further, it is Canada's position that Big Head was a headman of the Cumberland Band at the time of the 1902 surrender and, therefore, entitled to sign the surrender document and the affidavit of surrender. In the alternative, Canada argues that, even if he were not a headman, he would qualify as a principal man.\footnote{Written Submissions on Behalf of the Government of Canada, November 24, 2003, p. 78, para. 143, 146.} In its written argument, Canada submits that

the term “principal man” should not be given any more restrictive a meaning than that of one of the male members of the Band of the full age of twenty-one years who
was present at the surrender meeting and therefore qualified to swear under oath
as to what transpired at that meeting.\footnote{Written Submissions on Behalf of the Government of Canada, November 24, 2003, p. 78, para. 146.}

The Commission had an opportunity to consider the meaning of “principal
men” within the context of section 49(3) of the \textit{Indian Act}, 1906,\footnote{The language of section 39(b) of the \textit{Indian Act}, 1886, and section 49(3) of the \textit{Indian Act}, 1906, is identical.} in the \textit{Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry}. In that report, the Commission stated:

The term “principal men” in section 49(3) of the \textit{Indian Act} has not, to our
knowledge, been defined in the jurisprudence, nor have the parties sought to make
submissions on its meaning ... Without more guidance, we are able to infer that, at
least for the purpose of a surrender vote, a male band member over 21 was
considered a principal man.\footnote{ICC, \textit{Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry} (Ottawa, July 2003), reported (2004) 17 ICCP 265 at 325.}

For the purposes of this inquiry, we will adopt the interpretation given to
“principal men” in the \textit{Canupawakpa Dakota First Nation Inquiry} as meaning,
for the purpose of a surrender vote, a male band member over 21 years of
age.

In any event, Canada takes the position that “whether Big Head was or was
not a principal man is immaterial to the fact that he certified on oath that the
assent to the surrender was proper, given that this requirement was directory
only.”\footnote{Written Submissions on Behalf of the Government of Canada, November 24, 2003, p. 78, para. 148.} Canada makes no further submissions on the issue of the directory
nature of section 39 requirements. We are left to infer that Canada relies upon
the decision of McLachlin J in \textit{Apsassin} where she considered whether
subsections 51(3) and (4) of the 1927 \textit{Indian Act} are mandatory or merely

\begin{footnotes}
\item[553] The language of section 39(b) of the \textit{Indian Act}, 1886, and section 49(3) of the \textit{Indian Act}, 1906, is identical.
\end{footnotes}
directory. Subsection 51(3) of the 1927 *Indian Act* is equivalent to subsection 39(b) of the 1886 *Indian Act*. In *Apsassin*, McLachlin J said:

> The true object of ss. 51(3) and 51(4) of the Indian Act was to ensure that the surrender was validly assented to by the Band. The evidence, including the voter’s list, in the possession of the DIA amply established valid consent. Moreover, to read the provisions as mandatory would work serious inconvenience, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and certifying the assent. I therefore agree with the courts below that the “shall” in the provisions should not be considered mandatory. Failure to comply with s. 51 of the Indian Act therefore does not defeat the surrender.  

In the report *Kabkewistabaw First Nation: 1907 Surrender Inquiry*, the Commission considered the same issue of the directory or mandatory nature of subsection 49(3) of the 1906 *Indian Act*, a subsection equivalent to subsection 39(b) of the 1886 *Indian Act*. In that case, after reviewing the relevant jurisprudence and the judgment of McLachlin J quoted above, the Commission concluded that “the failure to comply with section 49 of the 1906 *Indian Act* does not ‘defeat the surrender’ in this case ... The purpose of subsection 49(3) is merely to confirm satisfaction of the requirements of subsection 49(1) and (2), and in particular that majority assent of the Band members was given at an open meeting called for the purpose of discussing the surrender.”

How then are we to view the May 10, 1896, “transfers” of Kahtapiskowat and George Sanderson to “the Band of Indians owning ... Cumberland 100A Reserve”? In our view, the Consents to Transfer 22 Chakastaypasin members to IR 100A on May 10, 1896, are unlawful transfers because they did not involve the consent of the whole of the Cumberland Band. Further, in our view, these Consents to Transfer cannot stand as valid documents for the creation or evolution of a separate band at IR 100A. As we have said, IR 100A was created for the whole of the Cumberland Band. This fact has been conceded by Canada. As such, the Cumberland Band’s treaty rights to its reserves at IR 20 and IR 100A survive until extinguished by consent of the Band – the whole Band. There is no evidence of the expression of the Cumberland Band’s treaty rights to the said reserves.

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agreement to those transfers. Further, the decision to expand the membership of the Cumberland Band at IR 100A was a decision that rested with the whole of the Band, and not just those resident at IR 100A. The acceptance of a new member by transfer into a band resulted in the sharing of the band’s collective interest in its reserve with the new member. Absent the consent of the whole band to the transfer of an individual into its membership and land base, the transfer cannot stand as valid. Viewed from this perspective, the transfers of Chakastaypasin people into the Cumberland Band are not valid. Rather than show the creation or evolution of a new band, we find the Consents to Transfer are evidence of Canada’s continuing breach of obligations owed to the whole of the Cumberland Band under treaty and the *Indian Act*.

Prior to 1895, when section 140 was added to the *Indian Act*, Canada’s informal practice regarding the transfers of people between bands, characterized in all cases to be “exceptional,” nevertheless required the consent of the originating band and the receiving band to the transfer. Even using this informal practice as the standard, we can find no evidence of the whole of the Cumberland Band’s consent to new members transferring into IR 100A. As we have said, the members of the Cumberland Band resident at IR 100A, in providing their consent to the transfer of individuals into IR 100A, cannot be considered to be an expression of the whole Band’s consent. Canada’s failure to seek the whole of the Band’s consent was also a failure of the government to respect its own practice of requiring the written consent of both bands. Canada’s failure was also a breach of the *Indian Act* since section 140, added to the act in 1895, required the consent of the receiving band:

> When by a majority vote of a band, or 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 and moneys of the band of which he was formerly a member, and shall be entitled to share in the lands and moneys of the band to which he is so admitted. 559

We can find no evidence of the consent of the whole of the Cumberland Band (those resident at IR 20 and IR 100A) to any of the transfers into IR 100A, as required by section 140. In the absence of the whole of the Cumberland Band’s consent to the transfer of the Chakastaypasin band members into IR 100A, we find Kahtapiskowat and George Sanderson to be without any legal

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559 *Indian Act*, RSC 1886, c. 43, s. 140, as amended by SC 1895, c. 35, s. 8.
authority to have signed the July 24, 1902, surrender document as “Principal men of the Cumberland Band of Indians.”

Based upon this finding, the next question to be determined is whether subsection 39(a) of the 1886 Indian Act was complied with.

**Compliance with the 1886 Indian Act**

Section 39 of the Indian Act, RSC 1886, c. 43, states:

> 39. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:

> (a) The release or surrender shall be assented to by a majority of male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question.\(^\text{560}\)

Before embarking upon an analysis of the specific conditions required by section 39 of the Indian Act, we believe it is necessary to step back and ask who is “the Band” to whom the statutory duties of section 39 are owed? It is fundamental to our understanding of events that we begin with this key question. Both the James Smith Cree Nation and Canada have argued their positions based upon their conclusion that a separate band — the Peter Chapman Band (as argued by James Smith) or the Cumberland 100A Band (as argued by Canada) — had evolved from the Cumberland Band at IR 20. For the reasons we found in the Cumberland House Cree Nation: IR 100A Inquiry, we disagree. 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 at IR 100A in 1902.

Our review of the evidence leads us to conclude 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

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\(^{560}\) Indian Act, RSC 1886, c. 43, s. 39(a).
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 has conceded in this inquiry.

From this vantage point, any analysis of the statutory compliance with section 39 must begin from here: the whole of the Cumberland Band, those resident at IR 20 and at IR 100A, constitute “the Band” to whom section 39 duties are owed. Based upon the evidence, the whole of the Cumberland Band were never notified of Canada’s intention to seek a surrender of IR 100A lands, nor were they notified of or included in any decision to surrender this land in 1902. Consequently, there is no evidence that even the minimum requirements of section 39 were complied with.

In addition, when viewed from the perspective of Canada’s continuing treaty obligations to the Cumberland Band, the evidence that Canada refers to as prima facie proof of compliance – the July 24, 1902, surrender document and affidavit of surrender – cannot be offered as proof of Canada’s fulfillment of its treaty obligations when disposing of the Cumberland Band’s interest in IR 100A. On the contrary, these documents serve as prima facie proof of Canada’s breach of its treaty obligations to the Cumberland Band. The surrender document is signed by two men, both of whom were Chakastaypasin members until their alleged transfer to IR 100A on May 10, 1896, a transfer that we have found to be invalid.

It was the whole of the Cumberland Band (at IR 20 and IR 100A) who had authority to dispose of the southern portion of IR 100A and who should have voted in 1902 according to the Act. Canada has conceded that it gave no notice to the Cumberland House Cree Nation or sought its consent.\textsuperscript{561}

Thus, Canada breached its statutory and treaty obligations through its failure to give notice of the intention to surrender the southern portion of IR 100A lands and through its failure to have sought the whole of the Cumberland Band’s consent. The two signatories to the July 24, 1902, surrender document cannot stand to represent the whole of the Cumberland

\textsuperscript{561} Written Submissions on Behalf of the Government of Canada, November 24, 2003 (into the Cumberland House Cree Nation: IR 100A Inquiry, p. 59, para. 106).
Band, including those resident at IR 20. Canada’s failure to meet its statutory and treaty obligations renders the 1902 surrender invalid, and therefore the surrender cannot stand.

It is well established in law that transactions related to the surrender of reserve land – and particularly the surrender requirements of the Indian Act – will trigger a fiduciary duty of the Crown. On the facts of this case, this duty was triggered and not met. Through the Crown’s failure to seek the whole of the Cumberland Band’s informed consent to the surrender of the southern portion of IR 100A in 1902 and through its failure to protect its interest in this reserve land, Canada has breached its fiduciary duty to the whole of the Cumberland Band.

By its failure to have sought the consent of the whole of the Cumberland Band, including those resident at IR 20, Canada breached its statutory, treaty, and fiduciary obligations to the Cumberland Band. The effect of these breaches is to render the surrender of IR 100A lands on July 24, 1902, invalid. Consequently, Canada owes an outstanding lawful obligation to the Cumberland House Cree Nation for its breaches of obligations.

**Issue 5  Validity of Amalgamation**

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

The James Smith Cree Nation took issue with what event – surrender or amalgamation – may have occurred first on July 24, 1902. Based upon our findings regarding the validity of the July 24, 1902, surrender, we do not feel it necessary to decide what the sequence of these events was.

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

> In connection with the surrender, I think it would be well to consider the question of amalgamating the bands of James Smith and Cumberland No. 100A. The latter have no Chief and the united bands would make a total population of 231 souls. If this suggestion meets with your approval, and the consent of both bands to the amalgamation can be obtained, I think it would be a great gain to the Indians of

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James Smith’s Band as well as those of Cumberland band, both of which are in a backward state.\textsuperscript{563}

Within one week of this correspondence, W.A. Orr in the Lands Branch of Indian Affairs wrote to the Secretary of Indian Affairs and reconfirmed that the reserve would be surrendered by the Cumberland Band 100A, which would receive 10 per cent of the proceeds to buy agricultural implements, and “the two bands [would be] amalgamated as proposed.”\textsuperscript{564}

We know from the historical documents that Indian Commissioner Laird wrote Indian Agent Jones on July 15, 1902, to inform the Agent that he, Commissioner Laird, intended to meet “the Indians of James Smith and Cumberland Reserves” at the treaty annuity payday to be held nine days later, on July 24, 1902, “to obtain a surrender of the southern township of the Cumberland Reserve, and I think it would be better that I should discuss the question with them before you begin the payments.”\textsuperscript{565}

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

For the JSCN, there is no provision in Treaty 6 for the amalgamation of Indian bands, just as there is no provision for the transfer of Indians from band to band; such decisions were left to the bands of Treaty 6. The language of Treaty 6 entitles its signatory bands to select their reserve lands, and any decision to join bands together would have been for the bands themselves to decide. In the JSCN’s view, the “Crown would neither have participated nor been expected to participate in the joining together.”\textsuperscript{566} For JSCN, “Canada sought to exert greater and greater control of membership of bands through the creation of informal, and then formal, statutory methods of transferring Indians. Equally, Canada sought to control band memberships through the

\textsuperscript{563} David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, June 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 668–71).

\textsuperscript{564} W.A. Orr to the Secretary, June 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 672–73).

\textsuperscript{565} David Laird, Indian Commissioner, to W.E. Jones, Indian Agent, Duck Lake Agency, July 15, 1902, LAC, RG 10, vol. 3562, file 82, pt. 9 (ICC Exhibit 1, p. 676).

amalgamation process.”

Finally, the JSCN maintains, Canada “casually” decided in 1902 to put James Smith and Peter Chapman together and gave directions for an amalgamation document to be prepared. In the words of counsel, “there is not even the pretence of consultation on the part of Canada.”

If the treaty is silent on the matter of amalgamation, then what, if anything, was required by the Indian Act? To this the parties agree that there was no provision in the Indian Act for the amalgamation of bands. For Canada, this fact leads to the conclusion that absent a statutory limitation on its royal prerogative, it exercised its prerogative power to bring about the amalgamation. The JSCN argues that, in the absence of statutory authority, the Crown had no authority to amalgamate and cannot rely upon its prerogative power to create or amalgamate bands. Without guidance from either the treaty or the Indian Act, we must ask whether principles of fiduciary law provide any assistance in determining the lawfulness of Canada’s actions in this case. We will not review the general principles concerning fiduciary law here. We believe we have thoroughly reviewed these principles in many other inquiries. We will, therefore, rely upon our synopsis of the case law in these other reports and categorically state here that the courts have clearly stated that the relationship between aboriginal people and the Crown is a fiduciary one, although not every aspect of this relationship will give rise to a fiduciary duty. To determine whether a specific fiduciary duty arises on the circumstances of this case requires a meticulous examination of the facts.

For the JSCN, the amalgamation of the Peter Chapman and James Smith Bands is most analogous to the surrender of lands where Canada seeks to rely upon the quantity of land reserved for Peter Chapman IR 100A, once amalgamated with James Smith, as satisfying the outstanding treaty land entitlement of James Smith IR 100. In the JSCN’s view, Canada cannot simply take land from an Indian Band; a valid surrender process must be completed. Similarly, JSCN argues, once Canada decided to proceed with an

570 Written Submissions on Behalf of the Peter Chapman Cree Nation, August 30, 2003, p. 121, para. 355.
amalgamation of these two Bands, it owed a duty to obtain the consent and approval of the two Bands. In JSCN’s view, whether such consent was obtained must be analyzed in the same way that the Supreme Court of Canada analyzed the validity of consent to surrender land in *Apsassin*. When viewed from this perspective, in JSCN’s view, Canada did not obtain this consent.\(^{572}\)

According to Canada’s position, there is an abundance of “clear, unchallenged, unequivocal evidence of informed consent to the amalgamation and aside from the agreement itself, it’s primarily in the post-amalgamation facts.”\(^{573}\) In Canada’s view, it is this post-amalgamation conduct “which is completely consistent with informed consent.”\(^{574}\) Further, Canada argues that JSCN’s attempt to equate an amalgamation with a surrender is not a proper question. Amalgamation[s] aren’t surrenders. There were detailed provisions for surrenders; there are no provisions for amalgamations ... A surrender is fundamentally different. On amalgamation the bands don’t surrender their land to third parties or at all, there’s no need for a surrender and that’s not what it’s about. On this amalgamation each band obtained an undivided interest in all land, monies and other privileges of the other band.\(^{575}\)

We agree with the parties in characterizing the fundamental question to be answered as, Was there informed consent to this amalgamation? To begin, we believe it is important to recite the first paragraph of the 1902 “amalgamation agreement,” which states:

*This Agreement* made in duplicate and entered into this Twenty fourth day of July in the year of our Lord one thousand nine hundred and two, between the owners of James Smith’s Indian Reserve No. 100, in the Provisional District of Saskatchewan, in the North West Territories and Dominion of Canada, as represented by their Chief and Headmen, hereinafter called the Parties of the First Part; and the owners of Cumberland Reserve No. 100A, also in the said Provisional District, as represented by their Headman, hereinafter called the parties of the Second Part.\(^{576}\)

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The authority of “the owners of the James Smith’s Reserve No. 100” to have entered into this agreement has not been disputed by the parties. From JSCN’s perspective, the issue is whether, in the absence of other evidence, Canada can rely upon this document as *prima facie* evidence of JSCN’s consent. We believe the document is impugned by a more fundamental question: With respect to the “owners of Cumberland Reserve No. 100A,” upon whom has Canada sought to rely as having the authority to amalgamate with the James Smith Band? Based upon the totality of the evidence, reviewed and reported in the *Cumberland House Cree Nation: IR 100A Inquiry* and summarized previously, we believe the “owners of Cumberland Reserve No. 100A” were the whole of the Cumberland Band, including those resident at IR 20 and IR 100A, and not just those members resident at IR 100A. The Cumberland Band included members at IR 100A and at IR 20; yet, based on the evidence, Canada relied upon only those resident at IR 100A (including non-members of the Chakastaypasin Band who allegedly had transferred into the Cumberland Band) to amalgamate with the James Smith Cree Nation. There is no evidence to indicate that those members who were also “owners” of IR 100A and were living at IR 20 voted to amalgamate.

The act, by certain residents at IR 100A, to amalgamate with the James Smith Band sought to transfer the right “to have, hold and possess forever, an undivided interest in all land, moneys and other privileges now possessed and enjoyed” by the “owners of Cumberland Reserve No. 100A.” We find the amalgamation agreement invalid because the signatories, Kahtapiskowat and George Sanderson, could not have given a joint and undivided interest as they were not the “owners of Cumberland 100A.” They were two members of Chakastaypasin IR 98, who allegedly transferred to IR 100A in 1896 without the consent of the Cumberland Band, including those resident at IR 20. In our view, the transfer of this right is a disposition of IR 100A under the terms of Treaty 5 and therefore required the consent of the whole of the Cumberland Band to be valid. Canada’s failure to have sought the informed consent of the whole of the Cumberland Band (including those resident at IR 20) 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 was deprived of its interest in IR 100A – not only the acreage invalidly surrendered, but also the remainder of the reserve, which was invalidly amalgamated with that of the James Smith Cree Band and then relied upon by Canada to satisfy improperly the James Smith Band’s outstanding treaty land entitlement.
Based upon our findings, it is not necessary to consider Issues 6 and 7.

**Issues 8–10  Land Disposition**

8 What were Canada’s obligations in disposing of IR 100A lands according to

(a) Treaty 6;
(b) the *Indian Act* and its Regulations;
(c) Canada’s fiduciary obligations?

9 Did Canada, having accepted that it breached its lawful obligation to dispose of the surrendered lands for a reasonable price, to cancel sales of 72 quarters to its employee Pedley, and to cancel sales when payments were not made in a timely fashion, breach any further obligation which may arise under issue 8 concerning the sale of the surrendered township? In considering this issue, the parties agree to address the following points:

(a) the application of the Indian Land Regulations;
(b) allegations regarding the manipulation of the land-tendering process as regards the Prendergast and Menary group lands;
(c) allegations of manipulation of the land-tendering process and fraud as regards the remaining quarters of the surrendered township that Canada asserts were properly sold and for which Canada has not accepted a breach of lawful obligation; and
(d) the actions of Canada in the administration of the sales of the land.

10 Is the effect of any breach(es) such that it (they) invalidate(s) the surrender of IR 100A or otherwise give(s) rise to a claim for damages?

In this part of our analysis we are asked to consider, first, what were the obligations of Canada in disposing of IR 100A lands, and second, did Canada breach any obligation which may arise. We will address these issues together.
As we have said, based on the totality of evidence, we find that the true owners of IR 100A are the Cumberland House Cree Nation. Thus, it is the CHCN membership that are “the Indians entitled” under the terms of Treaty 5 to the reserve at IR 100A. Consequently, Canada’s failure to have sought and obtained their consent to the surrender and subsequent sale of IR 100A is a breach of Canada’s lawful obligation to the Cumberland House Cree Nation. Canada owed the CHCN treaty, statutory, and fiduciary obligations to have sought and obtained its consent to the surrender and subsequent sale of the southern portion of IR 100A, amounting to 20,080 acres or nearly half of its reserve.

Under treaty, Canada had an obligation to seek and obtain the CHCN’s consent to the surrender of these lands. Once given, Canada has a general treaty obligation to sell the land for the Band’s “use and benefit.” We interpret “use and benefit” to mean an obligation, as fiduciary, to act as a prudent fiduciary when disposing of the land by sale and to maximize the Band’s benefit.

Under statute, Canada had an obligation, pursuant to section 41 of the Indian Act, to exercise its discretion as a prudent fiduciary. Section 41 of the Indian Act states:

41. All Indian lands, which are reserves or portions of reserves, surrendered or to be surrendered to Her Majesty, shall be deemed to be held for the same purposes as before the passing of this Act and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Act.\(^{577}\)

Under fiduciary principles, Canada has an obligation, in disposing of IR 100A lands by sale, to initiate and manage the sales as a prudent fiduciary. We acknowledge and agree with Canada that it has breached its obligations on the transactions that actually occurred. As a fiduciary, Canada has an obligation to sell reserve lands, once surrendered, for a reasonable price on the facts of each case. On the basis of \textit{Guerin},\(^{578}\) the Crown has a positive duty to consult with a band when contemplating the sale of reserve land at a price other than what may have been agreed to or understood by the band. Further, Canada has an obligation, in administering the sale of reserve land, to ensure compliance with section 110 of the \textit{Indian Act}. Section 110 states:

\(^{577}\) \textit{Indian Act}, RSC 1886, c. 43, s. 41 (ICC Exhibit 24a).
\(^{578}\) \textit{Guerin v. The Queen}, [1984] 2 SCR 335.
110. No agent for the sale of Indian lands shall, within his division, directly or indirectly, except under an order of the Governor in Council, purchase any land which he is appointed to sell, or become proprietor of or interested in any such land, during the time of his agency; and every such purchase or interest shall be void.579

Finally, Canada has an obligation, as a prudent fiduciary, to fully enforce the terms of sale. On the facts of this case, we acknowledge that Canada has accepted to negotiate its outstanding lawful obligation on the transactions that occurred.

On March 13, 1998, the Government of Canada offered to negotiate certain elements of the James Smith Cree Nation’s IR 100A specific claim. It is important, in our view, to set out in detail the basis on which Canada partially accepted this claim for negotiation.

Having determined that the July 24, 1902, surrender of IR 100A lands was valid in its view for the reasons previously reviewed and considered in this report, the Government of Canada next considered whether the Crown breached its fiduciary obligations in relation to the subsequent sale of the surrendered lands. In his letter of March 13, 1998, partially accepting the JSCN IR 100A claim for negotiation on behalf of the Government of Canada, Mr John Sinclair, then Assistant Deputy Minister, Claims and Indian Government, stated:

[As regards the allegations to the adherence to the terms of sale] The JSCN alleges that the department breached its fiduciary obligation by failing to apply the 1888 Indian Land Regulations that purported to set mandatory conditions on the sale of surrendered lands. It is also alleged that a breach of fiduciary obligation occurred when the department accepted tenders for more than one quarter section of land, tenders without the required 5 percent cash deposit, tenders containing different bids and tenders directed to the Deputy Superintendent General instead of to the Department Secretary.

Upon review of the 1886 Indian Act and subsequent amendments, it is our conclusion that the 1888 Indian Land Regulations did not apply to this sale ... Canada’s conduct [regarding the form and content of tenders in the case of reserve land sales] must therefore be judged according to fiduciary standards. In this case, the standard would appear to be that of a prudent businessman in the conduct of his own affairs. It is our preliminary position that a prudent businessman would have accepted the highest bid for the land even if they were submitted in bulk to the wrong official.

579 Indian Act, RSC 1886, c. 43, s. 110 (ICC Exhibit 24a).
[As regards the administration of the sales] The JSCN also alleges that Canada breached its fiduciary obligation by failing to cancel purchases fraudulently made by agents of the Crown who used privileged information available only to them to purchase the lands at low prices. It is also alleged that another breach occurred when Canada failed either to enforce the terms of sale regarding payment conditions or to cancel those sales that did not comply with them.

... [As regards fraud] It is our preliminary position that there is insufficient evidence to support the allegation of fraud in connection with the sale of surrendered land ... However, the lack of clear evidence of fraud does not mean that the administration of the sales was appropriate. The historical record is clear that no upset price was set and that all 138 sales were at prices well below the appraised values of the lands. A 1902 appraisal by Departmental Surveyor J. Lestock Reid found that the Cumberland 100A lands in question were worth anywhere from $2.50 to $6.00 per acre, with most of the land being in the $5.00 per acre range. Analysis of the purchase price for the lands shows that the average price paid by A.J. Menary, the Prendergast group and the Mossom Boyd group was $2.62 per acre. In our view a prudent fiduciary would not have accepted prices so far below the appraised value of the lands. By accepting them, the department did not act in the best interests of the Cumberland 100A Band. Canada therefore owes a lawful obligation to the JSCN for the difference between the appraised value and actual amounts paid for the land. However, compensation for this breach is captured by Canada’s lawful obligation arising from the administration of sale discussed below.

In addition, the lack of clear evidence of fraud does not mean that there was no wrongdoing on the part of Canada’s officials, for there is evidence that Frank Pedley, Deputy Superintendent General of Indian Affairs at the time of the tendering process, acted improperly by participating in the sales. As agent for the sale of lands in question, Pedley contravened section 110 of the 1886 Indian Act. Although their actions may equally be characterized as morally blameworthy, Smart and White were not employees of the department or agents for the sale of lands in 1903 and are not caught by the language of section 110.

Pedley’s actions, however, should have led to his immediate dismissal from office and the cancellation of that portion of the overall land purchases attributable to him followed by the resale of the lands in question to bona fide purchasers. This was not done and it is our preliminary position that Canada owes a lawful obligation to the JSCN for its failure to have followed the requirements of the Indian Act in this respect and particularly for its failure to cancel the portion of the sales attributable to Pedley when his involvement became known sometime after 1912.

It is Canada’s preliminary position that Pedley’s involvement was moot, given that Canada should have enforced the terms of sale as a prudent fiduciary prior to 1912. The historical record is clear that by 1912 the sale conditions had been met for only 54 of the 138 quarter sections purchased in 1903 ... The sales attributable to Pedley were among those that ought to have been the object of Canada’s
attention well before his illegal involvement was discovered in 1912. In short, the
department did not administer the sales in the manner of a prudent fiduciary, and
it is our preliminary position that Canada therefore owes an outstanding lawful
obligation to the JSCN in this regard.

In summary, it is our preliminary position that Canada owes an outstanding lawful
obligation to the JSCN for its actions at the point of sale of the lands and
subsequently. First, the lands should not have been sold so far below their
appraised value. Second, Pedley should not have participated in their purchase.
Third, the terms of sale ought to have been enforced more diligently than they
were, including the reasonable cancellation of purchases in default of the terms of
sale and the resale of those lands.  

The First Nation rejected Canada’s offer to negotiate on the basis outlined in its
March 13, 1998, letter. It has asked the panel to inquire into Canada’s
obligations in disposing of IR 100A lands and to offer a recommendation
based upon its findings.

Canada has admitted its breach of fiduciary duty in accepting prices far
below the appraised value of IR 100A lands. Further, Canada has admitted its
breach of fiduciary duty for failing to enforce the terms of sale regarding
payment conditions, including the reasonable cancellation of purchases in
default of the terms of sale and the resale of those lands. Finally, Canada has
admitted that Frank Pedley, in his position as Deputy Superintendent General
of Indian Affairs, should not have participated in the purchase of IR 100A
lands put up for sale. By his actions, as agent for the sale of the lands in
question, Pedley contravened section 110 of the Indian Act, and Canada
admits an outstanding lawful obligation for its failure to have immediately
dismissed its employee Pedley from office and for its failure to cancel the sales
attributable to him. We agree.

Although Canada has framed its acceptance to negotiate these breaches of
obligation in terms of the James Smith Cree Nation, Canada’s lawful obligation
is owed, in our view, to the Cumberland House Cree Nation. Therefore
compensation for these breaches of obligation is owed to the Cumberland
House Cree Nation.

Fraud
In the absence of clear and unequivocal evidence, we are unable to render a
finding of fraud based upon the record in this inquiry. Nevertheless, the lack
of clear evidence of fraud does not mean that the administration of the sales

580 John Sinclair, Assistant Deputy Minister, DIAND, Claims and Indian Government, to Chief Eddie Head, James
was appropriate, and Canada is prepared to negotiate on the basis that all 138 parcels were sold for less than appraised values and that it was in breach of section 110 of the *Indian Act* with respect to Pedley's actions.

**IR 100A STRIP**

**Validity of Surrender Issues**

1. (a) Was there a surrender of the IR 100A Strip to Canada?
   
   (b) If no, what obligations did Canada owe to the Peter Chapman Band on the use of the IR 100A Strip?

   (c) If there was a surrender, then what were Canada’s obligations in taking the surrender of the IR 100A Strip according to

   (i) Treaty 6;

   (ii) the *Indian Act*; and

   (iii) Canada’s fiduciary obligations? [a discussion of this issue will involve the matter of Canada’s pre-surrender fiduciary duties]

The consideration of this issue may include the following related issues:

   (i) to whom were the obligations owed;

   (ii) the alleged absence of Peter Chapman Band leadership at the time of surrender;

   (iii) the alleged absence of appropriate parties to the surrender;

   (iv) the 1902 amalgamation of the Peter Chapman Band and the James Smith Cree Band; and

   (v) the transfer to and from other bands.

2. Did Canada breach any obligation(s) that may arise under Issue 1?
3 Is the effect of any breach(es) such that it (they) invalidate(s) the surrender of IR 100A Strip?

4 Is the effect of any breach(es) such that Canada owes outstanding lawful obligations?

Land Disposition Issues

5 If there was a surrender, what are Canada’s obligations in disposing of IR 100A Strip according to:

   (a) Treaty 6;
   (b) the Indian Act and its Regulations;
   (c) Canada’s fiduciary obligations?

6 Did Canada breach any obligation(s) which may arise under Issue 5?

7 Did Canada breach its obligations to the Peter Chapman Band by failing to sell the IR 100A Strip after surrender?

8 Is the effect of any breach(es) such that it (they) invalidate(s) the surrender of IR 100A Strip or otherwise give(s) rise to a claim for damages?

In our view, to fully understand the status of the IR 100A Strip, it is necessary to return to the evidence regarding the selection and survey of IR 100A. Subsequent to the Department of Indian Affairs’ decision to permit the Cumberland Band to move to Fort à la Corne in 1883, the Department of Indian Affairs applied to the Department of the Interior for suitable land. In 1885, the two townships immediately south of James Smith’s reserve (IR 100) in townships 46 and 47, range 20, W2M, were identified by the Department of Indian Affairs for a reserve; however, this department was informed that township 46 had not yet been surveyed. Nevertheless, this land was accepted by both the Department of Indian Affairs and the Cumberland Band for a reserve. In July 1887, DLS John C. Nelson was dispatched to survey IR 100A. Nelson surveyed an area of about 65 square miles, and his plan of survey was
confirmed by Order in Council on May 17, 1889. In 1892, some years after the survey and confirmation of IR 100A as a reserve, township 46 was surveyed.

A review of the plan of survey of IR 100A reveals that the boundaries of the reserve do not coincide with the township boundaries – a fact not discovered until 1902, when DLS Lestock Reid was dispatched to subdivide the surrendered portion of IR 100A. At that time, Reid noted that small portions of township 46, range 20, at the south and west were not included in the reserve, while another small portion extended into township 46, range 19.

To address the boundary issues, Reid proposed that the department exchange a strip along the east boundary of the reserve (that portion within range 19) for that on the west and south; “this would make the boundaries of the Reserve conform to the township [outlines] and include the whole of Township 46 Range 20 W2M in the Indian Reserve.” Secretary McLean consulted with the Department of the Interior and then instructed Reid to proceed with the survey and subdivision “as if the strips of land had been dealt with in the manner you suggest.” By November 1902, the exchange was made, and the western and southern portions were put up for sale. Today, it is the eastern boundary encroachment into range 19 that is the subject of controversy. There is, however, no evidence that either the James Smith or the Cumberland Band was consulted regarding the adjustment of the reserve boundaries by the Department of Indian Affairs.

In the July 24, 1902, surrender document, the lands to be surrendered are described as “being composed of this southern township of the said Reserve, Township 46, Range 20, W.2 M, excepting thereout Sec. 6 and S ½ Sec. 7.” In the First Nation’s view, the land described as the IR 100A strip was never surrendered. The July 24, 1902, surrender document refers to township 46 as being the surrendered lands. The IR 100A Strip is located outside of township 46 but has always been a part of the reserve. As such, the IR 100A Strip is unsurrendered and unsold reserve land to which Canada owes an outstanding lawful obligation.

581 John C. Nelson, DLS, In Charge of Indian Reserve Surveys, to SGIA, December 30, 1887, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1887, 275 (ICC Exhibit 17, p. 35); Order in Council PC 1151, May 17, 1889, pp. 54–55 (ICC Exhibit 4a).
582 J. Lestock Reid to the Secretary, Department of Indian Affairs, September 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 727).
583 J.D. McLean, Secretary, Department of Indian Affairs, to J. Lestock Reid, Surveyor, Dominion Lands Branch, Department of Indian Affairs, NA, RG 10, Vol. 3736, file 27580 (ICC Exhibit 1, p. 738).
In contrast, Canada argues that the IR100A Strip was included in the July 24, 1902, surrender. Although Canada did accept in 1990 to negotiate an outstanding lawful obligation, Canada today argues that it was not then aware of the legal status of the lands in question. In fact, Canada submits, all parties believed that the strip had not been included in the 1902 surrender at IR 100A. Viewing the IR 100A Strip as reserve land, Canada did issue section 28(2) permits for what it believed to be encroachments on reserve land. Upon discovery of the legal status of these lands after 1990, Canada reversed its view of the IR 100A Strip and abandoned negotiations. Today, Canada describes these lands as surrendered but unsold lands. Consequently, Canada has accepted an outstanding lawful obligation for its failure to have fulfilled the terms of the 1902 surrender by selling the IR 100A strip lands for the benefit of the James Smith Band.

It is our view that Canada owed a duty to the Cumberland Band to have surveyed the land that was mutually agreed upon. On the facts of this case, the land identified and accepted by both Canada and the Band as suitable for a reserve was townships 46 and 47, range 20, W2M, but only a portion of these lands was surveyed and confirmed as IR 100A. There were, on the evidence, portions excluded by Canada’s survey of range 20, and portions included in range 19 (an area not mutually agreed upon by the Band and Canada). On this basis, we find that Canada is in breach of its fiduciary obligation derived from treaty when it failed to have surveyed township 46 and 47, range 20, W2M, which the Cumberland Band and Canada mutually understood in 1885 to be the extent of its reserve.

Further, when Canada realized its mistake in 1902, it owed the Cumberland Band a treaty and fiduciary obligation to inform the Band of the mistake and to seek its consent to the adjustment of the reserve boundaries. Based upon the evidence, the department made no attempt to consult with the Cumberland Band.

The extent of the lands at issue is approximately 191.33 acres. Although this acreage may appear modest, this matter is complicated by the Crown’s taking of a surrender in 1902 of the southern portion of IR 100A. The primary issue for this panel is, “Was there a surrender of the IR 100A Strip to Canada”?

Based upon our review of the evidence, there was no surrender of the IR 100A Strip. This finding has two foundations. First, the IR 100A Strip, lying wholly in township 46, range 19, was never intended to be part of IR 100A. The intention in selecting IR 100A lands, in our view, is evidenced in 1885 – when the Department of Indian Affairs applied for this exact location to the
Department of the Interior, and when the Department of Indian Affairs confirmed this location with the Cumberland Band. That DLS Nelson did not comply strictly with the selection of this land when surveying the boundaries of IR 100A in 1887 is, in our view, as stated above, the source of its own breach of obligation. In our view, the status of the IR 100A Strip has remained the same as it was prior to the survey of IR 100A.

The second foundation for our finding rests with the July 24, 1902, surrender document itself. As we have said throughout our analysis, there was no valid surrender on July 24, 1902, at IR 100A since the surrender signatories had no authority to surrender IR 100A lands. This authority rested exclusively with the Cumberland Band. Canada has taken the position in this inquiry that the IR 100A Strip was included in the July 24, 1902, surrender. In our view, even if Canada were correct, a strict reading of the surrender document itself shows that the subject lands of the surrender are described as comprised of “Township 46, Range 20.” As such, the extent of the surrendered lands at IR 100A lie wholly within range 20. The lands taken up by the IR 100A Strip, lying wholly within range 19, are therefore excluded from surrender upon a strict reading of the surrender document.

Conclusion to the IR 100A Strip Issues
1 (a) Was there a surrender of IR 100A Strip to Canada?
No. First, as we have stated, the July 24, 1902, surrender is invalid. Secondly, even if the surrender document were valid, the lands to be surrendered were comprised of “Township 46, Range 20.” The IR 100A Strip is located wholly within township 46, range 19. Upon a strict reading of the surrender document, the IR 100A strip lands lie wholly outside of the surrendered land.

1 (b) If no, what obligations did Canada owe to the Peter Chapman Band on the use of the IR 100A Strip?
None. In our view, the lands that comprise the strip were never intended to be part of IR 100A by mutual agreement of the Cumberland Band and Canada in 1885. The status of this land has remained the same as it was prior to the survey of IR 100A.

On the basis of our above-stated conclusions, it is not necessary to address the remaining issues regarding the validity of the surrender or land disposition of the IR 100A Strip.
PART V

CONCLUSIONS AND RECOMMENDATION

As regards IR 100A, we conclude that there are no outstanding lawful obligations owed to the James Smith Cree Nation in the matter of the 1902 surrender, amalgamation, or land disposition issues. Our conclusion is based upon the following findings.

We find that no separate band was created or evolved at IR 100A from the original Cumberland Band that was a signatory to Treaty 5. Further, as acknowledged by Canada, we find that IR 100A was selected, surveyed, and accepted as a reserve by both the Band and Canada for the whole of the Cumberland Band.

Consequently, the decision to expand the membership of the Cumberland Band at IR 100A was a decision that rested with the whole of the Band and not just those resident at IR 100A. The “Consents to Transfer” 27 Chakastapaysin members to IR 100A are, therefore, unlawful because these consents did not involve the consent of the whole of the Cumberland Band.

We find the July 24, 1902, surrender document and the July 24, 1902, amalgamation agreement invalid, because the signatories, Kahtapiskowat and George Sanderson, could not have disposed of IR 100A as they were not the “owners of Cumberland IR 100A.” Nor could they have given a joint and undivided interest in IR 100A so as to amalgamate the Cumberland and the James Smith Bands, simply because they lacked authority as they were not the “owners of Cumberland IR 100A.” They were two members of Chakastaypasin IR 98 who allegedly transferred to IR 100A in 1896 without the consent of the whole of the Cumberland Band.

Canada’s complete failure to have sought and obtained the consent of the Cumberland Band to the surrender and subsequent sale of IR 100A is a breach of Canada’s lawful obligation to the Cumberland House Cree Nation, and not to the James Smith Cree Nation. Moreover, Canada has admitted its breach of fiduciary duty in accepting prices far below the appraised value of IR 100A lands. Further, Canada has admitted its breach of fiduciary duty for
failing to enforce the terms of sale regarding payment conditions, including the reasonable cancellation of purchases in default of the terms of sale and the resale of those lands. Finally, Canada has admitted that Frank Pedley, in his position as Deputy Superintendent General of Indian Affairs, should not have participated in the purchase of IR 100A lands put up for sale. By his actions, as agent for the sale of the lands in question, Pedley contravened section 110 of the Indian Act, and Canada admits an outstanding lawful obligation for its failure to have immediately dismissed its employee Pedley from office and for its failure to cancel the sales attributable to him. We agree.

Finally, as regards the IR 100A Strip, we conclude that no outstanding lawful obligation is owed to the James Smith Cree Nation. IR 100A was selected, surveyed, and accepted by both the Cumberland Band and Canada to encompass the whole of township 46, range 20. The IR 100A Strip, lying wholly in township 46, range 19, was never intended to be part of IR 100A. As such, the status of this land has remained the same as it was prior to the survey of IR 100A.

In conclusion, we find that there are no outstanding lawful obligations owed to the James Smith Cree Nation as regards IR 100A for the surrender, amalgamation, and subsequent disposition of these reserve lands.

We therefore recommend to the parties:

That the lawful obligations that arise from Canada disposition’s of Indian Reserve 100A be accepted for negotiation with the Cumberland House Cree Nation.

FOR THE INDIAN CLAIMS COMMISSION

Renée Dupuis
Chief Commissioner

Alan C. Holman
Commissioner

Dated this 17th day of March, 2005.
APPENDIX A

INDIAN CLAIMS COMMISSION

INTERIM RULING
JAMES SMITH CREE NATION INQUIRIES
TREATY LAND ENTITLEMENT AND CUMBERLAND 100A RESERVE CLAIMS

RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

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

COUNSEL

For the James Smith Cree Nation
Sylvie Molgat

For the Government of Canada
Jeffrey A. Hutchinson

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

May 2, 2000
BACKGROUND

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

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

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

The Treaty Land Entitlement

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

By a Band Council Resolution dated May 10, 1999, the JSCN requested that the Indian Claims Commission conduct an inquiry into the rejected TLE claim. In advance of the Commission’s first planning conference, the First Nation prepared a summary document, entitled “James Smith Cree Treaty Land Entitlement: Legal Submissions.” In this submission, Canada argues, the First Nation raised claims pertaining to land quality and land occupied prior to treaty, claims which Canada argues were not raised in the original submission. As such these claims are “new claims” not previously rejected by the Minister and therefore are not properly before the Commission. Canada maintains that “there is a distinction between a Band simply presenting new legal argument
or relying on different evidence to prove the claim originally submitted and ... a Band submitting entirely new grounds for a claim.” The TLE claims based upon land occupied prior to treaty and land quality are, Canada submits, entirely new grounds for a TLE claim.

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

**Peter Chapman IR 100A**
The First Nation also submitted a claim to the Specific Claims Branch alleging breaches by the Crown of its statutory, treaty, trust, and fiduciary obligations to the Peter Chapman Band in relation to the taking of a surrender in 1902 and the subsequent sale of those lands. This claim was partially rejected in a letter of March 13, 1998, from then Assistant Deputy Minister John Sinclair to then Chief Eddie Head, JSCN.

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

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

The First Nation argues that, in its original submission, it made arguments that the Crown “breached its statutory, treaty, trust and fiduciary duties in the taking of a surrender and for Canada to now distinguish various sub-issues which may or may not have been considered in the rejection and characterize them as “substantively new claims” is engaging in legalistic and specious argument based on a narrow and restrictive interpretation of the Commission’s mandate.”
ISSUE

The Order in Council establishing this Commission provides:

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

(a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister. 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 “to restrict the mandate of the Commission to a narrow and literal reading of the Specific Claims Policy would prevent First Nations in certain circumstances from having their claims dealt with fairly and efficiently.” 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

³ ICC, Lax Kw’alaams Indian Band Inquiry (Ottawa, June 1994); reported [1995] 3 ICCP 99 at 158.
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 of duty. In the interests of fairness, we are prepared to proceed into the inquiry of the surrender and sale of the Peter Chapman IR 100A lands, including consideration of the mineral rights. To do otherwise, we believe, would result, not in a thorough inquiry into all matters at issue, but in a piecemeal inquiry, with some aspects of the claim before the Commission and others at various stages of review within the Specific Claims Process. This, we believe, runs counter to our remedial mandate and would result in unfairness to the First Nation.
In agreeing to inquire into all aspects of JSCN’s TLE, including lands occupied prior to treaty and the quality of those lands, and the issue of mineral rights in the Peter Chapman IR 100A claim, we are mindful of the effect our decision may have on the course of this inquiry in so far as Canada may not have had an adequate opportunity to consider the issues or may need more time to prepare, or because additional research is needed (a fact already admitted by Canada as regards the population analysis of JSCN’s TLE). The Commissioners are, as previously stated, “firmly of the view that they must strive to be fair to both parties, not only the claimants, and will attempt to avoid any unfairness the government feels their decision to proceed with the inquiry causes.” 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 Carole T. Corcoran Elijah Harper
Commission Co-Chair Commissioner Commissioner

Dated this 2nd day of May, 2000.
RULING ON APPLICATION FOR LEAVE TO INTERVENE

Via facsimile
June 4, 2001

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

- AND -

Mr. Tom J. Waller
Olive Waller Zinkhan & Waller
2255 Thirteenth Avenue
Regina, SK S4P 0V6

- AND -

Ms. Uzma Ihsanullah
DIAND - Department of Justice
10 Wellington Street - 10th Floor
Hull, QC, K1A 0H4

Dear Sirs and Madame:

Re: In the Matter of the Cumberland House Cree Nation Inquiry into IR 100A Lands and the James Smith Cree Nation - Peter Chapman IR 100 A Lands Inquiry

The Commission Panel, consisting of Commissioners Prentice, Augustine and Dupuis have carefully considered the application of the Cumberland House
Cree Nation seeking leave to intervene in the Commission’s proceedings into the claim of the James Smith Cree Nation regarding certain lands described as the “IR 100 A Lands”.

The Commissioners have concluded that the inquiry claim advanced by the James Smith Cree Nation and the claim advanced by the Cumberland House Cree Nation (which is also before this Commission and which also relates to the IR 100 A Lands) are based upon a common evidentiary and factual background. It also seems clear to the Commissioners that the findings of fact which the Commission may make in one of these inquiries, will have a direct bearing upon the factual and legal arguments available in the other. As such, the Commissioners are concerned that unless the Commission proceeds with considerable caution, there is risk of prejudice to both of the First Nations, and perhaps to Canada as well.

The Commissioners have therefore decided to convene a single fact finding process and to include both the James Smith Cree Nation and the Cumberland House Cree Nation as full participants in that process. Obviously, Canada would also be a full participant. The facts, to be found by the Commission, will be based upon that fact finding process and will subsequently apply to the inquiry claims of both the James Smith Cree Nation and the Cumberland House Cree Nation. The Commissioners wish to emphasize, however, that they are not merging or “joining” these two inquiries, but are merely engaging a single, common fact finding process which will provide an evidentiary basis for the two separate claims.

The Commission has the requisite authority to proceed in this manner. As a Commission constituted under the Inquiries Act, the Commission is not bound by the strict rules of evidence and procedure and the Commissioners are authorized to "adopt such methods as we (the Commissioners) consider expedient for the conduct of the inquiry and to sit at such times and in such places as they may decide". In discharging its mandate to inquire and report on whether a claimant has a valid claim for negotiation under the Specific Claims policy, the Commission is mindful that the procedures adopted must be appropriate to the circumstances and respect the fundamental principle of fairness.

The Commission’s procedural flexibility allow for, and in this case requires, that the Commission undertake this common fact finding session. These two
claims are so interrelated in their factual history that the Commission would run the risk of prejudicing the Cumberland House Cree Nation if it were to consider evidence heard in the James Smith Cree inquiry, without also permitting the participation of the Cumberland House Cree Nation in that context. The same obviously applies in respect of the inquiry claim of the Cumberland House Cree Nation, which would require the participation of the James Smith Cree Nation, so as to avoid prejudice to them. It is therefore important that the Commission proceed with care and in a manner which ensures fairness, consistency and which respects the right of everyone to be heard.

We have therefore instructed our legal counsel to meet with representatives of both the Cumberland House and James Smith Cree Nations to discuss the logistical arrangements for this process. Generally speaking, we anticipate traveling to each First Nation to convene a “Community Session” to hear from the community elders. In that context, each First Nation would be afforded the right to make submissions to the Commission and each First Nation would be afforded the right, within reason and with due regard to the direction of the Commissioners at that time, to participate in the questioning of the community participants, through Commission Counsel. Canada will obviously be a full participant during this entire process.

The separate inquiries of the James Smith Cree Nation and the Cumberland House Cree Nation will, however, retain their separate status and identity thereafter. We do not intend to transform these two separate inquiries into a single exercise.

Once the fact finding process has been completed the Commission will proceed with full consideration of the James Smith Cree Nation’s claim and the Cumberland House Cree Nation’s claim. In that context, the Commission will convene separate “Oral Sessions” to receive written and oral argument from each First Nation relative to the issues which are pertinent to their claim. Obviously, at that time, we would expect that First Nation and Canada to address the information and evidence collected by the Commission during the fact finding process. Once again, Canada would obviously participate in both inquiries at that time. It may be, that at that time, it will be in the best interests of all participants that the James Smith Cree Nation and the Cumberland House Cree Nation both be afforded certain limited rights to participate as an “intervenor” in the Oral Session relating to the other’s claim. If that were to
happen, we would expect the limited participation of that other First Nation to be directed towards assisting the Commission - as opposed to an adversarial intervention directed towards the claimant First Nation. While we are not deciding that matter at this time, this would seem to us to be a fair and consistent approach. We would, however, ask our counsel to discuss this matter with the representatives of each First Nation at the close of the fact finding process. The Commissioners will, at that time, address the issue if the parties cannot agree.

The Commission’s decision to proceed with a common fact finding exercise followed by legal argument will require the careful planning and the cooperation of all participants to ensure that each aspect of these inquiries proceeds concurrently and without prejudice to the other. The Commission is prepared to convene, where necessary, a planning conference of the James Smith Cree Nation, the Cumberland House Cree Nation and Canada to arrange for the most equitable and systematic manner of carrying out its decision. The Commission’s Counsel will be in contact with each First Nation and Canada to arrange for this planning conference at a time convenient to all.

Yours truly,

Kathleen N. Lickers on behalf of
Commissioners Prentice, Augustine & Dupuis

cc: Chief Delbert Brittain, Peter Chapman Band
Chief Pierre Settee, Cumberland House Cree Nation
Commissioner James Prentice
Commissioner Roger Augustine
Commissioner Sheila Purdy
Commissioner Renee Dupuis
APPENDIX C

INDIAN CLAIMS COMMISSION

INTERIM RULING

JAMES SMITH CREE NATION – PETER CHAPMAN IR 100A
CUMBERLAND HOUSE CREE NATION – IR 100A

The Commission panel has met and considered the December 20, 2001 objections of Mr. Waller to certain parts of the testimony of Mr. James Burns and the matter of questions to Sol Sanderson raised by Canada’s counsel in her objections of December 5, 2001 and by Mr. Selnes on December 20, 2001. The answer of the panel follows.

The Commission accepts that Mr. James Burns appeared before the Commission as a witness to give evidence of his knowledge and experience regarding the matters at issue in this inquiry. Mr. Burns was not appearing as an expert but as an Elder of the James Smith Cree Nation. His testimony has been accepted as evidence.

Generally speaking, the Commission is not bound by the strict rules of evidence used in the courts. The practice adopted by this Commission is to allow hearsay evidence and to hear opinion evidence from a broad range of witnesses, some of who would be considered experts and others not. The reason is simple. The Commission, in conducting its investigation into the facts and matters in issue, is willing to listen to a range of experience in expectation that in doing so, we will come to a greater understanding of the
case. In so saying, it is the responsibility of the Commissioners in each case, to weight the evidence presented.

In this case, the Commission is cognizant that we have undertaken a single fact finding process in an effort to create a common evidentiary basis for these two claims.

On June 4, 2001, we explained our view that these two claims are so interrelated in their factual history that the Commission would run the risk of prejudicing each First Nation if it were to consider evidence heard in the other’s inquiry without also permitting the participation of the alternate First Nation in that context. Obviously what the Commission determines as evidence has a direct bearing to this single fact finding process.

As we said in June 2001, the Commission must proceed in a manner which ensures fairness, consistency and which respects the right of everyone to be heard. In this regard, we accept all of the testimony of Mr. James Burns as evidence including the two areas objected to by Mr. Waller but we will allow the Cumberland House Cree Nation to introduce further evidence if they believe such evidence is needed.

The Commission therefore directs that upon completion of the James Smith Cree Nation Community Sessions, and all witnesses brought forward by James Smith Cree Nation have testified, further evidence maybe brought forward by the Cumberland House Cree Nation in a separate session, with James Smith Cree Nation present and participating.

The Commission further directs that in advance of this additional session, Cumberland House Cree Nation must indicate to the Commission the manner and form such evidence will be brought forward. As stated, James Smith Cree Nation will be present at this additional session and will be afforded the opportunity to raise questions, as was the case at Cumberland House Cree
Nation and is now the case with Cumberland House Cree Nation participation at James Smith Cree Nation.

As for the matter of questions for Chief Sol Sanderson, the Commission has no questions on any aspect of his November 20, 2001 presentation.

FOR THE INDIAN CLAIMS COMMISSION

[January 24, 2002]
cc: Chief Delbert Brittain, Peter Chapman Band
    Chief Walter Contstant, James Smith Cree Nation
    Chief Sol Sanderson, Chakastaypasin Band
    Chief Pierre Settee, Cumberland House Cree Nation
    James Burns, James Smith Cree Nation
    Tamantha Bedard, DIAND, Specific Claims Branch

Renée Dupuis  Alan Holman
Commissioner  Commissioner
APPENDIX D

CHRONOLOGY

JAMES SMITH CREE NATION: IR 100A INQUIRY

1 Planning conferences

Saskatoon, September 20–21, 1999
Ottawa, November 9–10, 1999
Ottawa, October 24–25, 2000
Saskatoon, December 5–6, 2000
Ottawa, January 10–11, 2001
Melfort, June 5–6, 2001
Prince Albert, November 21, 2001
Ottawa, May 16–17, 2002
Prince Albert, August 27, 2002

2 Community sessions

James Smith Cree Nation, June 27–28, 2001
The Commission heard from Jim Brittain, Charlotte Brittain, Robert Constant, George Whitehead, Walter Sanderson, and Violet Sanderson.

James Smith Cree Nation, November 20, 2001
The Commission heard from James Burns and Sol Sanderson.

Melfort, Saskatchewan, June 26, 2002
The Commission heard from Chief Delbert Brittain, Mervin Burns, John Dorion, and Sol Sanderson.

3 Interim rulings

James Smith Cree Nation: Treaty Land Entitlement and Cumberland 100A Reserve Inquiries – Interim Ruling, May 2, 2000

Ruling In the matter of an Application to the Indian Claims Commission for Leave to Intervene in the Inquiry of James Smith Cree Nation – IR 100A, June 4, 2001
Interim Ruling concerning the testimony of Mr. James Burns and the matter of questions to Chief Sol Sanderson, January 24, 2002

4 Written legal submissions

*Mandate challenge*

- Submissions on Behalf of the Government of Canada, January 7, 2000
- Submissions on Behalf of the James Smith Cree Nation, February 25, 2000
- Reply Submissions on Behalf of the Government of Canada, March 10, 2000

*Application for leave to intervene*

- Letter, Kathleen Lickers, ICC Commission Counsel, to Chief Walter Sewap, Cumberland House Cree Nation, and Tom Waller, Counsel for the First Nation, inviting CHCN make application for leave in the JSCN, Peter Chapman IR 100A Inquiry, December 13, 2001
- Cumberland House Cree Nation’s Application to Intervene, April 23, 2001
- Responding Submission on behalf of the Government of Canada, May 11, 2000
- Responding Submissions on behalf of the James Smith Cree Nation, May 14, 2001
- Reply on behalf of the Cumberland House Cree Nation, May 2, 2001
- Reply on behalf of the James Smith Cree Nation, May 22, 2001
- ICC, Summary of the Briefs Submitted by the CHCN, JSCN, Canada, May 27, 2001
Submissions with respect to testimony of Mr James Burns and the matter of questions to Chief Sol Sanderson

- Letter, Tom J. Waller, Olive, Waller, Zinkhan & Waller, Counsel for Cumberland House Cree Nation, December 20, 2001
- Letter, Uzma Ihsanullah, Department of Justice, DIAND, December 5, 2001
- Ruling

Submissions to oral session

- Written Submissions on Behalf of the Cumberland House Cree Nation, August 29, 2003
- Written Submissions on Behalf of the James Smith Cree Nation, September 2, 2003
- Reply Submissions on Behalf of the Cumberland House Cree Nation (to DOJ and JSCN), December 15, 2003
- Reply Submissions on Behalf of the James Smith Cree Nation (to DOJ and CHCN), December 15, 2003
- Further Written Submissions on Behalf of the Cumberland House Cree Nation, February 2, 2004

5 Oral legal submissions  Saskatoon, Saskatchewan, January 13, 2004

6 Content of formal record

Note: The formal record for this inquiry is supported by the record as it also appears in the Cumberland House Cree Nation: IR 100A Inquiry. It includes the following materials:

- written submissions relating to the mandate challenge
the document collection (7 volumes of documents, with annotated indices) (Exhibits 1 and 1a) (These are identical to Exhibits 1 and 1a in the Cumberland House Cree Nation: IR 100A Inquiry.)

- Exhibits 2–25 tendered during the inquiry
- transcripts of community sessions (3 volumes) (Exhibits 18a–18c)
- transcript of oral session (1 volume)

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

CUMBERLAND HOUSE CREE NATION
IR 100A INQUIRY

PANEL

Chief Commissioner Renée Dupuis
Commissioner Alan C. Holman

COUNSEL

For the Cumberland House Cree Nation
Thomas J. Waller, QC

For the Government of Canada
Robert Winogron/Uzma Ihsanullah

To the Indian Claims Commission
Kathleen N. Lickers

MARCH 2005
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SUMMARY

CUMBERLAND HOUSE CREE NATION
INDIAN RESERVE 100A INQUIRY
Saskatchewan

The report may be cited as Indian Claims Commission, Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183.

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 5 (1876) – Treaty 6 (1876); Treaty Interpretation – Reserve Clause; Band – Division – Amalgamation; Reserve – Surrender – Disposition; Fiduciary Duty – Protection of Reserve Land; Royal Prerogative; Practice and Procedure – Intervenor – Witness; Evidence – Admissibility; Saskatchewan

THE SPECIFIC CLAIM

The Cumberland House Cree Nation (CHCN) submitted a specific claim regarding the unlawful taking of 22,080 acres of IR 100A by surrender. On December 10, 1997, Canada rejected the First Nation’s claim on the basis argued by the First Nation but did admit a lawful obligation for Canada’s failure to have ensured an equitable division of assets between, in its view, the separate Cumberland Band that had evolved at IR 100A and the original Cumberland Band.

In February 2000, knowing that the James Smith Cree Nation (JSCN) had submitted its own rejected claim to the Indian Claims Commission (ICC) for an inquiry and knowing that the JSCN was asserting a claim over the same IR 100A, the CHCN requested an inquiry. Accepting both claims for an inquiry and following discussions between both First Nations, the panel decided to conduct a single fact-finding process with respect to the history of IR 100A, while maintaining separate inquiries for each First Nation.

BACKGROUND

On September 7, 1876, the Cumberland Band adhered to Treaty 5 at The Pas. Beginning in 1882, a reserve was surveyed on “Cumberland Island” for the
Cumberland Band. This reserve was designated as IR 20 for the Cumberland Band. Then, “owing to the utter uselessness for agricultural purposes of the land in the Reserve at Cumberland,” Canada granted the Cumberland Band’s repeated requests to be permitted a reserve at Fort à la Corne – a territory outside Treaty 5 and wholly within the territory of Treaty 6 – so long as this Cumberland Band was “always designated and known as the ‘Fort a la Corne Band of Treaty No. 5.’” On May 17, 1889, IR 100A was confirmed “[f]or the Indians of Cumberland District (of Treaty No. 5).” On July 24, 1902, Canada took a surrender of 22,080 acres of IR 100A and sought to amalgamate the “owners of the James Smith’s Indian Reserve No. 100” and the “owners of Cumberland Reserve No. 100A.” It is the validity of this surrender that is at issue in this inquiry.

**ISSUES**
Did the “Peter Chapman Band” become a separate band from the CHCN at any time prior to 1902? Could the CHCN lawfully have been divided or split and deprived of its reserve without its knowledge or consent? If a separate band was not established, what is the effect of the 1902 surrender? If a separate band was established, does the band split bring an end to the interest of the CHCN in IR 100A?

**FINDINGS**
Today, Canada concedes that IR 100A was set aside for the Cumberland Band. We agree. Based upon the totality of the evidence, a separate Band was not created at any point in time at IR 100A. The Cumberland Band that adhered to Treaty 5 resided at two locations: IR 20 and IR 100A. The Cumberland Band continues to exist and continues its treaty relationship with the Crown. This relationship and the terms of Treaty 5 limit the exercise of the Crown’s royal prerogative, especially where that prerogative is being exercised to deprive a band of its reserve land. Thus, a transfer of an interest (i.e., a reallocation) in reserve lands, set aside under treaty, to a group other than the band for whom it was originally set aside triggers the requirement, under treaty, that Canada seek and obtain the consent of the band to dispose of its interest in its reserve lands. On the evidence, no such consent was sought.

It was a breach of Canada’s treaty obligation to the Cumberland Band to have assigned an interest in IR 100A without the knowledge and consent of the whole of the Cumberland Band. Canada is in breach of its fiduciary duty for its failure to have protected the Cumberland Band’s interest in its reserve at IR 100A.

**RECOMMENDATION**
That the Cumberland House Cree Nation’s claim regarding Indian Reserve 100A be accepted for negotiation under Canada’s Specific Claims Policy.
REFERENCES
In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research that is fully referenced in the report.

ICC Reports Referred To
*Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175.

Treaties Referred To
*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); *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).

COUNSEL, PARTIES, INTERVENORS
KEY HISTORICAL NAMES CITED

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

**Big Head**, see Kahtapiskowat.

**Bray, Samuel**, Chief Surveyor for the Department of Indian Affairs, in 1899–1903.


**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.

**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.

**Constant, John**, member of the Treaty 5 Pas Band; paid annuities on the Cumberland band paylist at Fort à la Corne, 1886–90.

**Courtney, Joseph**, Indian Agent for the Pas Agency, 1898–1906.

**Crane, Jeremiah**, Chief of the Cumberland Band, 1892–95; acting headman of the Cumberland Band, in 1899; councillor for the Cumberland Band, in 1901.

**Daly, Thomas M.**, Superintendent General of Indian Affairs and Minister of the Interior, October 1892–April 1896.
Davis, Thomas O., Member of Parliament for Prince Albert.

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

Fischer, Fred, Indian Agent for the Pas Agency, 1906–12.

Flett, Albert, signed Treaty 5 in 1876 as headman of the Cumberland Band; Chief of the Cumberland Band in 1880–86 and 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.


Greenleaf, Samuel, Chief of the Cumberland Band, 1886–89.

Head, James, received annuities with the Cumberland Band at IR 100A until 1902; appointed Chief of the James Smith Band in 1903.

Herchmer, L.W., Inspector of Indian Agencies, in 1886.


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 in 1877–78; Indian Commissioner, 1879–88 and 1898–1914.

Macarthur, James, Indian Agent for the Duck Lake Agency, 1903–12.
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.


McGibbon, Alexander, Inspector of Indian Agencies and Reserves, North-West Territories, in 1889–96.

McKenna, J.A.J., Assistant Indian Commissioner in 1904–6.

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

McLean, J.D., Secretary for the Department of Indian Affairs; later promoted Assistant Deputy and Secretary for the same department.

Nelson, John C., Dominion Land Surveyor, surveyed IR 100A 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.

Pedley, Frank, Deputy Superintendent General of Indian Affairs, November 1902–October 1913; previously held the positions of Superintendent of Immigration and Inspector of Immigration Offices within the Department of the Interior.
Rae, J.M., Indian Agent for the Carlton District, 1880–83, 1885 to early 1886, late 1886 to 1887.

Reader, Joseph, Indian Agent for the Pas Agency, 1884–98.

Reed, Hayter, Acting Assistant Indian Commissioner, 1883–84; Assistant Indian Commissioner, 1884–88; Indian Commissioner, 1888–93; Deputy Superintendent General of Indian Affairs, 1893–97.

Reid, J. Lestock, Dominion Land Surveyor, carried out the subdivision survey of the surrendered portion of IR 100A in 1902.

Rimmer, Reginald, Law clerk for the Department of Indian Affairs, in 1899.

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.


Sifton, Clifford, Superintendent General of Indian Affairs and Minister of the Interior, November 1896–February 1905.

Smart, James A., Deputy Superintendent General of Indian Affairs, July 1897–November 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.

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

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 the counterparts in other communities is unclear. It seems that there would be one person recognized by all the communities as “chief” of the larger “band,” but the evidence is not entirely consistent on this point.1 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 paylist 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 paylist 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.

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

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1 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 Exhibit 12b, pp. 1–2); Affidavit of Joseph Laliberte, October 7, 2002 (ICC Exhibit 12c, pp. 2–3).
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, and Grand Rapids Bands, and others).²

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.³

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.

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 the 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

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² 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. 11–14).
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 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 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 case, we have, from the first planning conference to our final deliberations, worked towards gaining the most complete understanding of all the 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.

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

It has taken this Commission, the First Nations, and Canada's representatives five years to conclude our process, and we are mindful of the dedication, commitment, and hard work that each has applied. We thank you.
PART I

INTRODUCTION

On September 7, 1876, the Cumberland Band, represented by Chief John Cochrane and headmen Peter Chapman and Albert Flett, signed an adhesion to Treaty 5 at The Pas.\(^1\) This Band, originally located near the Hudson’s Bay Company (HBC) trading post known as Cumberland House, just south of Cumberland Lake, Saskatchewan, would, within two years of its adhesion to treaty, begin to request reserve land farther south at Fort à la Corne, near the forks of the Saskatchewan River.\(^2\)

The Band’s desire “to move from Cumberland,” while motivated, in part, by the general unsuitability of the land at Cumberland Lake for agriculture, was met with repeated resistance by the Department of Indian Affairs. Reluctant to permit the movement of Indians from one treaty area to another (Cumberland Lake was within the limits of Treaty 5, and Fort à la Corne within Treaty 6), the department surveyed and set aside a reserve of 2,172.53 acres for the Cumberland Band at Cumberland in 1882 – a reserve referred to as Indian Reserve (IR) 20.\(^3\) With a base population of 345, the Cumberland Band was entitled to 11,040 acres under the terms of Treaty 5, which allowed for 160 acres per family of five, or 32 acres per person.

Following the survey of IR 20, members of the Cumberland Band persisted in their requests for better farm land. In a sudden reversal of policy, the Department of Indian Affairs agreed to their migration from Cumberland to Fort à la Corne, so long as they “were always designated and known as the

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\(^1\) 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 13a, pp. 9–10).

\(^2\) Extract from report of Inspector McColl, December 31, 1878, Library and Archives Canada (LAC), RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 1).

\(^3\) W.A. Austin, Dominion Land Surveyor (DLS), to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 167 (ICC Exhibit 1, p. 78); Natural Resources Canada, Field book Canadian Lands Surveys Reports (GLSR), W.A. Austin, “Field Notes of Indian Reserves at Cumberland, Birch River, The Pas, Bear Island Lake, Chimawawin,” 1882 (ICC Exhibit 10c, p. 6).
Fort à la Corne Band of Treaty No. 5. In 1886, the “Cumberland Band paid at Fort à la Corne” received its own paylist, on which 17 families were initially listed. No reserve was surveyed or set aside at Fort à la Corne for these members until the following year.

In 1887, 65 square miles were surveyed and set aside “for the Cumberland Band of Indians on the Carrot River near Fort à la Corne,” and IR 100A was confirmed by Order in Council on May 17, 1889, “[f]or the Indians of Cumberland District (of Treaty No. 5).” The original intention of the Cumberland people who moved to Fort à la Corne was to settle and take up farming. Although the Department of Indian Affairs may have thought that the majority of the Cumberland Band would migrate to IR 100A, by 1891 no further migration beyond the 83 people who made the initial move had occurred.

Within this same period (1876–91), some of the Chakastaypasin band members migrated from IR 98 to Fort à la Corne, both before the 1885 North-West Rebellion and after it. We think this influx of Chakastaypasin members into IR 100A following the rebellion began to cloud the department’s relationship with the members of IR 100A in such a way that, when the Department of Indian Affairs sought the surrender of 22,080 acres of IR 100A, it obtained the consent of only two members of the Band living there – Kahtapiskowat and George Sanderson – both former Chakastaypasin band members.

The Cumberland House Cree Nation submitted a specific claim regarding the unlawful taking of the remaining 19,250 acres of IR 100A as a result of the amalgamation between the James Smith Band and the Cumberland contingent living at Fort à la Corne. A revised statement of claim was submitted to the Specific Claims Branch on September 2, 1988.

5 John C. Nelson, DLS, In Charge of Indian Reserve Surveys, to SGIA, December 30, 1887, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1887, 275 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 35); R. Sinclair, for DSGIA, to A.M. Burgess, Deputy Minister of the Interior, June 21, 1888, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, pp. 279–81); P.B. Douglas, Assistant Secretary, Department of the Interior, to L. Vankoughnet, DSGIA, July 9, 1888, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 284); Order in Council PC 1151, May 17, 1889, pp. 54–55 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 4a).
7 “Submission by the Cumberland House Indian Band to the Minister of Indian Affairs, re. the unlawful taking of 19,520 acres of Reserve 100A and its amalgamation with the James Smith Reserve by an invalid agreement of July 24, 1892 [sic],” March 1986 (ICC Exhibit 2).
On December 10, 1997, Assistant Deputy Minister John Sinclair communicated Canada’s rejection of the First Nation’s claim. Sinclair wrote:

Based on a comprehensive review of the facts of the claim presented in the research, our preliminary position is that under the Specific Claims Policy no outstanding lawful obligation is owed by Canada to the Cumberland House Cree Nation either with regard to the surrender of 22,080 acres in the southern portion of IR # 100A or with regard to the transfer to the James Smith Band of 19,520 acres through the merger of the Cumberland 100A Band and the James Smith Band in 1902.9

Canada’s position was based on the premise that the Cumberland House Band had split into two bands by 1891 – the Cumberland House Band and the Cumberland 100A Band. As a result, the Cumberland House Band lost its interest in IR 100A. Although the majority of the First Nation’s claim was rejected, Canada admitted that “a lawful obligation is owed by Canada to the Cumberland House Cree Nation for Canada’s failure to fulfill its duty to ensure an equitable division of assets between the two bands.”10

Following the James Smith Band’s request in May 1999 for the Indian Claims Commission (ICC) to conduct an inquiry into the surrender and sale of the southern portion of IR 100A, the Cumberland House Cree Nation made its own request for an inquiry. The First Nation’s counsel, Tom Waller, stated: “[O]ur client believes that, in order for the Indian Claims Commission to adequately consider issues relating to Cumberland Reserve No. 100A, it is necessary to place before the Commission its claim.”11 Following discussions between both First Nations, the ICC ruled on June 4, 2001, that it would conduct a single fact-finding process with respect to the James Smith and Cumberland House Cree Nation’s claims, while maintaining separate inquiries for each First Nation.12 The result of this single fact-finding process is reflected in Part II of this report.13 We have worked to set out our

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12 Kathleen N. Lickers, Commission Counsel, Indian Claims Commission (for Commissioners Prentice, Augustine, and Dupuis), to William Selnes, Kapoor, Selnes, Klimm & Brown; Tom J. Waller, Olive, Waller, Zinkhan & Waller; and Uzma Ihsanullah, Department of Justice, DIAND, June 4, 2001 (ICC file 2107-39-03). This Ruling on Application for Leave to Intervene is reproduced as Appendix A to this report.
13 On January 24, 2002, the panel also issued an interim ruling on the use of certain oral history evidence. See James Smith Cree Nation: Peter Chapman IR 100A Inquiry, and Cumberland House Cree Nation: IR 100A Inquiry – Interim Ruling, which is reproduced as Appendix B to this report.
understanding of the separate histories of each First Nation claimant and our understanding of where these histories intersect. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix C of 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.”¹⁴ 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.¹⁵ 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.¹⁶

Furthermore, Canada is prepared to consider claims based on the following circumstances:

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

It should also be explained that, when the original mandate of the Commission was still under discussion, Tom Siddon, then Minister of Indian Affairs and Northern Development, wrote to then National Chief Ovide Mercredi of the Assembly of First Nations, setting out the basis for what the Commission first referred to as its “supplementary mandate” in the Athabasca Denesuline Inquiry Claim of the Fond du Lac, Black Lake, and Hatchet Lake First Nations:

If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.  

In an October 1993 letter to the Commission, the Minister of Indian Affairs, Pauline Browes, reiterated the position taken by her predecessor. Minister Browes’s letter makes two key points in relation to the Commission’s jurisdiction:

(1) I expect to accept the Commission’s recommendations where they fall within the Specific Claims Policy; (2) I would welcome the Commission’s recommendations on how to proceed in cases where the Commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair …

PART II

HISTORICAL BACKGROUND

CLAIMANTS’ ADHESIONS TO TREATY 5 AND TREATY 6

Geography and Claimants
As they exist today, two separate communities are affected by claims concerning IR 100A in this inquiry. The first is the James Smith Cree Nation, which includes descendants from three separate groups: the James Smith Band at IR 100, the descendants of the Chakastaypasin Band at IR 98, and the descendants of the Cumberland Band at IR 20. The James Smith reserves 100 and 100A are located near the forks of the Saskatchewan River at Fort à la Corne, approximately 60 kilometres east of Prince Albert and within Treaty 6 territory. The Cree name for the area is Neechawechickinis, meaning “where they grew their crops” or “good growing.”

The second community is the Cumberland House Cree Nation, who were known as the Cumberland Band when they signed an adhesion to Treaty 5 in 1876. The CHCN’s main reserve, IR 20, is located on Cumberland Island in eastern Saskatchewan, approximately 250 kilometres northeast of James Smith. CHCN members refer to themselves as Waskahikanihk ininiwak, meaning “the people of Cumberland House,” whose traditional territory includes an area of approximately 95 kilometres in all directions around Cumberland Island. IR 20 itself is located within Treaty 5 territory.

Cumberland Band Adhesion to Treaty 5, 1876
In September 1875, Treaty 5 was concluded at Beren’s River and Norway House by Commissioner Alexander Morris, Lieutenant Governor of the Province of Manitoba and the North-West Territories, and “the Saulteaux and Swampy Cree tribes of Indians” inhabiting an area of 100,000 square miles

19 ICC Transcript, November 20, 2001 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18b, p. 21, James Burns).
20 Affidavit of Joseph Laliberte, October 7, 2002 (ICC Exhibit 12c, p. 3). See also ICC Transcript, November 19, 2001 (ICC Exhibit 12a, p. 48, Marie Deschambault; p. 49, Joseph Laliberte).
surrounding Lake Winnipeg in Manitoba. \textsuperscript{21} Treaty 5 promised “reserves for farming lands” of 160 acres for each family of five (or 32 acres per person), “or in that proportion for larger or smaller families,” and that these “reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty’s Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.” \textsuperscript{22} Provisions were also made for yearly annuities, as well as farming implements, tools, oxen, and seed to be furnished “for the encouragement of the practice of agriculture among the Indians.” \textsuperscript{23}

On September 7, 1876, “The Cumberland Band,” represented by Chief John Cochrane and headmen Peter Chapman and Albert Flett, signed an adhesion to Treaty 5 at The Pas. \textsuperscript{24} The adhesion defines the “Cumberland Band” as “the Band of Saulteaux and Swampy Cree Indians residing at ... Cumberland Island, Sturgeon River, Angling River, Pine Bluff, Beaver Lake and the Ratty Country.” \textsuperscript{25} The treaty also provides for a reserve for the “Cumberland Band” 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.’” \textsuperscript{26}

The Hudson’s Bay Company (HBC) trading post known as Cumberland House was also located on Cumberland Island, to the south of Cumberland Lake, and the treaty excluded those lands claimed by the HBC and church missions from the future reserve. \textsuperscript{27}

\textbf{James Smith Band and the Signing of Treaty 6, 1876}

On August 23 and 28, 1876, the Government of Canada, represented by Treaty Commissioner Alexander Morris, signed Treaty 6 with “the Plain and Wood Cree and the other Tribes of Indians” living in what are now the central portions
of Saskatchewan and Alberta. Chief James Smith and four councillors – Bernard Constant, Henry Smith, Ma-twa-ahs-tin-oo-we-gin (later known as Chekoosoo), and Jacob McLean – signed the treaty on behalf of their Band.

All were appointed to these positions for “life or resignation.” The treaty also promised yearly annuities, as well as farming implements, tools, oxen, and seed to be furnished “for the encouragement of the practice of agriculture among the Indians.” These are the same promises made in Treaty 5, although Treaty 6 provided for a greater range and quantity of these items. In addition, Treaty 6 bands were promised a medicine chest, assistance during “pestilence” or “famine,” and provisions to help those making the transition to agriculture.

It should be noted that a significant difference between Treaties 5 and 6, for the purposes of this inquiry, relates to the quantity of land entitlement: Treaty 5 provided for 32 acres of reserve land per person (or 160 acres per family of five), while Treaty 6 promised 128 acres per person (or 640 acres per family of five).

Cumberland Band Requests Reserve at Fort à la Corne

In 1878, two years after its adhesion to Treaty 5, E. McColl, the Inspector of Indian Agencies for the Manitoba Superintendency, reported that “the Cumberland Band request a part of their Reserve at an island 40 miles north

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28 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), 1–2 (ICC Exhibit 13b, pp. 2–3).
30 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 13b, pp. 6, 8).
32 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 13b, p. 4).
33 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), 3–4 (ICC Exhibit 13b, pp. 4–5). See also 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), 6 (ICC Exhibit 13a, p. 5).
34 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), 4 (ICC Exhibit 13b, p. 5).
where good land is available and where a portion of the Band lives.” An 1881 letter from McColl suggests that “an additional reserve” was granted at Pine Island Lake in response to this request. However, IR 20 for the Cumberland Band at Cumberland Lake (also known as Pine Island Lake) was not surveyed until 1882.

During the winter of 1879–80, “head chief” John Cochrane died. In September 1880, former councillor Albert Flett was elected to be the new Chief for the Cumberland Band, and councillor Peter Chapman resigned his position.

Beginning in 1880, there were a number of requests from the Cumberland Band to be allowed to move up the Saskatchewan River to a point near Fort à la Corne. In September 1880, Angus MacKay, Indian Agent for Treaty 5, reported that “about one half of the band” requested permission “to be allowed a Reserve and move from the Cumberland Band to a point between Fort la Corne and the Forks of the South and North branches of the Saskatchewan.” Their desire “to move from Cumberland” seems to have been motivated by flooding and the failure of the fisheries and hunting grounds in the area, as well as the general unsuitability of the land for agriculture.

These conditions caused great hardship between 1879 and 1882 as widespread hunger, destitution, and sickness were reported in the entire Treaty 5 area. Inspector McColl wrote that, during the winter of 1880, the Agent knew of extreme hunger and destitution prevailing at Cumberland, but

40 A. MacKay, Indian Agent, Treaty 5, to James F. Graham, Acting Indian Superintendent, November 26, 1880, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880, 323 (ICC Exhibit 1, p. 10); A. MacKay, Indian Agent, Treaty No. 5, to SGIA, September 6, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 72 (ICC Exhibit 1, p. 20); E. McColl, Inspector of Indian Agencies, to SGIA, December 10, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 103–4 (ICC Exhibit 1a, pp. 2–3); James F. Graham, Indian Superintendent, to SGIA, December 31, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 59 (ICC Exhibit 1a, p. 5); E. McColl to SGIA, November 28, 1882, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1882, 146–47 (ICC Exhibit 1, pp. 62–63).
failed to provide any relief for three months.\textsuperscript{41} The Agent later reported that, owing to the lack of food and proper medicines, “the hooping cough carried off a great number of children at The Pas and Cumberland.”\textsuperscript{42}

As the resources on which the people traditionally depended were rapidly failing, Agent MacKay reported in November 1880 that “some of the Indians living in the vicinity begin to feel somewhat anxious, and are more inclined than ever to farm; but they also find the work hard and unsatisfactory to make even a small garden in this part of the country. On this account some of them desire to move further up the river to a place more suited for agricultural purposes.”\textsuperscript{43} The work was made more difficult by the lack of appropriate farming implements. Inspector McColl reported in December 1881 that the garden hoes provided by the department had been refused by the Cumberland Band, as they considered them “unsuitable for the cultivation of that rocky and wooded country.” Grub hoes were sent instead, as requested by the Band, but were not distributed by the Indian Agent that year.\textsuperscript{44}

Indian Agent MacKay corroborated the Cumberland Band’s complaints regarding the quality of land at “Cumberland,” when he reported in 1880 that the land was indeed unfit for agriculture. He explained that

\begin{quote}
... a very small portion of this locality is fit for farming purposes ... Were a survey made here and the Indians of this Band allowed 160 acres to each family of five, it would be a difficult matter to find that quantity of land above water in that vicinity and the little there is above water is so very rocky as to render it almost unfit for growing anything on, without very hard work and expense.\textsuperscript{45}
\end{quote}

Inspector McColl concurred, stating that “it is impossible to better their condition in that District, as no land there is well adapted for farming.”\textsuperscript{46}

Around the beginning of 1881, Chief Albert Flett petitioned Inspector McColl, asking him “to place me in that good land up-country, there to have my reserve.” He explained:

41 E. McColl, Inspector of Indian Agencies, to SGIA, December 10, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 104 (ICC Exhibit 1a, p. 3).
42 A. MacKay, Indian Agent, Treaty 5, to SGIA, September 30, 1882, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1882, 43 (ICC Exhibit 1, p. 53).
43 A. MacKay, Indian Agent, Treaty 5, to SGIA, November 26, 1880, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880, 323 (ICC Exhibit 1, p. 10).
44 E. McColl, Inspector of Indian Agencies, to SGIA, December 10, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 103–4 (ICC Exhibit 1a, pp. 2–3).
45 A. MacKay, Indian Agent, to James F. Graham, Acting Indian Superintendent, September 21, 1880, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1, p. 4).
I could never keep my people alive in this place as it is almost all water, land not good & altogether too stony.

Besides, it is too small, therefore I must beg for a larger place where you can give me a reserve in good earnest. Also that you would regard or treat [illegible] just as you do the Indian of the Upper Country. And moreover, that you would without delay give me the means of cultivating the land, that I may be the sooner able to do for myself. I shall endeavour to my utmost to do as our Great Mother desires of us, as regards the tilling of the soil.

Already I have heard many expressing a desire to go there, so speedily send us word about this during this winter. I shall be very glad indeed if you will place me on good land before the White man takes it all up.

[Page torn] very clearly I cannot live from the cultivation of the soil here & for that reason desire to leave [page torn]early apprehensive (as to the future).

It is only now that I see how to obtain my livelihood: by looking for good land At the first, when you came to buy my land, you said ‘Look for good land. I will give it to you.’ I have found it now.”47 [Translation]

Inspector McColl forwarded Chief Flett’s letter to the department in March, explaining in his covering letter that “[t]he Chief brought this matter to my notice last Summer, but as I had no personal knowledge of the section of country where he desired his reserve, I made no allusion to it in my report.”48

In March 1881, an inquiry from the Department of Indian Affairs was made to the Department of the Interior, regarding “whether there is any objection to the change as applied for being made.” The same letter noted that no reserve had yet been surveyed for the Cumberland Band in Treaty 5 territory.49 Surveyor General Lindsay Russell replied that he was “unaware of any objection” to the change, “so long as land is selected that is not specially valuable as Timber Land.”50 This information was communicated to Superintendent James F. Graham in April 1881, but it appears that no further action was taken at this time.51

Concurrent with the Cumberland Band’s requests for permission to move up the Saskatchewan River to Fort à la Corne, some members of The Pas Band were making similar requests. They apparently suffered from many of the same hardships and declining resources, and, in at least a few instances, their

49 [L. Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA)], to J.S. Dennis, Deputy Minister of the Interior, March 29, 1881, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 15).
50 Lindsay Russell, Surveyor General, Department of the Interior, to L. Vankoughnet, DSGIA, April 9, 1881, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, pp. 16–17).
51 [L. Vankoughnet, DSGIA], to James F. Graham, Indian Superintendent, April 19, 1881, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 18–19).
requests to move were reported together. Agent MacKay reported in September 1881:

There are a number of the Cumberland and Pas Bands who are anxious to leave their reserves and be allowed to go up the Saskatchewan river, to some place in the vicinity of Fort a la Corne, where the land is better adapted for farming purposes than where they at present live. ... they assert that, unless the Department allows them to go to better farming lands, they will be obliged to look to the government for food in the future, as it is impossible to make a living by farming where they are at present, on account of the low, swampy and stony nature of the country.  

He also reported that neither band wanted its reserve surveyed in the areas promised by the treaty, since many wanted to leave those places.  

The same month, Agent MacKay reported that “Henry Ballandine together with about twenty other families from Cumberland” had requested permission to remove to “better farming lands” somewhere in the vicinity of Fort à la Corne, since it was impossible to make a living in farming “at Cumberland.” A similar request from John Constant “and a number of other families from the Pas” is noted in the same letter.  

Lawrence Vankoughnet, the Deputy Superintendent General of Indian Affairs (DSGIA), responded with serious misgivings about the movement of Indians from one treaty area to another. He explained: “I fear that serious complications will result if the same is countenanced as the stipulations of the different Treaties vary considerably.” For this reason, he denied the requests of Henry Ballandine and John Constant to move to Fort à la Corne.  

Despite Vankoughnet’s opposition, John Constant persisted in his request for farming land at Fort à la Corne. He wrote on September 6, 1882, that he had family already living in the area, and explained that he wanted to move so “that I and my family may live by farming.” Agent MacKay reported the Cumberland Band’s renewed requests for permission to move that same month.
Inspector McColl echoed these requests yet again in his annual report that year and reported on the continued scarcity of resources and dire circumstances in the “district”:

Their former resources of subsistence are becoming so exhausted that frequently they are famishing with hunger. They represent that it is impossible for them to obtain a livelihood there any longer, and consequently urgently petition the Department to grant them a suitable reserve elsewhere. They are desirous of going to Carrot River near Fort la Corne. If their request is not granted, they say the Government must supply them with food, as long as the sun courses around the world, for they cannot endure to listen to their children crying with hunger.58

In November 1882, a department official in Winnipeg communicated Indian Commissioner Edgar Dewdney’s objection to a “proposed transfer” from one reserve to another within Treaty 5, saying that “it would be impossible to keep trace of these Indians and would complicate the Pay Sheets.” Furthermore, he was concerned that allowing the transfer of Indians from one reserve to another would set a precedent, and “applications would come from all quarters for similar changes if these were allowed.”59

The department informed Inspector McColl in May 1883 that it was “undesirable that Indians connected with one treaty should be allotted land within the precincts of another Treaty,” although suitable agricultural land should be provided whenever possible. It was proposed to offer land at Birch River within Treaty 5 for the Cumberland Band, and McColl was instructed to bring the matter before the band after examining the locality.60

Survey of IR 20 at Cumberland Lake in Treaty 5
Concurrent with their requests to be allowed to move to Fort à la Corne, the Cumberland Band expressed its opposition to having a reserve surveyed at Cumberland Lake as promised by treaty. In September 1881, Agent MacKay reported that the Cumberland Band did not want its reserve surveyed in the locations promised by treaty, since many wanted to leave “that place.”61 Superintendent James Graham made a similar report that year, stating that

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59 Indian Office to the Minister, November 24, 1882, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1, p. 60).
61 A. MacKay, Indian Agent, Treaty 5, to SGIA, September 6, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 74 (ICC Exhibit 1, p. 22). MacKay’s reference to “these places” is ambiguous, since, in the same report, he refers to the “Cumberland district” and the “vicinity of Cumberland,” and to The Pas and Cumberland band members wanting to “leave their reserves.”
several reserves had not been surveyed in Treaty 5, “owing to a number of the Indians of the Pas, Cumberland and Che-ma-wah-win Bands being desirous to have their reserves in another locality.”62

Although Superintendent Graham was apparently aware of the Cumberland Band’s wishes, he instructed Dominion Land Surveyor (DLS) W.A. Austin on July 6, 1882, to survey a reserve for the Cumberland Band at “Cumberland.”63 On August 9, 1882, Austin arrived at Cumberland House and met with the Chief and two councillors the same day, where he was told that the Chief has often presented the petition of his people to get land suitable, and had never yet obtained it his people were poor, very poor, often starving ...

... neither he or his people wanted to remain here, all trusted in the goodness of their Grand Mother (the Queen) to fulfill all her promises i.e. to procure good land for them so that they might be able to till it and not starve.64

Nevertheless, Austin inspected Cumberland Island and, finding “some unoccupied land that might be given to Indians,” began the survey of it the next day, based on his understanding that “there was a number of the Band who did not desire to leave the Cumberland Reserve.” He also visited an island nearby where the Chief and a number of band members lived and named it Chief’s Island.65 Both islands were situated on what he called “Cumberland or Pine Island Lake.”66

Soon after Austin began this work, the Chief called him to a council with a number of the band members. They informed him that they had had a meeting amongst themselves and that they had come to the conclusion that they would have no Reserve laid out in this section. He then asked me if he could have 50 miles square laid out for himself and Band. ... he ended his speech by saying that he and his people would have no survey of a Reserve in this section of the country, and he informed me that for three years they had a promise of a Reserve up the Saskatchewan River, near Fort a la Corne.67

62 James F. Graham, Indian Superintendent, to SGIA, December 31, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 60 (ICC Exhibit 1a, p. 6).
63 W.A. Austin, Dominion Land Surveyor (DLS), to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 159 (ICC Exhibit 1, p. 70).
64 W.A. Austin, DLS, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 160 (ICC Exhibit 1, p. 71).
65 W. A. Austin, DLS, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 160 (ICC Exhibit 1, p. 71).
66 Natural Resources Canada, Field book 132 CLSR, W.A. Austin, “Field Notes of Indian Reserves at Cumberland, Birch River, The Pas, Bear Island Lake, Chimawawin,” 1882 (ICC Exhibit 10c, p. 6).
When Austin objected, saying that the government wished to give them “the best land in their own Treaty,” the Chief answered: “Will the Government support us here? The fish have gone and the fowl are scarce, we want some place where we can have land to till, where we may be able to feed our cattle.”

Austin completed his work on Cumberland Island, noting that 289.36 acres were available for a reserve there. He did not, however, set aside any reserve at that time, “considering the Indian’s opposition to the survey of their Reserve.” Soon after leaving Cumberland House, Austin met with Indian Agent Angus MacKay, who informed him that “he would arrange matters with the Band, and that the survey would have to be made.” In his annual report dated September 30, 1882, Agent MacKay reported that, during his visit to Cumberland to make annuity payments, “I found out that the band had objected to the survey of their reserve by Mr. Austin, who had been sent to this place for that purpose. On my talking over the matter with them, they changed their mind and expressed a desire to have their reserves surveyed.”

Austin returned to Cumberland and began the survey of a reserve on Chief’s Island on October 9, 1882, setting aside 1,855.57 acres there, as well as 27.60 acres on two hay islands. He described the soil as being “generally No. 2” class and hard to work, although there were small patches of “class No. 1” soil and some good gardens. The reserve contained good timber and was surrounded by marshes. With an additional 289.36 acres surveyed on Cumberland Island, the total set aside for the Cumberland Band at that time was 2,172.53 acres.

In his report, Austin calculated that the Cumberland Band had an outstanding treaty land entitlement (TLE) of 8,867.47 acres, based on the Treaty 5 provisions of 160 acres per family of five (or 32 acres per person).
With a population of 345, the Cumberland Band was entitled to 11,040.00 acres under this formula.  

Austin reported that the Cumberland Band also wished to have a survey of seven islands “where portions of the Band are already located,” about 25 miles from Cumberland House, as well as locations at “three different Sturgeon Rivers,” one of which was 50 miles away. All these locations were outside the Treaty 5 area. He commented:

I cannot see any other way of supplying them with land. The people are already located at these places, and there is not a sufficient quantity of land cultivatable near Cumberland for nearly one half of the band. Apart from Chief’s Island, already surveyed, one or two small islands and a piece of the shore is all that I know that can be used.

The “Plan of Part of Cumberland Indian Reserve Shewing Chief’s Island and part of Cumberland Island,” dated May 1883, calculates the area of IR 20 as 6.29 square miles, or 4,025.6 acres. No additional lands were surveyed for the Cumberland Band at this time.

Following the survey of IR 20 at Cumberland Lake, there were repeated references to its poor quality of land. In reference to the recent survey, Agent MacKay commented that the reserve was “altogether a poor place for either farming, hunting or fishing.” In the Department of Indian Affairs’ annual report for 1884, Prime Minister and Superintendent General of Indian Affairs John A. Macdonald referred to the reserve “at Cumberland” as a “miserable tract of sterile land.”

75 W.A. Austin, DLS, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 167 (ICC Exhibit 1, p. 78); Natural Resources Canada, Field book 132 CLSR, W.A. Austin, “Field Notes of Indian Reserves at Cumberland, Birch River, The Pas, Bear Island Lake, Chimawawin,” 1882 (ICC Exhibit 10c, p. 6).
76 W.A. Austin, DLS, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 167 (ICC Exhibit 1, p. 78).
77 W.A. Austin, DLS, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 168 (ICC Exhibit 1, p. 79).
78 Natural Resources Canada, Plan 237 CLSR, W.A. Austin, DLS, “Plan of Part of Cumberland Indian Reserve Shewing Chief’s Island and part of Cumberland Island,” March 1883 (ICC Exhibit 10d).
79 While not an issue in this inquiry, Austin’s survey report and the final survey plan reflect a discrepancy in the area of IR 20. There is no record of Austin returning to survey additional land at IR 20.
80 A. MacKay, Indian Agent, Beren’s River Agency, to SGIA, September 13, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884, 77 (ICC Exhibit 1a, p. 24).
81 John A. Macdonald, SGIA, to the Governor General, January 1, 1885, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884, xli (ICC Exhibit 1a, p. 30).
CONDITIONS AT FORT À LA CORNE, 1883–92

Creation of the Pas Agency in Treaty 5, 1883

In the report of the Department of Indian Affairs for 1883, Superintendent General of Indian Affairs (SGIA) John A. Macdonald reported that the Treaty 5 Agency had been divided into two new agencies: the Pas Agency, for the bands on the Saskatchewan River, including the Cumberland Band; and the Beren’s River Agency, for the other Treaty 5 bands. He noted:

In previous winters the Indians at distant points in the agency have suffered greatly from sickness and from actual starvation without the Agent having been aware of it; and owing to the distances, even if he had known of the distress, he could not have had supplies transported soon enough to meet many of the cases. \[82\]

The division of the Agency was expected to solve this problem, since the Agent would be closer to the bands under his supervision. \[83\] Joseph Reader, a minister residing at The Pas, took up his duties as Agent for the newly created Pas Agency in February 1884. \[84\]

Department Permits Move to Fort à la Corne, 1883

In late 1883, the department reversed its view and decided to grant permission for the Cumberland Band to move to Fort à la Corne. The survey of IR 20 for the Cumberland Band, at Cumberland Lake in Treaty 5, had been completed only a year earlier. This change came about after Lawrence Vankoughnet, the DSGIA, met with the Cumberland Band during his visit to the North-West Territories earlier that year. On his return, he reported to the Superintendent General:

An objection existed with the change asked for from the fact that Carrot River is within the territory embraced in Treaty No. 6, in which the Indians of Cumberland are not interested and it was feared that complications might arise owing to Indians connected with one Treaty being located upon territory within another Treaty. Such strong representations were however made to the undersigned upon his recent visit to the North-West by the Cumberland Indians at the point referred to, and owing to statements made to him by other residents in that section of country as to the utter uselessness for agricultural purposes of the land in the Reserve at

\[82\] John A. Macdonald, SGIA, to the Governor General, January 1, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, xlvii (ICC Exhibit 1, p. 111).
\[83\] John A. Macdonald, SGIA, to the Governor General, January 1, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, xlvi (ICC Exhibit 1, p. 111).
\[84\] Joseph Reader, Indian Agent, to SGIA, July 14, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884, 71 (ICC Exhibit 1a, p. 13).
CUMBERLAND HOUSE CREE NATION — IR 100A INQUIRY

Cumberland, the undersigned was led to reconsider the application made by the Cumberland Indians, and in view of the strong desire expressed by them to settle in the locality of the Carrot River for the purpose of cultivating the land and supporting themselves and families, he considers that the point of objection referred to might be waived in this instance, and that the distinction between these Indians and those of Treaty 6 would be probably maintained sufficiently were this Band, if allowed to remove to Carrot River and take up land there, were always designated and known as the “Fort a la Corne Band of Treaty No. 5.”

A marginal notation on the letter instructed Vankoughnet to “communicate with Department of Interior as to the land sought for.”

Movement from Cumberland to Fort à la Corne, 1883–86
Against this background of repeated requests for a reserve at Fort à la Corne, a migration of some Cumberland and The Pas band members to that place had already begun. The first instance is recorded on the August 1882 paylist for the Cumberland Band at Cumberland House, which shows that Charles and Alexander Fiddler had “left reserve and gone to La Corne – Treaty No. 6.” In February 1883, Agent MacKay reported that, “last summer, I noticed that several Indians had left their Reserves, and on enquiring ascertained that they had left and were receiving payment in Treaties 4 and 6.”

In reference to MacKay’s report that Treaty 5 Indians were leaving their reserves, Superintendent Graham advised the SGIA that they “should not be paid in any other Treaty” because they had left their reserves without permission. A draft letter to Indian Commissioner Edgar Dewdney requests that he “instruct the Agents of the Treaties to which these Indians have removed to inform the Indians that they must return to Treaty No. 5, and that until they do so they cannot be paid.”

The Cumberland Band’s paylist for 1883 shows nine families absent; they were later paid at Fort à la Corne in 1885 on the James Smith Band’s paylist, and included the Brittains, Fiddlers, and Peter Chapman. None of the families

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87 Treaty annuity paylist, “Cumberland Band paid at Cumberland Reserve,” 1882, no file reference available (ICC Exhibit 1, p. 98).
88 A. MacKay, Indian Agent, to James F. Graham, Indian Superintendent, February 6, 1883, LAC, RG 10, vol. 3634, file 6441 (ICC Exhibit 1, p. 67).
89 James F. Graham, Indian Superintendent, to SGIA, April 17, 1883, LAC, RG 10, vol. 3634, file 6441 (ICC Exhibit 1, p. 81).
90 Unidentified author to Edgar Dewdney, Indian Commissioner, May 8, 1883, LAC, RG 10, vol. 3634, file 6441, (ICC Exhibit 1, p. 89).
absent from Treaty 5 in 1883 were paid on a Treaty 6 paylist that year, as advised by Graham, although three of the families received arrears for 1883 when they were first paid at James Smith in 1885.\textsuperscript{91}

On July 17, 1883, an individual living near the south branch of the Saskatchewan River wrote to Inspector of Indian Agencies T.P. Wadsworth regarding a recent meeting with “the Cumberland Indians” at Fort à la Corne. His letter communicated their requests for

the same privileges as any other British subject, to live on an arable land there and raise food out of the ground. ... [and] that your Government will pity them and allow them to join their brethren, Mr. John Smith and Mr. James Smith’s Reserves, where there is land fit for cultivation. And to grant them means to break up the land.\textsuperscript{92}

On November 30, 1883, Inspector McColl reported that the Chief of the Cumberland Band, “on behalf of thirty families,” asked for permission to move to Fort à la Corne, “where nine of their number had already settled.”\textsuperscript{93} Chief Albert Flett repeated the request in a letter to Inspector McColl in January 1884, following the department’s decision to allow the “Cumberland Indians” to “remove to Carrot River and take up land there.”\textsuperscript{94} He wrote:

Having talked the matter over with some of my mind ... I beg that you will extend to me and the whole of the Indians on Pine Island and in the immediate vicinity of Cumberland Fort, the privilege Mr. Vankoughnet [has] already given to twenty families of moving to Fort La Corne.

Not having seen the members of any band residing at distant points, I am unable to say what their intentions are, but I have reason to believe that they are satisfied with their present position.\textsuperscript{95}

This letter seems to indicate the wishes of those residing immediately in the area of IR 20 to join those who had already moved to Fort à la Corne. Chief Flett does not appear to be speaking on behalf of those members of the

\textsuperscript{92} J. Settee, St James, to Inspector Wadsworth, July 17, 1883, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 95–96).
\textsuperscript{93} E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to SGIA, November 30, 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 141 (ICC Exhibit 1, p. 102).
\textsuperscript{95} Chief Albert Flett, Cumberland Band, to E. McColl, Indian Superintendent, January 14, 1884, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 113).
Cumberland Band “residing at distant points” outside the immediate Cumberland House area. However, his comment is somewhat unclear, since he refers to these people as “members of any band.” It is not certain if he is referring to other sections of the Cumberland Band living outside the immediate “Cumberland Fort,” or Cumberland House area, or to other bands in the Pas Agency.

Five months later, in June 1884, Indian Agent Reader reported the requests of some Cumberland band members for land at various points within the Pas Agency. Councillor Philip Canada and “about 10 families who for some time have farmed at Pine Island Bluff some twenty miles northwest of Cumberland House” asked for a reserve in that location. Henry Budd also asked that he be allowed “to settle on a piece of land good for farming between Cumberland and Birch River Reserves.” Reader specified that these requests were distinct from the 30 families who want to move to Fort à la Corne.

That same month, Indian Agent J.A. Macrae of the Carlton Agency reported that “several families from Treaty No. 5” had apparently already joined James Smith’s Band at Fort à la Corne. John Constant of The Pas Band had also moved to Fort à la Corne by this time, and Macrae communicated his request for a reserve there “for himself and about 30 families.” A similar request from the Cumberland Band was reported in July 1884 by Agent Reader. Agent Macrae commented: “Whilst Constant mentions 30 families as the numbers that he expects to leave Cumberland and the Pas this summer, many more would probably wish to follow in their footsteps.” It was also around this time in 1884 that Dominion Land Surveyor A.W. Ponton completed the survey of IR 100 for the James Smith Band on the Saskatchewan River near Fort à la Corne.

In September 1884, Agent MacKay confirmed that “several families” had already moved to Fort à la Corne “during the last three years.”
Map 2: Cumberland IR 100A and James Smith IR 100

Based on Sketch found in Bennett McCordie, "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)
1884 paylist for the Cumberland Band paid in Treaty 5 shows that five families who had been at Fort à la Corne the previous year returned to IR 20 to be paid, and received arrears for 1883. The other four families did not return. In September 1885, Indian Agent J.M. Rae reported that 20 families “from Cumberland” were residing near James Smith and had “spent last year’s treaty money” breaking 60 acres and making improvements. A sketch accompanying his report shows the settlement of Cumberland people east of the James Smith IR 100.

In November 1885, 14 families from the Cumberland Band and one family from The Pas Band in Treaty 5 were paid on the James Smith Band’s Treaty 6 paylist. The families all appear grouped at the end, and 11 have the notation “Cumberland” entered beside their names. Most were paid under their original Treaty 5 ticket numbers, although a few are not designated with any ticket number.

During the fall of 1885, the Cumberland Band reportedly had a successful potato crop and “good fall fishing,” and therefore experienced fewer cases of destitution. Only a few months later, however, Inspector L.W. Herchmer reported that 17 families from Cumberland were residing near James Smith, and he expected 30 additional families “next summer, as both fish & [musk]rats have completely failed below.” The annual report for 1886 reports only 55.5 acres of cultivated land in the entire Pas Agency.

Setting Aside Land for IR 100A, 1883–85
The differences between Treaties 5 and 6 have already been noted, especially the significant disparity between the two regarding the amount of land entitlement. These differences seem to have been a large factor in the department’s resistance to allowing the Cumberland people to move to Fort à

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105 J.M. Rae, Indian Agent, to the Indian Commissioner, September 8, 1885, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 168–69).
106 J.M. Rae, Indian Agent, to the Indian Commissioner, September 8, 1885, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 170).
108 E. McColl, Inspector and Superintendent of Indian Agencies, Manitoba Superintendency, to SGIA, December 1, 1885, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1885, 133 (ICC Exhibit 1a, p. 35); J. Reader, Indian Agent, Pas Agency, to SGIA, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886, 74 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 6).
110 John A. Macdonald, SGIA, to the Governor General, January 1, 1887, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886, xlvii (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 3).
la Corne, since it was outside the area of their own treaty territory. The department’s concern over this issue is demonstrated by its instructions not to pay treaty annuities to those outside Treaty 5 territory.\(^{111}\)

Regarding the reserve eventually set aside at Fort à la Corne, it is not entirely clear what basis the department relied upon to calculate the amount of land. The surveyor, John C. Nelson, did not make any reference to how the amount of land to be set aside was calculated. However, it appears that the 1882 population of the Cumberland Band at “Cumberland” in Treaty 5 was used to calculate how much land to allocate at Fort à la Corne; it also appears that the Treaty 6 land entitlement formula may have been used to approximate the amount of land required, based on that population.

On December 6, 1883, DSGIA Lawrence Vankoughnet wrote to the Department of the Interior to inquire about “securing a reserve on the Carrot River near Fort à la Corne for the Cumberland Band of Indians in exchange for the Reserve or part thereof occupied by them at Cumberland.” He went on to explain: “The population of the Cumberland Band is 345, and under the Treaty with them they are entitled to 160 acres for every five persons, consequently the quantity of land that would be required for the Reserve would be 44,160 acres.”\(^{112}\) It should be noted that according to the Treaty 5 formula of 160 acres per family of five, the correct entitlement would be 11,040 acres. However, marginal notations on a draft copy of Vankoughnet’s letter use the Treaty 6 formula of 640 acres per family of five to calculate an entitlement of 44,160 acres. Another marginal notation points out that the figure “[s]hould be 11,040 not 44160.” There is no indication as to who made either the calculations or the marginal notation.\(^{113}\)

Surveyor Austin used the same base population of 345 to calculate the Cumberland Band’s treaty land entitlement (TLE) in his 1883 survey report regarding IR 20 at Cumberland Lake.\(^{114}\) This population corresponds to the number paid on the Treaty 5 paylist for the “Cumberland Band paid at Cumberland Reserve” in 1882.\(^{115}\) Department of Indian Affairs law clerk Reginald Rimmer later surmised that the reserve at Fort à la Corne was most likely set aside on the basis of 345 people and that the Treaty 6 formula for

\(^{111}\) James F. Graham, Indian Superintendent, to SGIA, April 17, 1883, LAC, RG 10, vol. 3634, file 6441 (ICC Exhibit 1, p. 81).

\(^{112}\) L. Vankoughnet, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, December 6, 1883, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, pp. 105–6).

\(^{113}\) Marginal notations written on draft letter from L. Vankoughnet, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, December 6, 1883, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 108).

\(^{114}\) W.A. Austin, DLS, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 167 (ICC Exhibit 1, p. 78).

\(^{115}\) Treaty annuity paylist, “Cumberland Band paid at Cumberland Reserve,” 1882, no file reference available (ICC Exhibit 8, p. 28).
land entitlement was used, instead of the Treaty 5 formula. This opinion is discussed later in more detail.

From the time of Vankoughnet’s first inquiry in 1883 regarding a possible reserve location, it took almost two years to secure the land desired by the Cumberland people for a reserve near Fort à la Corne. There was a great deal of confusion among department officials regarding exactly which land was desired, and a number of options were considered.

Inspector McColl initially requested one and a half townships for the reserve, located northwest of the future James Smith IR 100, although the land he specified was later discovered to be unavailable. In April 1884, Inspector Wadsworth reported that he expected only about “30 families,” or “150 souls,” to make the move, rather than the entire Cumberland Band. On this basis, he calculated that 150 persons would be entitled to 4,800 acres under Treaty 5 (a correct calculation according to the Treaty 5 formula of 32 acres per person), and suggested a reserve of 10 sections south of Chakastaypasin’s reserve, totalling 6,400 acres. The department applied for this land, and accepted the Department of the Interior’s offer for only five sections (or 3,200 acres) as sufficient. In response to the offer, Agent Reader received a letter from Chief Flett explaining that

he had interviewed the Indians with respect to the offer made to them by the Government, but that there are none of them who wish to go. They say the reason is that they have spent so many pounds in getting the land at Fort a La Corne broken, and they do not wish to go to this other place.

In addition, Chief Flett explained that the land at Fort à la Corne was better able to provide a means of subsistence while they were getting established in farming, since the area was rich in timber, fish, and game. Reader reported: “Those who were at La Corne are of the same opinion, having in addition improved and incurred expenses on the land they settled on.”

116 Memorandum, Reginald Rimmer, Law Clerk, Department of Indian Affairs, to unidentified recipient, May 18, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 541–42).
117 John R. Hall, Secretary, Department of the Interior, to L. Vankoughnet, DSGIA, February 9, 1884, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 114–15).
121 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, March 25, 1885, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 154).
122 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, March 25, 1885, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 155).
alternative offer of land at Pas Mountain within Treaty 5 territory was refused as well. 123

In late 1884, Indian Commissioner Edgar Dewdney wrote to the Superintendent General to clarify that “the Indians from Cumberland” wanted the two townships immediately south of James Smith’s reserve, in townships 46 and 47, range 20, west of the 2nd meridian (W2M). 124 This information was communicated to Inspector McColl in June 1885, at which time he was instructed “to ascertain definitely whether this is the locality in which the Cumberland Indians wish to have a Reserve made for them.” 125

In the interim, A.M. Burgess, the Deputy Minister of the Interior, reported to Vankoughnet on June 30, 1885, that the desired townships were available for Indian reserve purposes, later clarifying that the reserve was “for the Cumberland band of Indians.” 126 Agent Reader confirmed on August 26, 1885, that this was indeed the land desired by the “Cumberland Band.” 127 On October 2, 1885, Vankoughnet accepted the two townships offered by the Department of the Interior, stating that the land would be set aside “as a reserve for the Indians of Cumberland.” 128 The Indian Commissioner and Inspector McColl were informed the following month. 129

The North-West Rebellion and the Cumberland Band

The North-West Rebellion (or Riel Rebellion) broke out in March 1885. During and after the conflict, government officials took steps to institute greater controls over the movements and the activities of treaty Indians. One of these measures was the pass system, introduced as a temporary measure during the uprising. 130

Following the cessation of unrest, Assistant Indian Commissioner Hayter Reed suggested that the pass system be continued as a means of dealing with

123 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 12, 1884, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 130–31).
127 J. Reader, Indian Agent, Pas Agency, to E. McColl, Inspector of Indian Agencies, August 26, 1885, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 163).
128 L. Vankoughnet, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, October 2, 1885, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, p. 172).
129 [L. Vankoughnet, DSGIA], to E. Dewdney, Indian Commissioner, November 27, 1885, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 184–85); and [L. Vankoughnet, DSGIA], to E. McColl, Inspector of Indian Agencies, November 27, 1885, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 186–87).
“rebel” Indians. His July 29, 1885, memorandum on the “future management of Indians” recommended that “no rebel Indians should be allowed off the reserves without a pass signed by an [Indian Department] official.” By October 1885, DSGIA Vankoughnet had agreed to the wider application of the system to all treaty Indians. In response to Hayter Reed’s recommendations, Vankoughnet replied, instead, that the system “should be introduced as far as practicable in the loyal Bands as well,” but that it “should not be insisted upon as regards loyal Indians” if they resisted on the basis of their treaty rights. The pass system was a means of reinstating and strengthening government control over Indian movements and whereabouts after the rebellion. Indian Agents received books of passes in 1886 and the system was strictly enforced, especially in the years immediately following the rebellion.

It is uncertain whether the pass system prevented a greater migration from the Cumberland district to Fort à la Corne, although a few people did make the move in the years immediately after the rebellion. Cumberland House Cree Nation elder Pierre Settee says that when land became available at Fort à la Corne, and some Cumberland band members moved there to begin farming, “it became more difficult for our people to come and go as time went on. This may have been due to the past [sic] system that was put in place by the government; for many years we needed permission to leave our reserve.”

**Scip Offered at Cumberland**

In 1885–86, the government offered scip (a set amount of cash or land) to those who wished to withdraw from treaty. Indian Agent Reader first reported on the matter when referring to a December 1885 visit to Cumberland, noting that only a few “availed themselves of the privilege to leave treaty.” However, by March 1886, the situation had changed remarkably. Agent Reader remarked:

The idea of leaving the Treaty and receiving scip in compensation for annuity, when once it fairly took possession of some of the half-breeds in this Agency,
spread almost like an epidemic. ... It was with difficulty that I could leave Cumberland on the 12th, owing to the number of applicants. ¹³⁶

Later that same month, a number of additional Cumberland band members applied to the Agent for withdrawal from treaty. ¹³⁷ He reported that “[i]nasmuch as about one hundred families in this agency have withdrawn from treaty, [t]here has been a large exodus at Cumberland.” ¹³⁸ Indeed, the 1886 Cumberland band paylist for Treaty 5 shows that the band population was reduced by almost half due to the large number of withdrawals from treaty that year. Chief Albert Flett and one of his councillors were among those who took scrip that year. ¹³⁹ After Chief Flett’s withdrawal from treaty, the Cumberland Band elected Samuel Greenleaf in 1886 as the new Chief for a three-year term. ¹⁴⁰ Albert Flett re-entered treaty in 1887 and was re-elected for another three-year term as Chief in 1889, after Samuel Greenleaf’s term expired. ¹⁴¹

In the annual report for 1886, the Superintendent General of Indian Affairs reported a population of 929 in the Pas Agency, a decrease of 514 since the last census owing to the numerous withdrawals from treaty. ¹⁴² A few Cumberland band members re-entered treaty over the next few years, but most chose not to do so. Of the Cumberland people living at Fort à la Corne, only three families chose to take scrip. ¹⁴³

**Paylist for Cumberland Band at Fort à la Corne, 1886**

In September 1886, the “Cumberland Band Paid at Fort la Corne” received its own paylist, labelled “Treaty No. 6.” Seventeen families appeared on the list,
although two were said to have withdrawn from treaty and were not paid. These 17 families include all 14 of those families originally from the Cumberland Band in Treaty 5 which were paid with James Smith’s Band in 1885, as well as John Constant from The Pas Band. In addition, two new families from the Cumberland Band in Treaty 5 arrived at Fort à la Corne in 1886 and were paid on this first paylist.  

**Other Treaty 5 Bands at Fort à la Corne**

It is possible that there were, originally, more families from The Pas resident near Fort à la Corne. Some were eventually paid with the James Smith Band or others, and some apparently returned to their original reserves at The Pas because of the instability caused by the 1885 North-West Rebellion. Indian Agent Reader of the Pas Agency reported in 1885 that “some Pas Mountain Indians, who, I believe, had been living at or near Fort à la Corne, fled back to the mountain, not wishing to join the Rebellion.” However, John Constant remained at Fort à la Corne, and his family was the only one from a different Treaty 5 band to be paid with the Cumberland Band on the new paylist. The family remained there from 1886 until 1890, before transferring to John Smith’s Band to join other relatives.

**Survey of IR 100A, 1887**

Dominion Land Surveyor John C. Nelson went to Fort à la Corne in July 1887 “to lay out a reserve for the contingent of the Cumberland Band and such other Indians as may be assigned locations therein.” On his arrival, he discovered that the “Cumberland band” had a settlement outside of townships.

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145 John A. Macdonald, SGIA, to the Governor General, January 1, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1885, xxxvii (ICC Exhibit 1a, p. 39).


147 Treaty annuity paylist, “Cumberland Band Paid at Reserve,” 1891, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 9a, p. 16); Consent of Band to Transfer, June 4, 1890, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1a, p. 110); Consent of Band to Transfer, August 8, 1890, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1a, p. 111).

148 John C. Nelson, DLS, In Charge of Indian Reserve Surveys, to SGIA, December 30, 1887, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1887, 274 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 34).
46 and 47, along the east side of James Smith’s IR 100 and extending north to the HBC reserve in township 48. Surveyor Nelson explained to Peter Chapman that he had no authority to mark off this settlement because it was outside townships 46 and 47. However, he laid out a temporary reserve in the area, saying that “possibly the Department might secure it for them.” He then proceeded to mark out the reserve in townships 46 and 47, noting the rich soil, “luxuriant herbage,” stands of poplar for timber, many lakes and swamps, and “small prairies of rich soil.” The survey report concludes by stating: “The reserve is well watered by Carrot River and Goose Hunting Creek and contains an area of about 65 square miles.”

Nelson’s field notes refer to IR 100A as being “for Indians of the Cumberland District.”

On June 21, 1888, the Department of Indian Affairs forwarded a tracing of the IR 100A plan of survey “for the Cumberland Band of Indians on the Carrot River near Fort à la Corne” to the Department of the Interior. The accompanying letter explained that the temporary reserve surveyed by Nelson was occupied by five “heads of families of the Cumberland contingent under Chapman, and if available for Indian Reserve purposes should form part of the Reserve.” The Department of the Interior approved the request on July 9, 1888. IR 100A was confirmed by Order in Council on May 17, 1889, “[f]or the Indians of Cumberland District (of Treaty No. 5),” including the extra 2.4 square miles adjacent to the east side of the James Smith reserve.

Department Support for Agriculture at Fort à la Corne

The original intention of the Cumberland band members who moved to Fort à la Corne was to settle and take up farming as a new way of life, and it appears that the department granted the reserve at IR 100A in order to facilitate their wishes in this regard. DSGIA Vankoughnet wrote in 1884: “This Department is most anxious to accommodate the Cumberland Indians with a Reserve, as they

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149 John C. Nelson, DLS, In Charge of Indian Reserve Surveys, to SGIA, December 30, 1887, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1887, 275 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 35).
150 Natural Resources Canada, Field book 151 CLSR, John C. Nelson, DLS, “Treaty No. 6, North West Territories, Field Notes of the survey of the Boundaries of Indian Res. No. 100a (for Indians of the Cumberland District) at Carrot River,” July—August 1887 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 4b, p. 2).
151 R. Sinclair, for DSGIA, to A.M. Burgess, Deputy Minister of the Interior, June 21, 1888, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, pp. 273–81); see also W.A. Austin, for Deputy Minister of Indian Affairs, to Mr McNeill, June 15, 1888, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 277–78).
152 P.B. Douglas, Assistant Secretary, Department of the Interior, to L. Vankoughnet, DSGIA, July 9, 1888, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 284).
are, for Indians, progressive and industrious, and it is important to encourage them as much as possible.”

The Cumberland members at Fort à la Corne took up the challenge of breaking land and attempting to farm with enthusiasm, but there was little support to encourage them. Indian Agent Rae reported in September 1885 that the Cumberland people were hard working and had already broken 60 acres of land and put up 30 tons of hay, and that they hoped to receive a few oxen and a farming instructor from the department to assist them. Six months later, Inspector Herchmer reported that 50 acres of the broken land had grown over, and again communicated the Cumberland contingent’s request for assistance, “as they understand very little about Farming.” He recommended that an instructor be provided for the James Smith Band and the Cumberland contingent at Fort à la Corne, because they could not live entirely by hunting. Instructor Goodfellow was hired in April 1886 for a term of six months, and the department issued six oxen and seven cows to “Peter Chapman” of the “Cumberland Band” that summer, more than the amount provided for by either Treaties 5 or 6.

At the end of the year, however, Inspector Wadsworth felt that the result of the season’s work at Fort à la Corne did not warrant the expense of a farming instructor and recommended against having the Bands there devote all their time to agriculture to the exclusion of the hunt. He recommended instead that Goodfellow be appointed as “sub-agent” for the Fort à la Corne Bands. This proposal was rejected, and Goodfellow was never reappointed as farm instructor. In a marginal note to Wadsworth’s letter, Assistant Indian Commissioner Hayter Reed wrote that “it would be injudicious to endeavour to make those Indians who can obtain not a little fur and thus a fairly good

living … to turn their attention to agriculture to the same extent as others differently situated.”

From 1887 until 1893, local agents and inspectors repeatedly emphasized the need for a farming instructor for the bands at Fort à la Corne. In September 1889, Indian Agent R.S. McKenzie reported that “a farmer is very much required for Bands No. 100 & 100A in fact there is no two reserves in the Agency that requires an instructor worse than these two bands.” Again, in 1890, the agent reported that the Fort à la Corne bands were taking a greater interest in farming and needed an instructor. Assistant Indian Commissioner A.E. Forget refused, stating that there would be no use in such an expenditure since he did not really believe that the bands intended to settle down and give up the hunt. Hayter Reed’s instructions to the agent in October 1890 may reflect some of the reasons for the reluctance to provide an instructor for the Fort à la Corne bands. He wrote:

The time has arrived when the result of the large expenditure upon Indians for years past, must be shown by throwing in a large measure the burden of their maintenance upon themselves, and so considerably decreasing expenditure. … I hear from all sides of a very plentiful supply of game, so that you should be able to take a number off the ration list altogether for a time, especially among the Indians at James Smith’s and at La Corne.

Thus, while the department originally granted the reserve at Fort à la Corne for the Cumberland Band to take up farming, the lack of support from local department officials made it extremely difficult for the people to have any success in this new way of life. Without instruction, their endeavours in agriculture were not very successful, and many therefore relied on hunting for their main source of support.

Cumberland Band Movement, 1887–91
During the period from 1887 to 1891, there was still movement between the reserves at Cumberland House and at Fort à la Corne. The 1887 paylist for the

161 Marginal notation written by Assistant Indian Commissioner Hayter Reed on letter from T.P. Wadsworth, Inspector of Indian Agencies, to Edgar Dewdney, Indian Commissioner, December 3, 1886, LAC, RG 10, vol. 3773, file 35764 (ICC Exhibit 1, p. 228).


164 Hayter Reed, Indian Commissioner, to R.S. McKenzie, Indian Agent, Duck Lake Agency, October 28, 1890, LAC, RG 10, vol. 1596 (ICC Exhibit 1, p. 351).
“Cumberland Band Paid at La Corne” shows that two more families moved to IR 100A that year and were added to the paylist there. At least two additional families went to Fort à la Corne in 1887, but never received annuities on the IR 100A paylist. One of those families returned to Cumberland House in 1888 and was paid annuities for 1888 and arrears for 1887. The other family disappeared and did not return to Cumberland House.

In 1888, Agent Reader wrote to inquire whether those who still wished to leave “the Reserve at Cumberland” and settle at 100A could do so, as he believed that “the desire to leave this district, and settle on the new Reserve is on the increase.” In January of the following year, on a letter from Inspector McColl to the Superintendent General of Indian Affairs, a marginal note states that “any members of the Cumberland Band may remove to the reserve referred to.”

Later that year, however, local officials seemed to be expressing a different sentiment. In a letter regarding the transfer of four families from Cumberland to Fort à la Corne, Assistant Indian Commissioner A.E. Forget instructed Agent McKenzie “that in [the] future, you will try to discourage these changes, especially those from another Agency.”

According to the Treaty 5 Cumberland band paylists, at least three families moved to Fort à la Corne between 1888 and 1890. In 1888 and 1889, Nancy Friday and her son Jeremiah Friday were recorded on the Treaty 5 Cumberland band paylist as being “absent” at Fort à la Corne, and they subsequently “transferred to La Corne” in 1890. However, they were both paid at Cumberland House in 1891, along with arrears for the previous three years, and never appeared on the Cumberland 100A paylist. Jacob Flett Sr is also marked on the same 1890 paylist as being “transferred to La Corne”; he similarly returned to Cumberland House to be paid in 1891, along with arrears for 1890. The notation by his name states that he had returned, “not being allowed in the La Corne Band (Reserve).” One other person was...

absent at Fort à la Corne in 1890 and 1894, but she was paid with the Cumberland Band in Treaty 5 in other years.\textsuperscript{171}

**Return to the Cumberland District, 1886–91**

The oral history of Cumberland House Cree Nation elders suggests that many of those who initially moved to Fort à la Corne later returned.\textsuperscript{172} Cumberland House elder Thomas Laliberte says that people from the Cumberland Band originally moved to take up farming and gardening, “but it didn’t work out and they came back, many of them.”\textsuperscript{173} Cumberland House elder Marcel McGillivary explained that those who moved to take up farming did not receive the “materials ... for farming” that they needed in order to be successful.\textsuperscript{174} Other families returned to Cumberland House, or chose not to leave at all, “because they didn’t want to become farmers.”\textsuperscript{175}

**Leadership of Cumberland Band at Fort à la Corne, 1886–92**

There is some evidence that Peter Chapman, originally a headman of the Cumberland Band in Treaty 5, was informally acknowledged as the leader of the Cumberland contingent at Fort à la Corne by the Department of Indian Affairs. However, this practical recognition was never formalized. Beginning in 1886, Assistant Indian Commissioner Hayter Reed and the local Indian Agent (in addition to a few other officials) consistently referred to IR 100A as “Peter Chapman’s” reserve and to the Cumberland band members living at IR 100A as “Peter Chapman’s Band.” They continued to do so until around the time of Peter Chapman’s death in 1892.

Although the designation of the group as such was not entirely consistent or without confusion, it is clear that local department employees and officials most commonly referred to the group in this way. In 1887, Surveyor John C. Nelson reported that Peter Chapman was “looked upon as chief of the band”

\textsuperscript{171} Treaty annuity paylist, “Cumberland Band Paid at Cumberland.” 1890–95, no file reference available (ICC Exhibit 8, pp. 57, 60, 63, 68, 73, 79). See ticket no. 115, Emily Ballendine.

\textsuperscript{172} ICC Transcript, November 19, 2001 (ICC Exhibit 12a, p. 44, Thomas Laliberte; p. 54, Marcel McGillivary; p. 91, Lena Sarah Stewart; pp. 105, 107, 112, Rodney Settee); ICC Transcript, June 27–28, 2001 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18a, p. 30, Robert Constant); ICC Transcript, June 26, 2002 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18c, p. 20, Delbert Brittain).

\textsuperscript{173} ICC Transcript, November 19, 2001 (ICC Exhibit 12a, p. 44, Thomas Laliberte).

\textsuperscript{174} ICC Transcript, November 19, 2001 (ICC Exhibit 12a, p. 54, Marcel McGillivary); see also ICC Transcript, November 19, 2001 (ICC Exhibit 12a, p. 44, Thomas Laliberte; p. 80, Pierre Settee; p. 91, Lena Sarah Stewart; pp. 105, 107, 112, Rodney Settee); ICC Transcript, June 27–28, 2001 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18a, p. 30, Robert Constant); ICC Transcript, June 26, 2002 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18c, p. 20, Delbert Brittain).

\textsuperscript{175} ICC Transcript, November 19, 2001 (ICC Exhibit 12a, p. 80, Pierre Settee); ICC Transcript, June 27–28, 2001 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18a, p. 30, Robert Constant); ICC Transcript, June 26, 2002 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18c, p. 20, Delbert Brittain).
by the Cumberland people living at Fort à la Corne, although the Department of Indian Affairs report for that year stated that the “100a Cumberland Indians” had “no regular chief.”  

When Agent McKenzie referred to the Cumberland contingent as “Peter Chapman’s Band” in one of his 1888 monthly reports, there was some confusion in Ottawa. The department wrote to the Assistant Indian Commissioner to clarify the matter, saying that, “[a]s respecting the Band designated by Mr. McKenzie as ‘Peter Chapman’s,’ the Department has no knowledge of them under that designation.” Reed replied that the group referred to was the “section of the Cumberland Band, whose Reserve is adjoining that of James Smith.”

**Request for Separate Leadership at IR 100A, 1888**

In 1888, the Cumberland contingent at Fort à la Corne requested department permission to appoint their own Chief and councillors, separate from those of the Cumberland Band at Cumberland House. The Indian Commissioner denied their request, with this reasoning:

This Band is a fragment of the Cumberland Band of Treaty No. 5, which has already the number of Chiefs and Councillors allowed a Band, to whom, under the provisions of the Treaty, the annuities and other privileges enjoyed by such office bearers can be accorded.

It would therefore be only possible to allow of the appointment of a Chief and Councillors, who would be composed of appointees, willing to act without the annuities and privileges given the Chief and Councillors of the Cumberland Band; but one serious objection to the adoption of such an arrangement is that they would not for long remain contented with it, and would soon come to regard the withholding of payment and privileges from their office-bearers, in the light of a standing grievance.

It should be noted that Peter Chapman was never paid as either Chief or headman on the Cumberland 100A paylists. However, the Cumberland people living at IR 100A viewed him as their leader, as Surveyor Nelson observed when he surveyed the reserve there in 1887. James Smith elder James Burns

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177 Unidentified author to Hayter Reed, Assistant Indian Commissioner, February 23, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 254).

178 Hayter Reed, Assistant Indian Commissioner, to SGIA, April 16, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 270).

said that “the old people regarded him as being, when he got to ... Prairie Cree country, as a chief, a leader of his people.” Other stories suggest that he may have been a trader or an Anglican missionary or church leader. The Cumberland House Cree Nation stories say Peter Chapman was never Chief, although he may have been a member of the Cumberland Band. They also maintain that there was never a separate leadership for the Cumberland people at Fort à la Corne, apart from the Chief and council already present at Cumberland House.

BAND MEMBERSHIP

Department Practice for Transfers of Band Membership
In late 1888 and early 1889, ongoing correspondence between Indian Commissioner Hayter Reed and department officials led to the establishment of a procedure for the transfer of membership between bands. On November 12, 1888, a discussion began within the department regarding band amalgamations and membership transfers. In a letter to the SGIA on that date, DSGIA Lawrence Vankoughnet expressed his general opposition to amalgamations, on the basis of his feeling that “the more Indian Bands are kept separate from one another the better, and more especially is this the case where the Bands are divided in religious sentiment.” He did, however, make an exception in cases where at least one party was “small and unprogressive and might be benefitted.” He explained that his general reservations were based on experience in “the older Provinces,” where the practice has almost invariably been productive of very serious complications ... causing bitterness of feeling among the members of the respective Bands in regard to their rights upon the Reserve on which they had been jointly located. ... As a rule, when a Band has been allotted a Reserve, it should be kept strictly to that Reserve, and ...
no other Indians than the members of the Band should be allowed to locate thereon.185

Two weeks later, on November 23, 1888, Vankoughnet informed Indian Commissioner Hayter Reed that “it is contrary to the law” to “transfer” anyone to another band, except in cases where a woman marries into it.186 Reed disagreed with the department’s thinking on this point. He argued that the Indian Act should be amended to allow “transfers” of membership when necessary, noting that “it has been our endeavour, in the past, to prevent, as much as possible, the removal either permanent or temporary of Indians from one reserve to another; but there were occasionally cases where a judicious discretion had to be exercised.”187 In support of this proposal, he noted as an example “the breaking up of some of the reserves in the north after the late rebellion, and the consequent scattering of the Indians among other reserves” — a situation that “necessarily” created a large number of applications for transfer.188

In response, the department argued that, if transfers of membership were allowed, there would likely be much confusion regarding land and treaty rights, especially for those joining a band within a different treaty area.189 Furthermore, it was stated that the Indian Act was designed to protect the rights of Indians owning particular reserves, and, based on experience,

[n]o end of complicat[ed] questions have arisen in connection with the ownership of land and the treaty rights of Indians who were in years gone by irregularly admitted to the membership of Bands in the older Provinces of which they had not originally been members and whose rights and those of their descendants to membership and ownership were subsequently disputed by the original members of the Band.190

Reed persisted in his attempt to have the department reconsider its position, bringing attention to cases that would benefit from a change in policy. He suggested, as a possible mechanism for such transfers, that a written statement

185 L. Vankoughnet, DSGIA, to E. Dewdney, SGIA, November 12, 1888, LAC, RG 10, vol. 3806, file 52332 (ICC Exhibit 1a, pp. 92–95).
186 [L. Vankoughnet, DSGIA], to Hayter Reed, Indian Commissioner, November 23, 1888, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1a, p. 96).
187 Hayter Reed, Indian Commissioner, to SGIA, January 21, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1a, p. 97).
188 Hayter Reed, Indian Commissioner, to SGIA, January 21, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1a, p. 98).
189 [L. Vankoughnet, DSGIA], to the Indian Commissioner, January 29, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1a, pp. 100–1).
of the person desiring transfer, as well as the consent of the Chief and council of the receiving band, should be required.\textsuperscript{191}

The department seems to have acquiesced to Reed’s suggestions. In a letter dated March 18, 1889, it was conceded that, in exceptional cases, transfers should be allowed. However,

\begin{quote}
the circumstances connected with any case of transfer should be of the most exceptional nature to justify the same, and it should be done in the most formal manner, viz. the person whom it is proposed to transfer should be allowed to do so by a vote of the majority of the Indians voting members of the Band to whom this Indian to be transferred belonged, and a paper expressing their consent to his or her being transferred should be signed by the Chief & Headmen [illegible] also the party to be “transferree” should in like manner be admitted only upon a vote of the majority of the voting members of the Band to which he or she is to be transferred consenting to the same and after full explanation [having] been given to the Band that the Indian who it is proposed shall join that Band shall be entitled to share in all land and other privileges of said Band and a document signifying that such consent has been given should be signed by the Chief & Headmen of the Band to which the applicant has been admitted and should be certified by the Agent.\textsuperscript{192}
\end{quote}

The procedure for handling such transfers – requiring the written consent of a majority of the voting members of both the originating and the receiving bands – appears to be what was to become department practice.

**Settlement of Chakastaypasin Band Members at Fort à la Corne, 1885–91**

Chief Chakastaypasin and four headmen, including Kahtapiskowat (also known as Big Head), signed Treaty 6 in August 1876 near Fort Carlton, at the same time as the James Smith Band.\textsuperscript{193} IR 98 was first surveyed in 1878 for the Chakastaypasin Band on the south branch of the Saskatchewan River, near John Smith’s reserve and the settlement of Prince Albert.\textsuperscript{194}

Following the outbreak of the North-West Rebellion in 1885, the Chakastaypasin Band scattered. A number of Chakastaypasin band members initially fled to the Stoney Creek and Carrot River valley areas, one of their

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\item \textsuperscript{191} Hayter Reed, Indian Commissioner, to DSGIA, March 14, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1a, p. 106).
\item \textsuperscript{192} [L. Vankoughnet, DSGIA], to the Indian Commissioner, March 18, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1, pp. 310–11). Text is as it appears on the document, with “Indians” and “party to be” struck out.
\item \textsuperscript{193} 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), 5–6 (ICC Exhibit 13b, pp. 6–7).
\item \textsuperscript{194} Order in Council PC 1151, May 17, 1889, p. 50 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 6b).
\end{itemize}
traditional territories. The Carrot River runs through the northern portion of what would later become IR 100A, and Stoney Creek was located farther south. James Smith band elders say that Chief James Smith invited the Chakastaypasin people to camp on IR 100 until the fighting was over. At the end of 1885, six Chakastaypasin families, including Kahtapiskowat and his extended family, received their annuities on the James Smith band paylist.

One of the important outcomes of the North-West Rebellion for the Chakastaypasin Band was the department’s characterization of the entire band in 1885 as “rebels.” This generalization led to the department’s efforts to “break up” the band and depose Chief Chakastaypasin. Shortly thereafter, in 1886, a distinction was made: a portion of the band, led by Chief Chakastaypasin, continued to be viewed as “rebels,” while the remaining portion of the band, led by Kahtapiskowat, came to be viewed as “loyal.” As early as 1886, the department ordered that the Chakastaypasin band members living near Fort à la Corne be “amalgamated” with the James Smith Band. Assistant Indian Commissioner Hayter Reed later commented that the Chakastaypasin Band had consented “to join Peter Chapman’s Band,” but there is no record of this agreement.

It is difficult to determine exactly where Chakastaypasin band members were living during the years 1885–87. However, it is known that some stayed in the vicinity of Fort à la Corne, some returned to IR 98, and others either disappeared or joined other bands. Some Chakastaypasin members may have planted gardens in 1887 at or near IR 100A (surveyed that year), but returned

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199 E. Dewdney, Indian Commissioner, to Acting Indian Agent, May 25, 1886, LAC, RG 10, vol. 1591 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 234); Statement of “Chiefs and Head Men of Chakastaypasin’s and John Smith’s Bands,” c. February 1889, no file reference available (ICC Exhibit 1a, pp. 104–5).

200 Acting Indian Agent, to George Goodfellow, Farm Instructor, June 17, 1886 [LAC, RG 10, vol. 9098, book 1, p. 82] (ICC Exhibit 1a, p. 53).

201 Hayter Reed, Assistant Indian Commissioner, to SGIA, April 14, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 268).
to IR 98 for the winter. However, the surveyor made no mention of Chakastaypasin band members located at IR 100A in his survey report that year.

At the beginning of 1888, a portion of the Chakastaypasin Band (including Kahtapiskowat and his family) were living at IR 98, and at least some of the other members were living at Fort à la Corne. In January 1888, Indian Agent R.S. McKenzie reported that some of those living at Fort à la Corne had requested the department to “take back the Reserve on the South Branch, and give them a Reserve near James Smith’s at La Corne.” The department agreed in February 1888 that this exchange should be done. Agent McKenzie subsequently met with Kahtapiskowat at IR 98 in March 1888 and reported that “Big Head and his men” were prepared to relinquish the reserve at any time and join Peter Chapman’s Band, but that they expected something for so doing no matter how small.” On May 23, 1888, McKenzie reported that “Big Head and his band” had left IR 98 earlier that month and moved to Fort à la Corne to “join Chapman’s Band.”

The October 1888 Cumberland 100A paylist shows six Chakastaypasin families grouped at the end according to their Chakastaypasin ticket numbers and marked with an “A.” The notations beside these names on the paylist state that they were “now transf[erre]d” or “transf[erre]d from Chakastaypasin.” A seventh family, “transferred” that year from the James Smith Band to the Cumberland 100A paylist, was likely a former Chakastaypasin family, paid under Chakastaypasin ticket no. 13 from 1876 to
1880. The corresponding Chakastaypasin band paylist for October 1888 states that six families had “transferred to the Cumberland Band.” As noted above, the department mechanism for such “transfers” was not formalized until 1889. Furthermore, section 140 of the Indian Act, which provided the statutory basis for such membership transfers, did not come into force until 1895.

In 1889, the Chakastaypasin band paylist was discontinued. The annuities of Chief Chakastaypasin and his grandson, Neesooptahtawein, were reinstated that year (after having been withheld since 1885 from those identified by the department as “rebels”). Both men received their annuities on the Cumberland 100A paylist that year under new ticket numbers (rather than their old Chakastaypasin band ticket numbers). Chief Chakastaypasin was no longer recognized as Chief and did not receive the extra annuity associated with that position, while Kahtapiskowat continued to be recognized as a headman and received the associated extra annuity.

On October 23, 1889, Agent McKenzie reported that the Chakastaypasin Band “is now thoroughly broken up” and its members settled with the One Arrow, James Smith, and Cumberland Bands.

Although Chakastaypasin members appeared on the Cumberland 100A paylist in October 1888, it is not certain when they settled at IR 100A. However, the historical record suggests that at least some Chakastaypasin band members were settled on the southwest corner of IR 100A by 1889. Even then, former Chief Chakastaypasin and some followers continued to winter south of IR 100A near Stoney Creek. In August 1890, Indian Agent

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212 Treaty annuity paylist, Chakastaypasin Band, 1889, no file reference available (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 12a, p. 221).


216 See, for example, R.S. McKenzie, Indian Agent, Duck Lake Agency, to Hayter Reed, Indian Commissioner, April 30, 1889, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 316); R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Indian Commissioner, August 31, 1890, LAC, RG 10, vol. 3793, file 46008 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 571).

McKenzie and Inspector of Indian Agencies Alexander McGibbon reported that Kahtapiskowat and Chakastaypasin were settled at the “extreme South West corner” of IR 100A, engaged in farming and putting up houses.218

In May 1891, Indian Commissioner Hayter Reed reported that 26 Chakastaypasin band members had been “amalgamated” with the “Cumberland Band.”219 In October 1891, the Chakastaypasin members were given new ticket numbers on the Cumberland 100A paylists.220

Transfers to Cumberland Band, 1891
By 1889, it appears that most of the Cumberland band members were settled on the northern portion of IR 100A, while most of the Chakastaypasin band members chose to settle separately on the southern portion.221 For their own convenience and administrative purposes, however, local department officials reported jointly on the activities and agricultural progress of both groups at IR 100A.222

On September 4, 1891, Chakastaypasin and Cumberland band members, described as “members of the Band owning the Reserve ... known as Cumberland Reserve No. 100A,” signed a Consent to Transfer for Nanequaneum from Beardy’s Band, which stated:


221 John C. Nelson, DLS, In Charge of Indian Reserve Surveys, to SGIA, December 30, 1887, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1887, 275 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 35); Alexander McGibbon, Inspector of Indian Agencies and Reserves, to the Indian Commissioner, September 1, 1890, LAC, RG 10, vol. 3843, file 72695-1 (ICC Exhibit 1a, p. 124); see also Justus Wilson, Farmer, John Smith Reserve, to R.S. McKenzie, Indian Agent, Duck Lake Agency, February 24, 1891, LAC, RG 10, vol. 1596 (ICC Exhibit 1, p. 352); Diary of Justus Wilson, John Smith’s Reserve, July 1891, LAC, RG 10, vol. 1596 (ICC Exhibit 1, p. 355).

We the undersigned Councillors and members of the Band of Indians owning the Reserve situated in treaty No. 6 and known as the Cumberland Reserve No. 100A 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 4th day of September 1891, granted leave to “Nanequaneum” No. 35 of Beardy’s Band No. 97 to be transferred from said band to this our Band of Indians owning the Reserve as situated at Fort a la Corne in Treaty No. 6 and known as Cumberland Reserve to which transfer, we the undersigned hereby give our consent.223

The consent contains the signatures of five Cumberland band members and two Chakastaypasin band members, George Sanderson and “Big Head per G. Sanderson.”224 The department approved the transfer of Nanequaneum to “Peter Chapman’s Band” on October 20, 1891,225 and he appeared the next year as ticket no. 105 on the 1892 paylist for “Big Head’s Band 100A.”226

The October 13, 1891, Cumberland 100A paylist shows that a grandson of Kahtapiskowat moved from the James Smith Band to the Cumberland Band 100A that year and received his own ticket number, following his marriage into one of the Chakastaypasin families.227 No Consent of Band to Transfer form was signed for his admission to the Band.

Death of Peter Chapman, 1892
Peter Chapman died on April 29, 1892.228 Around this same time, there was a shift in terminology, as the Cumberland contingent began to be more commonly referred to as the Cumberland Band or some variation of Cumberland Band 100A. This usage was fairly consistent until 1902.

Paylists for Big Head and Cumberland Bands at IR 100A, 1892–96
An important departmental effort to distinguish between the Cumberland and Chakastaypasin band members living at IR 100A began in 1892, but lasted for only four years. In May 1892, on the instructions of DSGIA Vankoughnet, who was concerned with maintaining the distinction of the Cumberland Band’s

223 Consent of Band to Transfer, September 4, 1891, LAC, RG 10, vol. 3862, file 83104 (ICC Exhibit 1, p. 356).
224 Consent of Band to Transfer, September 4, 1891, LAC, RG 10, vol. 3862, file 83104 (ICC Exhibit 1, p. 356).
225 Unidentified author and recipient, October 20, 1891, LAC, RG 10, vol. 3862, file 83104 (ICC Exhibit 1a, p. 150).
226 Treaty annuity paylist, Big Head Band, 1892, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 9b, p. 2). See ticket no. 105.
228 “Register of Indian Deaths for Band 100A,” entry for April 29, 1892, LAC, RG 10, vol. 9995 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 25e, p. 33).
Treaty 5 status, Commissioner Hayter Reed instructed the Indian Agent to keep the Cumberland people separate from all others on the paylists and returns. He conceded that this distinction might be difficult, since “a portion of the Chekastaypaysin’s Band, and possibly some other Indians of Treaty Six are merged with them.” That year, a new paylist was created for “Big Head’s Band,” and the Agent’s tabular statements list the “100A Big Head’s” and the “100A Cumberland” Bands separately.

**Commutation of Annuity, 1892**

On March 11, 1892, a “Consent of Band to Commutation of Annuity” for Mrs. Albert Ballendine was signed by “Chiefs and Councillors of the Cumberland (No. 100a) Band of Indians owning the reserve situated at Fort à la Corne.” This form was signed entirely by Cumberland band members: Peter Chapman, William Head, James Head, Fredrick Okeekeep, Samuel Brittain, Patrick Brittain, and Edwin Brittain.

**Transfers into Big Head’s Band, 1892–95**

During the existence of the Big Head band paylist at IR 100A from 1892 to 1896, there were a number of transfers into Big Head’s Band by various methods.

In September 1891, Chief Chakastaypasin’s daughter (“Paskoostequean’s widow”) and two of her children entered treaty with Big Head’s Band, although

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229 [L. Vankoughnet, DSGIA], to Hayter Reed, Indian Commissioner, April 22, 1892, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 359–60).

230 Hayter Reed, Indian Commissioner, to the Indian Agent, Duck Lake Agency, May 7, 1892, no file reference available (ICC Exhibit 1a, p. 151).

231 Treaty annuity paylist, Big Head Band, 1892, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 9b, pp. 1–2); see, for example, Statement of Farming Agencies and Indian Reservations: Approximate return of grain and roots sown and harvested, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1892*, 332–35 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, pp. 120–21); Statement of Farming Agencies and Indian Reservations: Approximate return of grain and roots sown and harvested, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1893*, 387 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 136); Number and whereabouts of Indians in the North-West Territories, 1893, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1893*, 399 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 138); Number and whereabouts of Indians in the North-West Territories, 1895, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 400–3 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, pp. 186–89).


233 Consent of Band to Commutation of Annuity, March 11, 1892, LAC, RG 10, vol. 3871, file 88885 (ICC Exhibit 1, p. 358).
they did not appear on the paylist until the following year.\textsuperscript{234} In 1894, her son moved from the One Arrow paylist to her ticket on the Big Head band paylist.\textsuperscript{235} No Consent to Transfer forms were signed for his admission to the Band.

On March 26, 1894, a Consent to Transfer form was signed for the admission of Yellow Quill member Mah-sah-kee-ask to “Big Head’s Band No. 100A.” The consent states:

We the undersigned Chiefs and Councillors of the Band of Indians owning the Reserve situated in Treaty No. 6 and known as Big Head’s Cumberland Reserve No. 100A, 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 twenty-sixth day of March, 1894, granted leave to Mah-sah-kee-ask No. 84 of Yellow Quill’s Band to join our said Band 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.\textsuperscript{236}

Three Big Head band members signed the consent – George Sanderson, John Sanderson, and Big Head – along with two members of the Cumberland Band 100A.\textsuperscript{237} The Yellow Quill Band signed the corresponding Consent for the transfer on July 16, 1894.\textsuperscript{238} The DSGIA subsequently approved the “transfer” on October 1, 1894.\textsuperscript{239}

The final transfer into Big Head’s Band executed during this period was for the admission of Muskochepaketimit of Yellow Quill’s Band into “Big Head’s Band 100A” residing at “Cumberland 100A Indian Reserve.” The wording on the Consent form is the same as that on the Consent for the transfer for Mah-sah-kee-ask, except for the identification of signatories. This form states that the transfer is approved by the “Chiefs and Councillors of the Band of Indians owning the Reserve situated in Treaty No. 6 and known as Cumberland 100A Reserve.” It was signed entirely by members of Big Head’s

\textsuperscript{234} Treaty annuity paylist, Big Head Band, 1892, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 9b, p. 2). See ticket no. 107. See also Sturgeon Lake First Nation, “Families of the Chakastapaysin Band: Remarks on Homik’s Tracing Study from the Perspective of the Sturgeon Lake First Nation,” revised May 1997 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 17c, pp. 44, 46).

\textsuperscript{235} Treaty annuity paylist, Big Head Band, 1894, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 9b, p. 6). See ticket no. 107.

\textsuperscript{236} Consent of Band to Transfer, March 26, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1a, p. 153).

\textsuperscript{237} Consent of Band to Transfer, March 26, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1a, p. 153).

\textsuperscript{238} Consent of Band to Transfer, July 16, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1a, p. 155).

\textsuperscript{239} Acting DSGIA to Assistant Indian Commissioner, October 1, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1a, p. 160).
band, including Kahtapiskowat, who signed as headman. The department approved the “transfer” in October, 1894.

**Farm Instructor Appointed, 1893**

In 1893, an instructor was finally appointed for the James Smith, Big Head, and Cumberland Bands at Fort à la Corne. However, there does not appear to have been any significant change at this time in how the Fort à la Corne Bands earned a livelihood. In 1895, Agent McKenzie commented that “the Indians of these Bands cannot be looked upon as being farmers … Hunting is the main source of earnings of these bands.” This comment does not present the whole picture, as some progress had been made. Cattle raising became the focus of agricultural efforts on the James Smith and Cumberland 100A reserves, as the land there was suited to it, and some crops were grown as well. In 1895, Big Head’s Band and the Cumberland Band 100A each had 20 acres cultivated — one quarter more than the amount of the previous year.

**Surrender of 640 Acres at IR 20, 1894**

In 1892, a petition from 21 “Half-breeds of Cumberland” living near the HBC settlement at Cumberland House asked that the portion of IR 20 occupied by them be withdrawn from the reserve. On December 6, 1892, Surveyor T.D. Green wrote a memorandum to the Deputy Minister of Indian Affairs regarding this proposal. He recommended that the surrender be taken “in view of the fact that the Indians of Cumberland District have 65 sq. miles of good farming lands reserved for them on the Carrot River near Fort à la Corne.” In 1894, a surrender of 640 acres at IR 20 was accepted by Order in Council 3147.

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240 Consent of Band to Transfer, September 25, 1894, IAC, RG 10, vol. 3936, file 119588 (ICC Exhibit 1a, p. 159).
241 Acting DSGIA to Assistant Indian Commissioner, October [15], 1894, IAC, RG 10, vol. 3936, file 119588 (ICC Exhibit 1a, p. 161).
242 Alexander McGibbon, Inspector of Indian Agencies and Reserves, to SGIA, June 28, 1894, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1894, 93 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 145).
243 R.S. McKenzie, Indian Agent, to SGIA, July 15, 1895, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895, 81 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 165).
244 Statement of Farming Agencies and Indian Reservations: Approximate return of grain and roots sown and harvested, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895, 400–1 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, pp. 180–87).
245 H.T. Vergette, Head of Land Titles Section, DIAND, to Acting District Supervisor, Prince Albert Indian District, February 4, 1970, no file reference available (ICC Exhibit 4).
246 T.D. Green, Department of Indian Affairs, to Deputy Minister, Department of Indian Affairs, December 6, 1892, no file reference available (ICC Exhibit 1, p. 363).
N.W.T.,” it can be seen that an addition of 640 acres to the “Cumberland House Indian Reserve” in the Pas Agency was planned for that year. The addition, approved by Order in Council of January 25, 1902, was “in lieu of 640 acres surrendered in 1894.”248 There is no available evidence regarding whether the Cumberland band members at IR 100A were informed of this surrender or whether they participated in any vote.

**Change of Leadership for the Cumberland Band at IR 20, 1895**

Chief Albert Flett served three separate terms as Chief between 1880 and 1892.249 In July 1895, department policy was against the election of band leaders, and officials hoped to do away with the offices altogether. That month, Agent Reader wrote that “[t]he system of doing away with councillors has been adopted where the term of office had expired,” except for those bands where the “practice of denouncing the Government to obtain votes” was not practised.250 On this subject, Inspector McColl commented: “I am thoroughly convinced that all the councillors are generally worse than useless ... at all events the bands to which they belong could be prevailed upon to dispense with their positions altogether, but in the case of the Chiefs, it would be more difficult to do away with.”251

In August 1895, when Chief Jeremiah Crane’s term expired, Agent Reader wrote in his journal that the Cumberland Band refused to approve the nomination of a new Chief “as directed by the Department.” He speculated that, if they had been allowed to select their own chief,

> it is probable a number, if not the majority, would have retained the former one, who however is incompetent for the post. A bad feeling has sprung up, and work generally has ceased on the Reserve ... The opposition feeling at present evinced by many will probably die out, and the Indians it is hoped will wisely recognize that Albert Flett is the man to be at the head of Cumberland Band.252


250 Extract from journal of J. Reader, Indian Agent, Pas Agency, July 1895, LAC, RG 10, vol. 3943, file 121698-28 (ICC Exhibit 1, p. 424).


252 Extract from journal of J. Reader, Indian Agent, Pas Agency, August 1895, LAC, RG 10, vol. 3943, file 121698-28 (ICC Exhibit 1, p. 425).
The annuity paylists for 1895 state that Albert Flett was “nominated as Chief,” and he received the extra Chief’s annuity. Hayter Reed apparently disagreed with Reader’s actions, as he felt that

where it is found after sounding the Indians, that they are adverse to giving up the privilege of electing Chiefs and Councillors, the abolition should not be insisted upon. At the same time the Agent should exert himself as much as possible to meet the views of the Department on the subject.

Reed wrote to Inspector McColl in October 1895, stating that Albert Flett had not been confirmed as Chief, and inquiring whether an election for a Chief and councillors for the Cumberland Band in the Pas Agency had yet been held. He observed that Agent Reader “seems to have made the appointment though the Indians generally do not approve of the same, and as a result a bad feeling has sprung up.”

McColl disagreed with Reed’s assessment, stating that Albert Flett was “a very good man and perhaps the very best man” in the Band to become Chief, although he was appointed against the wishes of the Band, who instead wanted an election to be held. McColl recommended that, “under the circumstances,” Albert Flett be confirmed as Chief, at least until the next annuity payments.

The department confirmed Albert Flett’s appointment on November 7, 1895, and he was paid as Chief in 1895 and 1896.

Creation of Section 140 of the Indian Act, 1895
Lawrence Vankoughnet retired from his position as Deputy Superintendent General of Indian Affairs in 1893 and was succeeded by Hayter Reed. As a department official, Vankoughnet had been instrumental in having land set aside for the Cumberland band members at Fort à la Corne. He also pushed to maintain the distinction of separate treaty status for the Cumberland band members living at IR 100A, as evidenced by the 1892 separation of the Big Head Band and the Cumberland Band 100A paylists. In contrast, while he was an official in the Indian Commissioner’s office, Hayter Reed generally treated...
the Cumberland people at IR 100A as their own band. He also pushed for the establishment of a procedure for band membership transfers, as noted previously.

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 was 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 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.  

**Requests for Transfer from Cumberland House, 1896**

By 1896, the large expected migration of Cumberland band members from Treaty 5 had not materialized. On May 6, 1896, Inspector McColl inquired “if any of the Cumberland Band who desire to remove to Fort la Corne may still be allowed to do so.”  

He reported that Albert Greenleaf and his family wished to make the move and “that there are others also who will shortly make the same request.” In response, Hayter Reed, Deputy Superintendent General of Indian Affairs, instructed Indian Commissioner A.E. Forget that “the Department will allow a few who can and will work, to transfer” to Fort à la Corne “in order to better their condition.”

On May 27, 1896, F.H. Paget, writing for the Indian Commissioner, informed the Indian Agent at Duck Lake of Albert Greenleaf’s application “for transfer to the Cumberland Reserve at a la Corne” and enclosed blank Consent forms “for his admission thereto.” The letter also states that applications of others from Cumberland House would be permitted “if the Bands concerned make no opposition thereto.” On June 10, 1896, six “members of the Band of Indians owning the Reserve situated in Treaty No. Six and known as the

258 *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).


Cumberland (No. 100A) Reserve” signed the transfer form granting Albert Greenleaf “leave to ... join our said band.” However, he never appeared on the paylist at IR 100A, and no others from the Cumberland Band in Treaty 5 applied for transfer or appear on the paylists at IR 100A at this time.

**Transfer of Chakastaypasin Members to Cumberland Band 100A, 1896**

Sometime before the fall of 1895, Thomas M. Daly, the SGIA and Minister of the Interior, visited the North-West Territories and took notice of the “very fine tracts of land” within the “unoccupied and unused” Chakastaypasin and Young Chipewayan reserves. On October 18, 1895, he instructed his Deputy Minister, A.M. Burgess, to “open a correspondence with Mr. Reed as to these reserves being surrendered.” Soon after, on November 9, 1895, DSGIA Hayter Reed wrote to Indian Commissioner A.E. Forget and inquired whether the members of Chacastapasin Band were formally transferred to the other Bands with which they become amalgamated, and if not to request that the formal application for such transfer and consent of the Bands concerned to receive applicants may be obtained without delay – and transmitted to the Dept.

Reed wrote again to Forget in January 1896, asking him whether “action has been completed relative to the formal transfer” of the Chakastaypasin members to other bands. He explained that the Department of Indian Affairs intended to hand control of the Chakastaypasin reserve over to the Department of the Interior, “but desires assurance in the direction indicated before proceeding.”

On February 3, 1896, Commissioner Forget instructed the Indian Agent at Duck Lake to immediately “obtain the consent of the councils of the several Bands into which these Indians have gone, to their formal admission thereinto,” since it appeared that “no formal transfer of these Indians to the

263 Consent of Band to Transfer, June 10, 1896, LAC, RG 10, vol. 1594 (ICC Exhibit 1, p. 468).

264 J. McTaggart, Dominion Lands Agent, to T. Mayne Daly, Minister of the Interior, October 12, 1895, LAC, RG 15, Series D-II-1, vol. 724, file 390906 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 717).

265 Marginal note written on letter from J. McTaggart, Dominion Lands Agent, to T. Mayne Daly, Minister of the Interior, October 12, 1895, LAC, RG 15, Series D-II-1, vol. 724, file 390906 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 717).

266 DSGIA to A.E. Forget, Indian Commissioner, November 9, 1895, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 164).

Bands with which they subsequently amalgamated has apparently ever been obtained.”

In a letter to Forget dated February 8, 1896, Hayter Reed confirmed that the department intended to use the provisions of section 140 to obtain control of the Chakastaypasin reserve. He wrote that “the Department does not propose to take any surrender of the Chakastaypasin Reserve ... and it is largely on that account that it desires to have the transfer to other Bands, by which the original owners have forfeited all rights in the Reserve set apart for them, formally completed.” In subsequent communications with the Agent, Forget instructed that all Chakastaypasin members should be transferred to the “Cumberland Band No. 100a”, and Big Head’s Band should be “done away with.” In addition, Forget instructed that all the former Chakastaypasin members being paid with the James Smith Band should be transferred to Cumberland Band 100A as well, since they had “never formally transferred” to James Smith. 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.

While the Indian Agent and the Indian Commissioner were attempting to organize the formal transfers of Chakastaypasin members, the Department of the Interior continued to press Hayter Reed for “early action” in transferring control of the Chakastaypasin and Young Chipeewayan reserves. Immediately following this communication from the Department of the Interior, Reed wrote to Forget asking him to instruct the Agent “not to allow any evitable delay” in completing the formal transfers.

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269 Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, February 8, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 172).
271 E.H. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, April 27, 1896, LAC, RG 10, vol. 1594 (ICC Exhibit 1a, p. 175).
273 J. Hall, Secretary, Department of the Interior, to Hayter Reed, DSGIA, April 22, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 755).
Consents to Transfer Signed by Cumberland Band 100A

On May 18, 1896, Indian 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 admitting 16 Big Head families (on 15 forms) and seven James Smith families into the Cumberland Band 100A. He explained that a number of the names on the Consent forms had never appeared on the Chakastaypasin paylists, but that “these people are descendants or have become members since 1888 and have never been legally transferred to any band, even although some of them have been paid Treaty with James Smith’s Band.” Some of those referred to by McKenzie were Chakastaypasin members who had moved to the James Smith band paylists before the Rebellion in 1885. Others were not former Chakastaypasin band members, but they had family connections to members of the band. A notation on the Consent forms for these individuals states that they wished “to be transferred to Cumberland Band with the remnant of Chakastaypasin 98.” An additional Consent to Transfer form admitting one former Chakastaypasin member into the James Smith Band was also forwarded at this time, making 23 Consent forms in total.

The Consent to Transfer forms admitting the Chakastaypasin band 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

277 Consents of Band to Transfer, May 10, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 456–61, 465); see also Sturgeon Lake First Nation, “Families of the Chakastaypasin Band: Remarks on Hornik’s Tracing Study from the Perspective of the Sturgeon Lake First Nation,” revised May 1997 (ICC, James Smith Cree Nation Chakastaypasin IR98 Inquiry, Exhibit 17c, pp. 46–7, 107–10). The members referred to were Paskoostequan’s widow (Baldhead), Alexander Baldhead, Oopepeequanakhissseewayake (Hard Sounding Flute), Quaytwaywayweein, William Hard Sounding Flute, Mahsakask, and Maskochepatemit.
thereof to share in all land and other privileges of the Band, to which admission we the undersigned also give full consent.\footnote{279}

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 members with an X mark.\footnote{280} Although the Consent to Transfer forms were evidently signed by Cumberland members, Delbert Brittain says that the elders do not remember having a meeting to accept the Chakastaypasin members into their band.\footnote{281}

In his covering letter forwarding the Consent forms, McKenzie explained that

the reason the Cumberland Band did not give their consent sooner was because they wished to know if by so doing they would be allowed to appoint a Chief and Councillors. However, after I explained to them that I did not expect this privilege would be extended to them but that I would submit their desire to the Department, I got them to sign the papers without any difficulty.\footnote{282}

A marginal note signed by “F.H.P.” for the Indian Commissioner states that “[t]he Agent will be asked to inform the band that their request cannot be granted.”\footnote{283} McKenzie reported, however, that the Chakastaypasin members had not yet consented to join the Cumberland Band because “they do not wish to give up their claim to their Reserve.”\footnote{284}

In his covering letter to the DSGIA forwarding these Consent to Transfer forms and McKenzie’s letter, Commissioner Forget commented that “it will be seen that these Indians either do not comprehend the full effect of their transferring themselves to another Band or have only accepted the same conditionally.”\footnote{285} Reed replied:

\footnote{279 {\textit{Consents of Band to Transfer, May 10, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 444–65).}}
\footnote{280 {\textit{Consents of Band to Transfer, May 10, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 444–65).}}
\footnote{281 {\textit{ICC Transcript, June 26, 2002 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18c, p. 46, Delbert Brittain).}}}
\footnote{282 {\textit{R.S. McKenzie, Indian Agent, to the Indian Commissioner, May 18, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 442).}}}
\footnote{283 {\textit{Marginal note written by F.H. Paget for the Indian Commissioner on letter from R.S. McKenzie, Indian Agent, to the Indian Commissioner, May 18, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 442).}}}
\footnote{284 {\textit{R.S. McKenzie, Indian Agent, to the Indian Commissioner, May 18, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 442).}}}
\footnote{285 {\textit{F.H. Paget, for the Indian Commissioner, to DSGIA, May 23, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 177).}}}
With regard to the unwillingness of the members of the Chakastaypasin Band to surrender their title to the Reserve which they have left ... the Agent should be instructed to tell them that since by admission to other Bands they share all privileges with the Bands concerned, including the right to the Reserves, they can not, in the opinion of the Department, expect any compensation for relinquishing their own Reserve, and have in fact already done so by leaving it and taking up permanent abode upon others.

They should be reminded that it is somewhat late for them to set up such a claim after they have been virtually members of other Bands for years, which they joined entirely of their own accord, the Department refraining from making any objection; and they should be told, moreover, that in order to complete the transfers and make the privileges accorded them by the other Bands secure they should make no delay with regard to formal application for admission.

The Agent should be further instructed to act promptly in this matter, as the longer time the Indians have to think about and talk it over, and to be influenced by others, the more unreasonable they are likely to become.\textsuperscript{286}

By May 10, 1896, the department had obtained the consent of the Cumberland Band 100A to the admission of the Chakastaypasin members into their Band, but it did not yet have the consent of the Chakastaypasin members themselves for the transfers.

**Applications for Admission to Cumberland Band 100A and James Smith Band**

On June 5, 1896, Commissioner Forget instructed Agent McKenzie to obtain an application from each Chakastaypasin head of family for admission “into membership in the Band which has consented to receive them,” even though consent for their admission to IR 100A had already been obtained on May 10, 1896. Forget noted that this procedure was “necessary” “in the absence of the customary consent of band to release members applying for transfer, which cannot in this case be procured as the whole band or remnant thereof, is being transferred.”\textsuperscript{287} He wrote: “No time should be lost in having the work completed and the papers forwarded, for the longer the matter is allowed to stand open the more chance there is of the present tendency to opposition developing into a pronounced refusal, and this it is desired to avoid.”\textsuperscript{288} He

\textsuperscript{286} Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, June 2, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, pp. 811–12).

\textsuperscript{287} F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1a, p. 178).

\textsuperscript{288} F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1a, p. 178).
also instructed the Agent to tell the Chakastaypasin Band that admission into other bands entailed

all the privileges including the right to lands, which they enjoyed as members of a separate band, and for this reason they cannot expect compensation where no loss is sustained. ... In any case they have practically relinquished all claim to their old reserve by abandoning it and taking up their abode on others and after years of practical membership in such other bands, which was not opposed by the Department, it is now somewhat late to set up any claims to lands ... They might also be informed that in order to definitely assure themselves of the privileges now offered them in connection with other bands, they had better, in their own interests, make no unnecessary delay in accepting the offer while it remains open. 289

On receipt of these instructions, Agent McKenzie called a meeting “of the members who were not absent” on June 12 and made an unsuccessful attempt to get their signatures on an application for transfer. He reported that “they flatly refuse unless they are allowed something for the Checastapasins Reserve” and that, in any case, only a few members were present. 290 He suggested that “the only time it will be possible to get the Band together will be at Treaty payments and I am in hopes by that time to induce them to sign the document but I cannot say positively that I shall be able.” 291 DSGIA Reed reluctantly agreed to this plan of action, commenting to Commissioner Forget that “apparently nothing can be done in the matter pending the fresh effort to be made by the Agent later on, but you will see that it is not lost sight of.” 292 However, he instructed that, “should the Agent find it less difficult to get the Indians to make individual applications,” he should pursue that course rather than trying to get all the signatures on a single application. 293 Forget communicated these instructions to the Agent, informing him that since it was “useless” to approach the Chakastaypasin members as a whole, “except in making the trial you suggest at the approaching treaty payments,” the Agent

289 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1a, p. 179).
should “take the members individually and endeavour to win them over one by one, obtaining their signatures as occasion offers.”

On October 15, 1896, at the time of the treaty payments, 27 former Chakastaypasin families applied for admission to the Cumberland Band at IR100A, and another family applied for admission to the James Smith Band. 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. Chakastaypasin and James Smith elders do not recall stories of a meeting or a vote to transfer to another band or any talk of “becoming one band.” It is unclear from their statements whether the elders were referring to the 1896 transfer to the Cumberland Band or the 1902 amalgamation with the James Smith Band.

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.

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 the Chakastaypasin IR 98 on June 23, 1897.

No annuity payments are recorded on the paylist for “Big Head’s Band Paid at Fort à la Corne,” dated October 14 and 15, 1896. Each name has a note beside it stating that the ticket had been “transferred to Cumberland Band No. 100A,” and referencing the Indian Commissioner’s letter dated June 5, 1896, as the authority

298 Surrender for sale of Chakastaypasin IR 98, June 23, 1897, no file reference available (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 899).
for the transfer. As mentioned previously, this letter contained instructions from Forget to Agent McKenzie, instructing him to “obtain the signatures of each head of family or adult member thereof, to an application to be transferred to and admitted into membership in the Band which had consented to receive them.”

The paylist shows that 17 families containing 48 people were transferred from Big Head’s Band to the Cumberland Band 100A at that time.

The paylist for the “Cumberland No. 100A Band, Paid at Reserve Fort à la Corne” on October 14 and 15, 1896, reflects the transfers of the 17 families transferred from the Big Head band paylist. In addition, 10 families (28 people) from the James Smith Band also appear on this paylist, with a note stating that they were now “transferred” to the Cumberland Band and a reference to the Commissioner’s letter dated June 5, 1896. In all, 27 families (with 76 people) transferred to the Cumberland Band 100A at that time.

The James Smith band paylist also notes the transfer of one person from Big Head’s Band to the James Smith Band on the same date, citing the same Commissioner’s letter as the authority for the transfer.

Although all 27 Chakastaypasin families who applied for admission to the Cumberland Band on October 15, 1896, were added to the Cumberland 100A paylist and said to be “transferred,” it was noted that Consent forms had been obtained for the transfer of only 24 of these families. Some confusion was caused by variant spellings of names on the Consent forms and the application for admission, but it was finally determined that four additional Consents to Transfer and one application for admission were required to complete the formal transfers. The Indian Commissioner instructed the Agent on December 10, 1896, to obtain them “with as little delay as possible.” By March 27, 1897, all the necessary Consents to Transfer and applications for admission had been obtained, and the formal transfer of 27 Chakastaypasin families to

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300 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1a, p. 178).
301 Treaty annuity paylist, Big Head Band, October 14–15, 1896, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 9b, pp. 10–11).
the Cumberland Band 100A and one family to the James Smith Band under section 140 of the Indian Act was complete.  

In the end, the department opted to obtain a formal surrender of Chakastaypasin IR 98, one that was allegedly carried out on June 23, 1897.

Leadership of Cumberland Band at IR 20 in Treaty 5, 1895–1910  
Chief Albert Flett was confirmed as Chief of the Cumberland Band in 1895, but it turned out that he was active in the post for only about a year. The paylist for 1896 shows that he was paid as Chief that year, but it noted that he was “very sick.” On May 26, 1897, Inspector McColl informed the department that Chief Flett had been in an asylum at West Selkirk since the previous fall “in consequence of insanity,” and the Agent therefore recommended that Chief Flett be dismissed and another Chief elected. A marginal note on McColl’s letter recommended that the Chief “be deposed for incompetency.” It appears that no further action was taken, since the Secretary wrote to the Agent in 1899, asking, “If he is in the Asylum should not another Indian be appointed Chief in his place?” The Agent replied that “for some years past this Band has been scattered over the country and they have been told that no Chief or Headman would be appointed until they settled on their Reserve.”

The 1899 Department of Indian Affairs annual report lists Jeremiah Crane as the acting headman for the Cumberland Band in the Pas Agency, with the accompanying note, “Chief in Asylum.” Chief Flett died in 1902, but


310 Secretary to Joseph Courtney, Indian Agent, December 9, 1899, LAC, RG 10, vol. 3979, file 156710-28 (ICC Exhibit 1, p. 583).

311 Joseph Courtney, Indian Agent, to the Secretary, Department of Indian Affairs, January 8, 1900, LAC, RG 10, vol. 3979, file 156710-28 (ICC Exhibit 1, p. 586).

312 List of Indian Chiefs and Councillors, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899, 577 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 257).
authorization to elect a new Chief for the Cumberland Band was not obtained until 1910.313

The treaty annuity paylists show that, during the period 1895–1901, the Cumberland Band had no recognized councillors. As noted above, Jeremiah Crane was appointed as “acting headman” in 1899,314 but he did not begin receiving the extra annuity for that position until 1901.315 It is uncertain how long he held office or whether other councillors were appointed between 1901 and 1910.

Conditions in the Cumberland District, 1890s

It appears that the Cumberland Band in the Cumberland District spent little time at IR 20 in the years following its survey, since conditions required that its members travel long distances to find better hunting and fishing grounds. In his annual report for 1893, Agent Reader reported that most Cumberland band members lived in other locations near IR 20 or farther north.316 In 1899, Agent Joseph Courtney reported that, owing to difficult conditions and the loss of employment opportunities with the HBC, the Cumberland Band had in previous years “broken up into small bands” that were “scattered all over the country.”317 He reported, however, that there seemed to be a move by the Band to change this fragmentation. He explained: “They are now getting anxious to be united and settled together again, and a strong effort is being made to re-organize the band, with the hope that good results will follow.”318

In the immediate years following, however, little seemed to change, despite this desire to reunite the Band. Agent Courtney explained in 1902 that all the bands in the Pas Agency “are not confined to their reserves, but range all over in quest of a living ... They only live four or five months out of the year on their

313 Treaty annuity paylist, “Cumberland Band Paid at Cumberland,” 1902, no file reference available (ICC Exhibit 8, p. 114); Fred Fischer, Indian Agent, The Pas Agency, to the Secretary, Department of Indian Affairs, September 24, 1910, LAC, RG 10, vol. 3943, file 121698-28 (ICC Exhibit 1, p. 1111); J.D. McLean, Secretary, to Fred Fischer, Indian Agent, November 16, 1910, LAC, RG 10, vol. 3943, file 121698-28 (ICC Exhibit 1, p. 119).
314 List of Indian Chiefs and Councillors, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899, 577 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 257).
316 J. Reader, Indian Agent, Pas Agency, to SGIA, June 29, 1893, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1893, 70 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 131).
317 Joseph Courtney, Indian Agent, to SGIA, September 30, 1899, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899, 91 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 240).
318 Joseph Courtney, Indian Agent, to SGIA, September 30, 1899, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899, 91 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 240).
Inspector S.R. Marlatt confirmed this observation in 1900, when he commented of the Cumberland House reserve that it was “used more as a meeting place once a year for the annuity payments than for actual residence.”

Around the turn of the century, conditions in the Cumberland District improved dramatically. In July 1901, Agent Courtney reported that the muskrats had become very numerous and that, “since the seasons of high water have set in, fish and game can be procured much closer to the reserve and the Indians are staying more at home. The school will be opened this summer.” This situation is a dramatic change from previous years, where few lived on the reserve because the scarcity of fish and game forced them to travel long distances for subsistence. The fact that the school was being reopened further testifies to the change, since it had previously been closed because so few lived on the reserve. In September 1902, Inspector Marlatt reported that fur and fish had been “exceptionally plentiful” during the previous winter and spring, and that, “[f]or Indians following the Indian mode of life, this agency is unsurpassed.” However, Agent Courtney reported in 1902 that, although conditions had improved, “the Indians of this Agency are not confined to their reserves, but range all over in quest of a living, the district being very different from most localities where Indian Reserves are situated: there is practically speaking no farming land nor any settled community within hundreds of miles.”

Much later, additional reserves at Pine Bluff (IR 20A and IR 20B), Budd’s Point (IR 20D), and Muskeg River (IR 20C) were surveyed for band members living at those

319 Joseph Courtney, Indian Agent, to SGIA, July 26, 1902, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902, 34 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 306).
320 S.R. Marlatt, Inspector of Indian Agencies, Manitoba Superintendency, to SGIA, October 1, 1900, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900, 106 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 265).
321 Joseph Courtney, Indian Agent, Pas Agency, to SGIA, July 10, 1901, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1901, 92, 94 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, pp. 290, 292).
322 For example, Joseph Courtney, Indian Agent, Pas Agency, to SGIA, July 31, 1900, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900, 93 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 262).
323 S.R. Marlatt, Inspector of Indian Agencies, Manitoba Superintendency, to SGIA, September 15, 1902, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902, 97 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 311).
324 Joseph Courtney, Indian Agent, Pas Agency, to SGIA, July 26, 1902, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902, 34 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 306).
places. As well, a portion of the Band shared the reserve at Birch River with The Pas Band, until it was surrendered in 1918.\(^{325}\)

**EVENTS AT FORT À LA CORNE, 1897-1902**

In 1896, Agent McKenzie began reporting jointly on the “James Smith and Cumberland Reserves, Nos. 100 and 100A,” noting that “these reserves adjoin one another and are dealt with together.”\(^{326}\) He continued with this practice in all his subsequent annual reports until 1902.

After his transfer from the Chakastaypasin to the Cumberland 100A paylists, Kahtapiskowat retained his position as headman, given to him at the time of treaty. Accordingly, he received the increased headman’s annuity on the IR 100A paylists, both in the period 1888–91 before the creation of separate Big Head band paylists, and from 1896 to 1902, following his formal transfer to the Cumberland Band 100A under section 140 of the *Indian Act*. No other individual was ever paid as headman or chief on the Cumberland 100A paylists.

On an 1897 “Statement of Chiefs and Councillors” for the Duck Lake Agency, the entry for the Cumberland Band 100A lists Kahtapiskowat, with his position unspecified.\(^{327}\) On a similar statement dated 1899, Kahtapiskowat is designated as “councillor” for the Cumberland Band 100A, appointed in September 1876 “for Life or Resignation.”\(^{328}\) According to the oral history passed on to Delbert Brittain by elders, Kahtapiskowat was never accepted by the membership as either a chief or a headman. Instead, it was felt that his leadership was imposed by the department.\(^{329}\)

**Surrender and Exchange of 960 Acres at IR 100A, 1899**

In July 1898, Agent McKenzie requested that the department exchange a portion of land at the southern part of IR 100A for another area at the northern end.\(^{330}\) He reported that the south end of the reserve was of little use

\(^{325}\) H.T. Vergette, Head of Land Titles Section, DIAND, to Acting District Supervisor, Prince Albert Indian District, February 4, 1970, no file reference available (ICC Exhibit 4); ICC Transcript, November 19, 2001 (Exhibit 12a, pp. 23–24, Joseph Laliberte).


\(^{330}\) R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Secretary, Department of Indian Affairs, July 22, 1898, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 503).
because it was so dry, and that during the previous two or three years, an area just outside the northern part of the reserve had been used for wintering cattle because “there is no good water on the reserve.” Elder James Burns describes this area as a “petawikan” – a place for wintering cattle where the creek flowed year round.

In a memorandum to the Secretary, Chief Surveyor Samuel Bray suggested that the exchange be done by an order in council rather than by a surrender. He also pointed out that the reserve was originally set aside under Treaty 5 “for the Indians of the Cumberland District,” and thus the current area of 65 square miles was enough for 1,300 people.

It was decided to obtain a legal opinion on the matter from law clerk Reginald Rimmer, and his report was delivered on May 18, 1899. He recommended that a surrender be carried out for the proposed exchange. In response to Bray’s observation regarding the size of the reserve, he noted:

Although the size of the reserve is out of all proportion to the requirements of the persons residing thereon and although this disproportion may have arisen from a grave error in calculation shown on file, it is also shown on file that the Department of the 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 [and] to some extent the correspondence on file supports this view.

Rimmer observed that a reserve size of 65 square miles is sufficient for 325 persons under Treaty 6. Furthermore, given that the population of the Cumberland Band in 1883 was 345 persons, the combined area of IR 20 and IR 100A (amounting to 71.69 square miles) is “very little in excess of the proportion of land required” for a population of 345 under Treaty 6.

He went on to state:

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.

331 R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Secretary, Department of Indian Affairs, July 22, 1898, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 503).
332 ICC Transcript, November 20, 2001 (ICC Exhibit 18b, p. 52, James Burns).
333 S. Bray to the Secretary, March 15, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 537–38).
334 Reginald Rimmer, Law Clerk, Department of Indian Affairs, to unidentified recipient, May 18, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 541).
335 Reginald Rimmer, Law Clerk, Department of Indian Affairs, to unidentified recipient, May 18, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 541–42).
supports 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.\(^{336}\)

In light of Rimmer’s opinion, Samuel Bray recommended to the Secretary that a surrender be taken “from the Indians residing on the Reserve” — presumably IR 100A.\(^{337}\)

On June 5, 1899, Agent McKenzie was instructed to take a surrender “in accordance with the Indian Act” and to have the affidavit signed by a chief or a headman.\(^{338}\) The surrender, dated June 17, 1899, was made by the “Chief and Principal men of the Cumberland Band of Indians resident on our Reserve No. 100A” for the exchange of 960 acres at the southwest corner of IR 100A for “a portion of land of equal area situated at the North end of our said Reserve.”\(^{339}\) Three out of nine signatories to the surrender were former Chakastaypasin members, including Kahtapiskowat, who by this time had been transferred by the department to the Cumberland Band 100A under section 140 of the Indian Act. Kahtapiskowat signed the surrender document as “Headman.”\(^{340}\) The affidavit of execution was signed by Kahtapiskowat and Indian Agent McKenzie on June 21, 1899,\(^{341}\) and Order in Council PC 1683 accepted the surrender on August 12, 1899.\(^{342}\) There is no evidence that the Cumberland Band in the Pas Agency was informed of this surrender or participated in the vote.

Almost two years after the surrender, Agent Jones reported that the addition to the reserve had not yet been surveyed and warned: “This section of country I expect will be very soon thickly populated, as the Canadian Northern [Railway] is coming close to it[,] it is well to guard against encroachment by outsiders.”\(^{343}\)

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\(^{336}\) Reginald Rimmer, Law Clerk, Department of Indian Affairs, to unidentified recipient, May 18, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 542).

\(^{337}\) S. Bray to the Secretary, Department of Indian Affairs, May 19, 1899, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 543).


\(^{341}\) Affidavit of Robert Sutherland McKenzie, Indian Agent, and “Kahtapiskowat,” Headman, June 21, 1899, LAC, RG 2, vol. 532 (ICC Exhibit 1, p. 552).

\(^{342}\) Order in Council PC 1683, August 12, 1899, no file reference available (ICC Exhibit 1, p. 561).

\(^{343}\) W.E. Jones, Indian Agent, Duck Lake Agency, to the Secretary, Department of Indian Affairs, February 4, 1901, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 605).
Petition for Councillor, 1900

In March 1900, a petition from “the Chief and Councillors on James Smith’s Reserve Fort-a-la-Corne” was submitted to the Superintendent General, Clifford Sifton. They wrote that, since the resignation of their headman Henry Smith in 1893,

we have been without one councilor although there was an election for the vacancy but the successful candidate was not put in office. We humbly beg that the money due our reserve for this office be given … and hereafter we shall have a councilor to fill the office which is at present vacant.\(^{344}\)

Interestingly, the petition is signed by members of all three groups at Fort à la Corne: the James Smith Band, former Chakastypasin band members (now transferred by the department to the Cumberland Band 100A), and original Cumberland band members. For the James Smith Band, Chief James Smith and his three councillors — Bernard Constant, Jacob McLean, and Chekoosoo — signed. Samuel Brittain and Michael Okeekeep, as well as former Chakastypasin band members George Sanderson and Neesoopahtawein, signed for the Cumberland Band 100A.\(^{345}\)

In response to the petition, Agent McKenzie reported in May that an election had been held to replace the councillor, Henry Smith, “but the Department did not approve of the man so elected and ordered me not to countenance any such meeting as it was not the intention of allowing any more Councillors to be elected, as there were already four Councillors at La Corne.” Furthermore, McKenzie concluded that “the Indians do much better, and are much more thrifty and less difficult to handle” without chiefs and councillors, since they are the ones to “put mischief into the Indians heads.”\(^{346}\)

With respect to Agent McKenzie’s statement that “there were already four Councillors at La Corne,” it might be noted that the James Smith Band had three recognized councillors, and the Cumberland Band 100A had one councillor (Kahtapiskowat) recognized by the department at this time.\(^{347}\)


\(^{345}\) Chief James Smith and others to Clifford Sifton, Minister of the Interior, March 28, 1900, LAC, RG 10, vol. 3940, file 121698-9 (ICC Exhibit 1, pp. 596–97).


\(^{347}\) List of Indian Chiefs and Councillors, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899, 581 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 259).
Commutations of Annuity, 1900
Two commutations of annuity were signed by the Cumberland Band 100A in 1900. On July 10, 1900, a “Consent of Band to Commutation of Annuity” for Eliza MacKay (née Fox) was signed by the “members and Councillors of the Cumberland Band No. 100A ... composing a majority of the members and Councillors of the said Band.” The Consent was signed by three band members, all original Chakastaypasins, who by this time had been formally transferred to the Cumberland Band 100A under section 140 of the Indian Act: Kahtapiskowat, George Sanderson, and Neesoopahtawein. Each signed on the lines entitled “Councillors,” while the line for “Chief” was blank and crossed out.348 This is the first official Cumberland band document signed only by former Chakastaypasin band members.

The following month, on August 30, 1900, a commutation of annuity for Lydia Cook (née Brittain) was signed by the “Chief and Councillors of the Cumberland Band of Indians.” The Consent was signed by four band members: Michael Okeekee, an original Cumberland band member, and “Big Head Kah ta pis kowat,” George Sanderson, and Neesoopahtawein. All designations for “Chief” and “Councillor” are crossed out, except next to the name of Big Head, who is designated as a councillor.349

Requests for Transfer from Cumberland House, 1900
On July 12, 1900, Indian Commissioner David Laird informed Agent McKenzie of a recently received request for the transfer of three individuals from “the Cumberland Band, in the Pas Agency” to the “Fort a la Corne Band.” He wrote:

Mr. Peter Turner, of Fort a la Corne, has applied to the Department through Mr. T.O. Davis, M.P., for the transfer of Jeremiah Friday, David Tea Boy and Andrew Tatispask from the Cumberland Band, in the Pas Agency, to the Fort a la Corne Band. ... if the Fort a la Corne Band is willing to receive them in their Reserve, obtain its consent on the forms herewith enclosed. In the meantime I will ascertain from Mr. Agent Courtney whether these men desire to be transferred and if so obtain the consent of the Cumberland Band.350

348 Consent of Band to Commutation of Annuity, July 10, 1900, LAC, RG 10, vol. 3953, file 135540-9 (ICC Exhibit 1, p. 599).
349 Consent of Band to Commutation of Annuity, August 30, 1900, LAC, RG 10, vol. 3953, file 135540-9 (ICC Exhibit 1, p. 601).
350 David Laird, Indian Commissioner, to the Indian Agent, Duck Lake Agency, July 12, 1900, LAC, RG 10, vol. 1599 (ICC Exhibit 1, p. 600).
The only available evidence regarding the identity of Peter Turner is an application made in 1898 for a licence to trade on “the Indian Reserve at Fort a la Corne” during the annuity payments that year, a request that was approved by the Indian Agent. 351

The Cumberland Band 100A signed Consent to Transfer forms for David Tea Boy, Andrew Tatispask, and Jeremiah Friday on August 30, 1900. The forms were signed by three original Cumberland members (Joseph Head, James Head, and Michael Okeekeep) and three former Chakastaypasin members (Kahtapiskowat, George Sanderson, and Neesoopahtawein), all of whom were by this time formally transferred by the department to the Cumberland Band 100A under section 140 of the Indian Act. Kahtapiskowat signed as “Councillor.” 352

Apparently, none of these families actually moved to IR 100A. Both Jeremiah Friday and David Tea Boy continued to receive annuities with the Cumberland Band at IR 20, and never appeared on the IR 100A paylists. 353

David Laird explained later:

In 1900, application was made by a Mr. Peter Turner at Fort a la Corne writing to Mr. T.O. Davis, M.P. asking leave for three families to remove from Cumberland House band to the La Corne reserve. ... Both bands were asked to consent to the removal. The Band of reserve 100A gave their consent in 1900, but when the Band at Cumberland House were asked for their consent to the transfer in 1901 by Mr. Agent Courtney, the reply was that there was no such man as one of those named, and Mr. Courtney reported that “the Councillor replied on behalf of David Teaboy and Jeremiah Friday, saying that they did not wish to be transferred. In the event of their desire to be transferred a vote was taken which was unanimous in refusing to give their consent.” 354

351 Peter Turner to R.S. McKenzie, Indian Agent, September 27, 1898, LAC, RG 10, vol. 9994 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 25a, p. 43).
352 Consents of Band to Transfer, August 30, 1900, LAC, RG 10, vol. 1596 (ICC Exhibit 1, pp. 602–4).
ALLEGED SURRENDER AND AMALGAMATION, 1902

Events Preceding
On January 30, 1902, C.S. Lowrie, a resident of Kinistino, a town about 5 kilometres to the west of the southern township of IR 100A, sent a letter to T.O. Davis, a local Member of Parliament. Regarding IR 100A, he wrote:

> When in Prince Albert last I intended speaking to you ... about trying to get the Southern Township of the Indian Reserve lying between here and Melfort opened up for settlement, this is a great eyesore having the reserve running so far South and the Indians all on the North part. ...

> If this could be done it would be a great benefit to both this settlement and also to the Indians.\(^{355}\)

This is the only document on the record demonstrating public pressure for a surrender of township 46 of IR 100A. It is not known if there were other such letters, but there is evidence that Davis himself was involved in bringing pressure to bear on the department for a surrender. A note on a departmental memorandum regarding the reserve states that “Mr. Davis has called attention two or three times to the desirability of throwing a portion of the Reserve 100A into the market.”\(^{356}\) Davis was a strong promoter of the Liberal government’s efforts to promote settlement through immigration, and he spoke favourably of the change brought about by the settlement of a former Indian reserve near Prince Albert.\(^{357}\) Davis also purchased lands in the sale of IR 98 in 1901 and the sale of IR 100A in 1903.\(^{358}\)

Secretary McLean forwarded Lowrie’s letter to Indian Commissioner Laird on March 6, 1902, noting that T.O. Davis delivered the letter to the department. McLean explained:

> The reserve to which Mr. Davis refers is the Cumberland Indian Reserve No. 100A. It was set apart for the Indians of Cumberland House and District. Only a small number of these Indians removed from the vicinity of Cumberland House to occupy the new reserve, and consequently it is much larger than necessary for the requirements of the present occupants.

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\(^{355}\) C.S. Lowrie to T.O. Davis, Member of Parliament, January 30, 1902, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, p. 628).

\(^{356}\) Marginal note written by Secretary J.D. McLean to the Deputy Minister on a memorandum from W.A. Orr to the Secretary, June 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 672).

\(^{357}\) “Mr. T.O. Davis’ Speech in the House of Commons on the New Settlers of the West,” *Prince Albert Advocate*, April 29, 1901, 5 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 15f, document 5).

\(^{358}\) “Research on ‘Davis Group’ and ‘Prendergast Group’: Final Historical Report,” prepared by Public History Inc., November 2000 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 15f); see also Federation of Saskatchewan Indian Nations (FSIN), Transcript of an interview with Angus Burns, April 14, 1972 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 23, pp. 1, 7).
I think it would be well to have the matter looked into ... with the view of ascertaining if the Indians will surrender the southern portion to be sold for their benefit.\textsuperscript{359}

Laird replied on June 19, 1902, with a proposal regarding the matter. He reported:

I have looked into this matter and so far as I am able to ascertain at present there is very little prospect of further emigration of Indians from the vicinity of Cumberland House to settle on this reserve. The population of the reserve at the last payments was only 122 souls, and as the area of the reserve is 65 square miles it is much larger than required for the number of Indians settled thereon. Before taking action to consult the Indians about the surrender ... it will be necessary to be in a position to state the terms the Department is prepared to offer as an inducement for them to give up the land.\textsuperscript{360}

He suggested that a small cash payment and expenditure of 10 per cent of the expected sale proceeds on implements, provisions, and such would be an appropriate “inducement.” He went on to make a further proposal:

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. ... 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.\textsuperscript{361}

In response to Laird’s letter, W.A. Orr, an official in the Lands and Timber Branch of the Department of Indian Affairs, recommended that the surrender and amalgamation should be carried out as proposed, “in view of the representations made by the Commissioner.” Interestingly, he notes that James Smith IR 100 and Cumberland IR 100A were both “set aside under Treaty No. 6.”\textsuperscript{362} A marginal note on Orr’s memorandum, signed “JAS DM” and presumably from Deputy Minister James A. Smart, inquired whether it was intended to sell the surrendered land and if there had yet been a survey.\textsuperscript{363}

\textsuperscript{359}  J.D. McLean, Secretary, to David Laird, Indian Commissioner, March 6, 1902, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, p. 635).
\textsuperscript{360}  David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, June 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 668).
\textsuperscript{361}  David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, June 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 668).
\textsuperscript{362}  W.A. Orr to the Secretary, June 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 672).
\textsuperscript{363}  Marginal note written by DSGIA James A. Smart on memorandum from W.A. Orr to the Secretary, June 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 672).
On July 4, 1902, James A. Smart, DSGIA, wrote to David Laird, enclosing forms of surrender and granting approval to Laird's proposals. He said: “Your suggestion as to the offering of a bonus of 10 per cent of proceeds of sale to be expended in implements &c., as well as suggestion as to amalgamation of James Smith and Cumberland Bands, meets with approval.”

Laird wrote to Indian Agent W.E. Jones shortly thereafter with his plans for carrying out his proposals. He informed him: “It is my intention to meet you and the Indians of James Smith and Cumberland Reserves at the payments on the 24th instant.” He went on to say, “I have been instructed by the Deputy Minister to endeavor to obtain a surrender of the southern township of the Cumberland Reserve, and I think it would be better that I should discuss the question with them before you begin payments.”

Alleged Surrender and Amalgamation, July 24, 1902
On July 24, 1902, Kahtapiskowat and George Sanderson signed a surrender of the southern township of IR 100A. On the same date, the James Smith Band and Cumberland Band 100A signed an amalgamation agreement, merging the membership, lands, and assets of the two Bands. The surrender, affidavit, and amalgamation agreement, as well as two very brief reports by David Laird, are the only contemporaneous documents in the evidentiary record that deal directly with the day’s events.

Documentary Evidence
The surrender document itself reads as follows:

KNOW ALL MEN by these Presents That We, the undersigned Chief and Principal men of The Cumberland Band of Indians resident on our Reserve No. 100A in the Province of Saskatchewan and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, his Heirs and Successors forever, All and Singular, that certain parcel or tract of land and premises, situate, lying and being in the said Reserve 100A, Province of Saskatchewan containing by admeasurement Twenty-Two Thousand and eighty acres be the same more or less and being composed of this southern township of the said Reserve, Township 46, Range 20, W.2 [I.]M. excepting thereout Sec. 6 and S ½ Sec. 7.

364 James A. Smart, DSGIA, to David Laird, Indian Commissioner, July 4, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 675).
To Have and to Hold the same unto His said Majesty The King, his Heirs and Successors forever, in trust to sell the same to such person or persons, and upon such terms as the Governor of the Dominion of Canada may deem most conducive to our welfare and that of our people.

And upon the further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed to the credit of the amalgamated Bands James Smith and Cumberland.

And We, the said Chief and Principal men of said Cumberland Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of the said land and the disposal of the moneys derived from such sale.

Stipulating, however that as soon as convenient after the money is received from the sale of the land, ten per cent thereof shall be paid to the amalgamated Band in implements, waggons, harness and other useful articles.

In witness whereof, we have hereunto set our hands and affixed our seals this Twenty fourth day of July in the year of Our Lord one thousand nine hundred and two.366

Two men signed the surrender on behalf of the Cumberland Band 100A: “Headman” Kahtapiskowat and the “Headman’s son,” George Sanderson. The document is witnessed by Donald Macdonald as interpreter, Angus McLean, and A.J. McKay. David Laird appears to have initialled various changes to the original document, but did not sign it himself.367

The affidavit attesting to the validity of the surrender document was made before Indian Agent W.E. Jones as Justice of the Peace “in and for the North West Territories” on the same day at Fort à la Corne. The document reads as follows:


And the said Hon. David Laird for himself saith:

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Cumberland Reserve 100A of the full age of twenty-one years then present.

366 “Cumberland Band of Indians,” Surrender for sale, July 24, 1902, DIAND Indian Land Registry, Instrument no. X10691 (ICC Exhibit 1, pp. 677–79). Text is as it appears on the surrender document, with “Chief and” struck out.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to its Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council and heard such assent given.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in said Release or Surrender.

And the said Kh-ta-pis-kowat says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the Cumberland Reserve 100A of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to its Rules, and held in the presence of the said.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in said Release or Surrender.

That he is a Chief Headman of the said Band of Indians and entitled to vote at the said meeting or council.

Sworn before me by the Deponents Hon. David Laird & Kh tapiskowat at Fort à la Corne District of Saskatchewan this twenty fourth day of July, A.D. 1902. 368

This affidavit is the only documentary evidence indicating that the statutory requirements of surrender were fulfilled.

As noted above, an agreement to amalgamate the James Smith Band and Cumberland Band 100A was also signed on July 24, 1902. The agreement reads:

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

368 Affidavit of Kh-ta-pis-kowat, Headman, and David Laird, Indian Commissioner, July 24, 1902, DIAND Indian Land Registry, Instrument X10691 (ICC Exhibit 1, p. 687). Text is as it appears on the document, with “Chief” struck out.
of Cumberland Reserve No. 100A, also in the said Provisional District, as represented by their Headmen, 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 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-soo & Jacob McLean, Headmen of Reserve 100 and Kh-ta-pis-kowat, 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.369

Agent W.E. Jones, Angus McLean, interpreter Donald Macdonald, and another whose identity is uncertain acted as witnesses. David Laird did not sign. It might be noted that Bernard Constant, one of the James Smith Band councillors, signed his own name, while the others signed with an X.370 This is consistent with oral evidence suggesting that Bernard Constant could read and write in English and always signed his own name, rather than using an X.371

**Testimony of Elder Angus Burns**

In 1972, James Smith band elder Angus Burns was interviewed regarding his recollection of the events that took place at IR 100 and IR 100A on July 24, 1902. The transcript of this interview is included in our record of inquiry. Angus Burns was 20 years old at the time of these events and a member of the

369 Amalgamation Agreement between the owners of IR 100 and the owners of IR 100A, July 24, 1902, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, pp. 690–91).

370 Amalgamation Agreement between the owners of IR 100 and the owners of IR 100A, July 24, 1902, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, pp. 690–91).

371 ICC Transcript, June 27–28, 2001 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18a, p. 47, Robert Constant); FSIN, Transcript of an interview with Angus Burns, April 14, 1972 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 23, p. 3); ICC Transcript, October 29–30, 2002 (ICC, James Smith Cree Nation IR 100 TLE Inquiry, Exhibit 5a, p. 44, Mervin Burns; p. 59, Isaac Daniels); see also Bernard Constant, La Corne Reserve, to Mr. Parker, June 14, 1893, LAC, RG 10, vol. 1595 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 25a, p. 13).
James Smith Band. He recalls that, on the day of surrender, David Laird, farm instructor Andrew MacKay, Angus MacKay (from the HBC), an interpreter named MacDonald, and a teacher named D. Parker were at the reserve. He also recalls that Chief James Smith and his three headmen – Bernard Constant, Jacob McLean, and Chekoosoo – were present. Burns recalls that they had meetings “a lot of times” before the surrender was taken because “the Indians didn’t want to sell this land, nobody was eager to sell.” According to his description, there was a final meeting of the “old men,” apparently including the councillors and Chief. When the agreement was made, the Chief called everyone into the old schoolhouse, where the meeting was being held, to witness the signing of the surrender document. The following excerpt gives Burns’s account of what happened:

[T]hey 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 all ready a mature young man, this was in Nineteen O Two, what I’m telling about. ... A big meeting, these were the men that were sitting there. Now they were going to sell now, this school, the old school that used to stand here, this was where the meeting was held. ... 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 [you] 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. ... There were a lot of interpreters, you know Angus MacKay, and a Andrew MacKay, Macdonald, they were chosen for

372 Treaty annuity paylist, James Smith Band, 1902, LAC, RG 10, vol. 9119, book 36 (ICC Exhibit 1, pp. 706–7); Treaty annuity paylist, James Smith Band, 1950, no file reference available (ICC, James Smith Cree Nation IR 100 TLE Inquiry, Exhibit 3b, p. 1603). Angus Burns was given his own number, no. 175, in 1901; in 1903, when the paylist was reorganized, he was assigned no. 29.
373 FSIN, Transcript of an interview with Angus Burns, April 14, 1972 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 23, p. 1).
374 FSIN, Transcript of an interview with Angus Burns, April 14, 1972 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 23, pp. 1–2).
this purpose for them to talk so they could be understood when they talked. ... The 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 [sic] 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. ... 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.  

Angus Burns recalled that only Councillor Bernard Constant could sign his name, and the others “were held to the pen.” Aside from Angus Burns’s recollections, as related by himself and Delbert Brittain, there is very little oral history regarding the surrender. The only other stories regarding these events come from elder Violet Sanderson. She recalls that her grandfather William Head, and her husband’s father and grandfather, were “in council” and involved in discussions about the sale of part of IR 100A.

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 documents 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 annuity paylist for the Cumberland Band 100A notes that 115 people, including 29 men, were paid annuities “at James Smith’s reserve.” The James Smith band paylist indicates that 107 people were paid annuities that day, including 28 adult men. Agent Jones’s annual report for

375 FSIN, Transcript of an interview with Angus Burns, April 14, 1972 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 23, pp. 2–3).
376 FSIN, Transcript of an interview with Angus Burns, April 14, 1972 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 23, p. 3).
that year notes 25 men in the James Smith Band and 27 in the Cumberland Band 100A.\(^\text{380}\)

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.\(^\text{381}\)

Laird’s Report on Alleged Surrender and Amalgamation

On August 1, 1902, David Laird reported to James Smart, the DSGIA,

that pursuant to instructions contained in your letter of the 4th July ultimo ... I proceeded to Indian Reserve No. 100A last week, and on the 24th of the said month obtained a surrender of Township 46 ... and also effected an amalgamation of James Smith’s Band of Reserve 100 with the Cumberland Band of Reserve 100A.\(^\text{382}\)

In his later annual report for the year, Laird gave another, very similar account.\(^\text{383}\) Indian Agent W.E. Jones’s annual report, dated August 15, 1902, does not refer to either the surrender or the amalgamation, and speaks of “two bands” living at IR 100 and IR 100A.\(^\text{384}\) However, Agent Jones’s 1903 annual report for “James Smith Band No. 100” states: “This reserve includes part of the reserve formerly held by the Cumberland band, 100A; the latter band surrendered part of its reserve and then joined with James Smith’s band, making one band with one reserve now known as the ‘James Smith Band, No. 100.’”\(^\text{385}\) No other report was made by Agent Jones regarding the events of July 24, 1902, with regard to the surrender or the amalgamation.

Acceptance of Surrender by Order in Council

On August 19, 1902, Clifford Sifton, the Superintendent General of Indian Affairs, submitted the surrender to the Governor General in Council for approval.\(^\text{386}\) The accepting Order in Council reads as follows:

\(^{380}\) W.E. Jones, Indian Agent, Duck Lake Agency, to SGIA, August 15, 1902, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902, 143 (ICC Exhibit 1, p. 712).
\(^{382}\) David Laird, Indian Commissioner, to James A. Smart, DSGIA, August 1, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 710).
\(^{384}\) W.E. Jones, Indian Agent, Duck Lake Agency, to SGIA, August 15, 1902, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902, 143 (ICC Exhibit 1, p. 712).
\(^{385}\) W.E. Jones, Indian Agent, Duck Lake Agency, to SGIA, August 25, 1903, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903, 162 (ICC Exhibit 1, p. 906).
\(^{386}\) Clifford Sifton, SGIA, to the Governor General in Council, August 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 714).
On a Memorandum dated 19th August, 1902, from the Superintendent General of Indian Affairs, submitting herewith, a surrender in duplicate made by the Cumberland Band of Indians in the North West Territories, of 22,080 acres, being composed of Township 46 of the said Reserve, Range 20 West 2nd Initial Meridian, excepting thereout Section 6 and South ¼ of Section 7, in order that the land may be disposed of for their benefit on such terms as the Superintendent General may consider necessary in their interests.

The Minister recommends, the surrender having been authorized, executed and attested in the manner required by the 39th Section of the Indian Act that the same be accepted by the Governor General in Council, and that the original thereof be returned to the Department of Indian Affairs and the duplicate kept of record in the Privy Council Office.

The Committee submit the same for approval. 387

The Order in Council, PC 1510, is dated October 14, 1902.

Status of James Smith Band Leadership, Post-1902

Some of the oral history evidence casts doubt on the presence of leadership in the James Smith Band at the time of these agreements. Angus Burns spoke of James Smith dying “before this was finished.” 388 At the same time, records kept in the Agency record the death of Chief James Smith on November 20, 1902, after the time of the events in question. 389

Following the death of Chief James Smith, Assistant Indian Commissioner J.A.J. McKenna recommended in June 1903 that Agent Jones select a new Chief for the amalgamated Band. 390 James Head, formerly of the Cumberland Band 100A, was appointed as the new Chief of the James Smith Band on July 24, 1903. 391 Notably, the 1903 James Smith band paylist indicates that Kahtapiskowat continued to be paid as a headman after his transfer to that Band. He received the additional headman’s annuity until his death, sometime between 1906 and 1907. 392

387 Order in Council PC 1510, October 14, 1902, LAC, RG 2, vol. 593 (ICC Exhibit 1, pp. 745–46).

388 FSIN, Transcript of an interview with Angus Burns, April 14, 1972 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 23, pp. 4–5).

389 Register of deaths, James Smith Band No. 100, entry for November 20, 1902, LAC, RG 10, vol. 9995 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 25e, p. 27). See also ICC Transcript, October 29–30, 2002 (ICC, James Smith Cree Nation TLE Inquiry, Exhibit 5a, p. 162, Oliver Constant).

390 J.A.J. McKenna, Assistant Indian Commissioner, to the Secretary, Department of Indian Affairs, June 17, 1903, LAC, RG 10, vol. 3940, file 121698-9 (ICC Exhibit 1, p. 885).


Church Official Questions Surrender

On November 12, 1902, a series of correspondence commenced between department officials and J.A. MacKay, the Archdeacon and Superintendent of Indian Missions in Saskatchewan. MacKay wrote on that day that he had discovered the surrender of part of IR 100A on a recent visit to Fort à la Corne, although he did not indicate the source of his information. He pointed out to the Superintendent General that “the transaction is certainly not to the advantage of the Indians.” He explained:

The land which has been surrendered belongs to the Cumberland Indians. Now it is quite clear that the Indians at present occupying this Reserve are not entitled by the terms of the Treaty to the amount of land which it comprises, but the land was reserved for any of the Indians of Cumberland district who might wish to settle on it. There is a large number of Indians in Cumberland district and there is scarcely any land for agricultural purposes. The Indians live by fishing and hunting, but the population is too large for the resources of the district, and how they are to subsist will be a very serious question in the near future. ... although only a comparatively small number had arrived so far, the land will be required by immigrants from Cumberland district in the future. At the present time there is no movement of the Cumberland Indians in this direction, but this is simply due to an exceptional state of things in the district. The number of muskrats, which afford the Indians abundant food during the hunting season as well as a profitable article of barter. This source of subsistence cannot last long, and, when it fails, the Indians will be reduced to greater straits than before.

I beg therefore to implore the Department to reconsider its actions in this matter, because the land will be required by the Cumberland Indians in the future, and supposing it is not required by the Indians for their own actual use, it surely is in their interest that the land should not be sold until it commands a higher price than is likely to be obtained for it at present.

On November 24, David Laird wrote to the Superintendent General of Indian Affairs to defend the department’s actions. Regarding the justification given for the surrender – that little further emigration from Cumberland House was expected – he reported that the 1891 paysheets showed 28 families, or 83 people, present at IR 100A who had removed from Cumberland House. Since that time, he was not aware of any who had actually made the move. To illustrate this point, he reviewed the various
applications from Cumberland House members at IR 20 to move to IR 100A during the years 1896 to 1900 and the outcomes of each.\textsuperscript{396} Recalling the opposition of those at Cumberland House to the transfers requested in 1900, he argued:

If all the band only last year were unanimous against transfers, it is not very probable that in the near future any of them will consent to be transferred to Reserve 100A at Fort a la Corne, consequently it appears to me that the Department would not be justified in keeping land locked up an indefinite number of years for a migration of Indians which they may never be willing to make.\textsuperscript{397}

In reply to MacKay’s assertion that the present prosperity in the “Cumberland District” would not last, Laird replied:

I ask why should muskrats become less abundant? For the last few years the floods have been so destructive in the Cumberland region that scarcely any hay could be saved for the Indians cattle. To all appearance, therefore, for the next half century it will be more of a rat country than one for white settlers, in which case the Indians will probably be undisturbed in a hunt which yields them a means of subsistence which they highly appreciate.\textsuperscript{398}

There is nothing to indicate that Laird consulted the Cumberland Band at Cumberland House to ascertain its wishes or intentions in the matter.

Archdeacon MacKay wrote to the department again at the end of the year, noting that “in Cumberland district itself, that is in the Pas Agency,” only 60 square miles of practically valueless land was set apart for nearly 1,200 treaty Indians. He explained the situation of the Treaty 6 Lac La Ronge and Montreal Lake Bands, who were given a large reserve at Little Red River because little good land could be found for them in their original location, and compared it to that of the Cumberland Band. MacKay noted that the Little Red River reserve had only three or four families living on it, while IR 100A had 125 residents. He argued that “any reason that may be advanced against depriving the Lac La Ronge Indians of their reserve on the Little Red River,

\textsuperscript{396} David Laird, Indian Commissioner, to SGIA, November 24, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 759–60).
\textsuperscript{397} David Laird, Indian Commissioner, to SGIA, November 24, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 760).
\textsuperscript{398} David Laird, Indian Commissioner, to SGIA, November 24, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 759–60).
applies much more strongly to the case of the Cumberland Indians and their reserve at Fort a la Corne."

On January 29, 1903, Samuel Bray prepared a memorandum for the DSGIA, attaching Archdeacon MacKay’s letters dated November 12 and December 29, 1902, and David Laird’s letter dated November 24, 1902. In his covering memorandum, Mr Bray wrote: “The Department made full enquiry and was advised to the effect that there was no prospect of any more of the Cumberland Indians removing to the Reserve 100A, and consequently the surrender was asked for and [obtained] from the Indians residing on the Reserve.”

A marginal note on this memorandum, initialled by DSGIA Frank Pedley, stated: “I see no reason why the intention of Dept should not be carried out by sale of Reserve as surrendered.” On February 2, 1903, Pedley reiterated his conclusions in a short letter to Archdeacon MacKay.

Archdeacon MacKay responded to Pedley’s letter on March 3, 1903. He commented that the advice received by the department stating that no further immigration was expected “must have been based solely on a view of the conditions that exist at the present time in the Cumberland district, and not on any long experience of the state of things in the past.” He argued that the current conditions in the Cumberland district were “exceptional,” but that “the time must come when there will be more need than ever” for the lands at IR 100A. The annual reports for the Pas Agency during this period uphold Archdeacon MacKay’s observations regarding conditions in that agency.

MacKay went on to inquire whether the matter had been placed before “the Indians of the Cumberland District” and submitted that this should be done “in order to make the surrender equitable.” Finally, he brought it to the attention of the department that if it was determined to go ahead with the sale, “it is not in the interest of the [Indians] that the land should be placed on the [market] at the present time or in the near future, as it must rise in

400 Samuel Bray to DSGIA, January 29, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 788).
401 Marginal notation written by DSGIA Frank Pedley on a memorandum from Samuel Bray to DSGIA, January 29, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 788).
404 See, for example, Joseph Courtenay, Indian Agent, Pas Agency, to SGIA, July 10, 1901, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1901, 94 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 292).
value with settlement of the country, and there is still abundance of land in Saskatchewan” open for “homesteading and purchase.”

Pedley replied to Archdeacon MacKay’s concerns in a final letter, dated March 19, 1903, stating: “As the eighty-three individuals now on the reserve are only entitled to 10664 acres there is a balance of 8896 acres, which would be sufficient for sixty-nine individuals. There is, therefore, a wide margin for any other Indians of the Cumberland district who might wish to remove to the reserve.” It is interesting to note that Pedley’s calculations are based on the Treaty 6 land entitlement formula, rather than that for Treaty 5. In addition, the number paid on the IR 100A paylists in 1902 was 115, rather than 83 people (the number paid in 1891). Both figures include a number of former Chakastaypasin band members, in addition to the Cumberland band emigrants.

Community Understanding of Events of 1902
It is unclear what information those at Cumberland House had with respect to the events occurring at Fort à la Corne. Indian Agent Joseph Courtney’s 1902 annual report for the Pas Agency, written two days after the surrender, makes no mention of the surrender at IR 100A. And, although Archdeacon MacKay advocated on behalf of Cumberland band members living in the Cumberland district, it is unclear from whom he learned of the surrender, and whether he communicated with the Cumberland Band at IR 20 on the matter.

There is no evidence on the record to suggest that the Cumberland Band at Cumberland House had any knowledge of the alleged surrender and amalgamation, or that it participated in any meeting or vote. The oral history shared by Cumberland House Cree Nation elders is emphatic that “nobody ever sold that land from here.” Those who remember the reserve at Fort à la Corne understand that the reserve there is still their land.

409 Joseph Courtney, Indian Agent, Pas Agency, to SGIA, July 26, 1902, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902, 85 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 307).
410 ICC Transcript, November 19, 2001 (ICC Exhibit 12a, p. 94, Lena Sarah Stewart).
Laliberte says that they still refer to the former Cumberland band members living with the James Smith Band as “Cumberland people,” or “Waskiganihk,” the same name they use to refer to themselves.\(^{412}\)

James Smith Cree Nation elders seem to agree that there was no real understanding of what the surrender meant, and no one recalls a vote being held to sell the land at IR 100A. James Burns speaks of the people being surprised to discover white settlers breaking the land on the southern township of the reserve and then being told by Indian Agent “Pond Smith” that they had sold the land, although no one could remember the meeting happening.\(^{413}\) There is no record of an Indian Agent by the name of Pond Smith in the Duck Lake Agency in the years following the surrender. However, an Indian Agent named Charles Pantaleon Schmidt was assigned to the Duck Lake Agency from October 1912 until December 1936.\(^{414}\)

The oral history of the James Smith Cree Nation does not reflect any memory of the amalgamation agreement signed on July 24, 1902, or how such an arrangement came about. Most of the elders say that there has always been a distinction among the communities within the James Smith Cree Nation and a common understanding of which lands belong to each Band.\(^{415}\) Violet Sanderson testified that “there’s never been a time that they considered themselves as one band ... they were three separate bands.”\(^{416}\) None of the oral history makes reference to a meeting, a vote, or any type of consent being given to amalgamate, or bring together into one Band, the separate communities living at IR 100 and IR 100A.\(^{417}\)
On February 3, 1905, Indian Agent J. Macarthur reported that Chief James Head requested “a statement showing how much of the Band’s money has been expended and what was the balance on hand.” The following year, on March 8, 1906, David Laird reported that

at a meeting of the Indians of James Smith’s Band held on the 19th ultimo it was resolved to ask the Department to inform them as to how much of the money realized from the sale of that portion of Indian Reserve No. 100A, which was disposed of in 1903, had so far been spent for their benefit, and what balance remains on hand. They also desire to know whether they are not entitled to draw the interest yearly.

... They also ask for a copy of the surrender and agreement of amalgamation

This is the only piece of evidence suggesting that the James Smith Band had any knowledge of the amalgamation agreement. In response, the Secretary furnished David Laird with an itemized statement of the James Smith Band’s capital and interest accounts, covering the period from July 1, 1904, until March 13, 1906.

Establishment of Trust Fund and Expenditure of Land Sale Proceeds

Trust account no. 293 for the “Cumberland Reserve, N.W.T.” was established in the fiscal year 1902/3. It seems clear that the account was established for the “Cumberland Reserve” at Fort à la Corne, since revenue from both the Chakastaypasin IR 98 and the Cumberland IR 100A land sales was deposited in the capital account that year, and management fund and survey fees relating to the sale of IR 100A were disbursed. An Order in Council dated March 7, 1903, authorized that the costs for the subdivision survey of township 46 be charged to the capital account of the “Cumberland Indians.” Following the alleged amalgamation of the James Smith Band and the Cumberland Band 100A, David Laird recommended that their trust accounts be combined as

419 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, March 8, 1906, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1048).
420 Secretary to David Laird, Indian Commissioner, March 17, 1906, enclosing statement of the James Smith Band’s capital and interest account A/C 293 for the period July 1, 1904, to March 13, 1906, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, pp. 1050-54).
421 Auditor General’s Report, 1902/1903, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903, part J, 168 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 333). A cursory search of the trust accounts from this period did not reveal a trust account for the Cumberland Band residing at IR 20.
well. He was notified on July 2, 1903, that the separate accounts had been combined into account 293, the number originally belonging to the Cumberland Band 100A. It was known as the “Cumberland (James Smith) Band” account until 1918, when the name was changed to the “James Smith Band” account 293.

Most of the 10 per cent share of the proceeds from sale, promised in the surrender document to be used for “implements, waggons, harness and other useful articles,” became available in 1904 and was spent on agricultural implements, oxen, a threshing machine, and miscellaneous other items.

It is also important to note that Kahtapiskowat received a pension from January 1904 to January 1906, which totalled $183. These payments are reflected in the statement provided to David Laird in response to the James Smith Band’s request for an accounting of the proceeds and expenditures from the sale of the surrendered portion of IR 100A. Big Head died sometime between 1906 and 1907. The last-known pension payment to Kahtapiskowat was made on January 10, 1906. He was the only person to receive this type of payment from the trust account.

The IR 100A Strip

When the lands in townships 46 and 47, range 20, W2M, were originally offered for reserve purposes in 1885, the Department of Indian Affairs was informed that township 46 had not yet been surveyed. In 1892, some years after the initial survey of IR 100A, the townships surrounding the reserve were surveyed according to the Dominion Lands system.

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423 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, May 30, 1903, no file reference available (ICC Exhibit 1, p. 860).
424 Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, July 2, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 886).
425 See the Auditor General’s Reports, 1903–18, Canada, Annual Report of the Department of Indian Affairs (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 23a). See Trust Account no. 293.
430 The IR 100A Strip is also referred to in some reports as “No Man’s Land.”
Map 3  
Cumberland IR 100A  
IR 100A and Surrounding Townships, including the IR 100A Strip

I.R. 100

I.R. 100A

Tp. 47
Tp. 46
Tp. 45

Range 21  Range 20  Range 20  Range 19

Township Lines
Land added to Reserve
I.R. Boundaries
IR 100A Strip

Tp. 47 (new 12" correction line)
Tp. 46 (old 12" correction line)

Subdivision

In the image, the map illustrates the Cumberland IR 100A and surrounding townships, emphasizing the IR 100A strip and various townships and ranges. The map includes symbols for township lines, land added to the reserve, I.R. boundaries, and the IR 100A strip. The subdivisions are indicated by a legend in the bottom right corner of the map.
The first plan of township 46, range 19, W2M, located directly to the east of the reserve, is dated June 24, 1893. It shows a slight encroachment of IR 100A on the western boundary of the township, as well as road allowances at the southern and eastern boundaries of the reserve.\(^{432}\) The 1894 plan of township 46, range 20, W2M shows the Indian reserve lying slightly north and east of the township boundaries.\(^{433}\) That is confirmed by the field book for the survey of township 45, range 20, W2M, located directly south of township 46. The field notes show that the Indian reserve boundary lies slightly north of the line separating townships 45 and 46, and slightly east of the western boundary line separating ranges 20 and 21.\(^{434}\)

Following the surrender, DLS J. Lestock Reid was instructed, on September 13, 1902, to subdivide the surrendered township for sale.\(^{435}\) He was already engaged in resurveying the boundaries of IR 100 and IR 100A at that time.\(^{436}\) On September 19, Reid reported that he was encountering a problem with the survey. He explained that he had started running boundaries, on the assumption that the township and Indian reserve boundaries were the same, but he soon discovered Indian reserve markers located out of line with the township boundaries.\(^{437}\)

After studying current township plans, he noted that small portions of township 46 at the south and west were not included in the reserve. He also found that a small strip of the reserve extended over into township 46, range 19. He concluded that alterations to the Dominion Land Surveys must have taken place since IR 100A was originally laid out in 1887.\(^{438}\) In order to deal with this unforeseen complication, Reid proposed

to exchange with the Dominion Lands the strip along the east boundary of the Reserve for that on the west and south[.] [T]his would make the boundaries of the


\(^{433}\) Department of the Interior, Topographical Surveys Branch, Survey Plan of Township No. 46, Range 20, West of Second Meridian, approved June 26, 1894 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14b).

\(^{434}\) Field Notes for the Survey of Township No. 45, Range 20, West of the Second Meridian, surveyed by P.R.A. Belanger, DLS, August 2–September 24, 1892, pp. 19–24 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14h, pp. 5–8).

\(^{435}\) J.D. McLean, Secretary, to J. Lestock Reid, DLS, September 13, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 721).

\(^{436}\) J. Lestock Reid to the Secretary, Department of Indian Affairs, September 2, 1902, LAC, RG 10, vol. 3960, file 141977-7 (ICC Exhibit 1, p. 716).

\(^{437}\) J. Lestock Reid to the Secretary, Department of Indian Affairs, September 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 726–27).

\(^{438}\) J. Lestock Reid to the Secretary, Department of Indian Affairs, September 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 726–27).
Reserve conform to the township [outlines] and include the whole of Township 46 Range 20 W2M in the Indian Reserve.\textsuperscript{439}

On September 22, Reid reported that, in addition to those irregularities already reported, a small strip of township 47 north of the 12th correction line was not included in the reserve.\textsuperscript{440} He revised his previous proposal to suggest that the strip of reserve lying in township 46, range 19, should be exchanged for the three small strips not included in the reserve at the north, west, and south, noting: “This would make the surrendered portion agree with the township outlines and save innumerable complications.”\textsuperscript{441} In summary, Reid discovered the following irregularities with the original survey of IR 100A:

- a strip of land along the southern boundary of township 46, range 20, W2M, was excluded from the reserve;
- a strip of land along the western boundary of township 46, range 20, W2M, was excluded from the reserve;
- a strip of land immediately north of the 12th correction line (the boundary between townships 46 and 47, W2M) was excluded from the reserve; and
- a strip of land along the western boundary of township 46, range 19, W2M, was included in the reserve.

Secretary McLean wrote to the Secretary of the Department of the Interior on September 25, 1902, regarding the matter. He noted that the Indian reserve “was surveyed with the intention of making its boundaries coincide with the boundaries of the said Township 46-20” and that it would simplify matters very much ... if your Department could see its way to accept the narrow strip on the East, in exchange for the narrow strips ... on the West and South of the Reserve. In other words, to make the boundaries of the Indian Reserve the boundaries of T.46-20-W.2M.\textsuperscript{442}

\textsuperscript{439} J. Lestock Reid to the Secretary, Department of Indian Affairs, September 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 727).
\textsuperscript{440} J. Lestock Reid to the Secretary, Department of Indian Affairs, September 22, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 729).
\textsuperscript{441} J. Lestock Reid to the Secretary, Department of Indian Affairs, September 22, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 730).
\textsuperscript{442} J.D. McLean, Secretary, to P.G. Keyes, Secretary, Department of the Interior, September 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 734–35).
He wrote again on October 1, 1902, to ask that the small strip between the correction line and township 46 be added to the reserve as well. He instructed Surveyor Reid on the same day that “no harm” would be done if he proceeded with the survey “as if the said strips of land had been dealt with in the manner you suggest.” The Surveyor General informed the Assistant Secretary for the Department of the Interior on October 18, 1902, that he had “no objection” to the proposal.

After much correspondence between the Department of the Interior and both the North-West Territories government and the Manitoba and North Western Railway Company, the lands in question were obtained and the exchange made. There is nothing to indicate that the James Smith Band was consulted regarding the adjustment of the reserve boundaries by the department.

Reid completed the subdivision of the surrendered portion in November and December 1902 and submitted his report in January 1903, along with subdivision plan 271 of township 46, field notes, and valuations of the different sections. This plan clearly shows the encroachment of the reserve into range 19, as well as the strips of land along the west and south that are not included in the reserve. Plan 273, dated October 1902, shows the retraced boundaries of IR 100 and 100A and include a notation in township 46 that “[s]ubsequent to the making of this plan, it has been arranged with the Department of the Interior that the east, south and west boundaries of this surrendered portion of Reserve 100A are to conform with the township

443 J.D. McLean, Secretary, to P.G. Keyes, Secretary, Department of the Interior, October 1, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 737).
444 J.D. McLean, Secretary, to J. Lestock Reid, DLS, October 1, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 738).
445 Surveyor General to the Assistant Secretary, Department of the Interior, October 18, 1902, no file reference available (ICC Exhibit 1, p. 744).
446 See, for example, Assistant Secretary, Department of the Interior, to William Whyte, Commissioner, Manitoba and North Western Railway Company, October 27, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 749); Assistant Secretary, Department of the Interior, to Deputy Commissioner of Public Works [Government of the North-West Territories], October 27, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 750); J.S. Dennis, Deputy Commissioner, November 6, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 751); W. Whyte, Agent, Manitoba and North Western Railway Company of Canada, November 8, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 752); P.G. Keyes, Secretary, Department of the Interior, to J.D. McLean, Secretary, Department of Indian Affairs, November 20, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 758).
447 J. Lestock Reid, Department of Indian Affairs, to DSGIA, January 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 778–79); J. Lestock Reid to the DSGIA, January 15, 1903, LAC, RG 10, vol. 3960, file 141977-7 (ICC Exhibit 1, pp. 784–85).
448 Natural Resources Canada, Plan 271 CLSR, “Plan showing sub-division of Portion of Indian Reserve No. 100A, Township 46 Range 20 W 2nd. M, Treaty No. 6, N.W.T.,” signed by J. Lestock Reid, DLS, February 1903 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14e, p. 45).
boundaries.” The small strip along the western portion of township 46, range 19, is visible on this plan.\(^{449}\)

Reid’s subdivision plan was subsequently revised to show the surrendered portion of the reserve as corresponding to the township boundaries. All references to the reserve’s encroachment into range 19 and misalignment with the township in range 20 have been removed, and the plan shows the quarter sections around the periphery as containing the full 160 acres.\(^{450}\) The notice of sale prepared in early 1903 indicated that all the available lands were within township 46, range 20, and it did not make reference to any fractional parcels.\(^{451}\) Successful purchasers were charged for the full 160 acres for most quarter sections on the periphery, except in cases of lands covered by water.\(^{452}\)

Events in later years suggest that, although the Departments of the Interior and of Indian Affairs undertook to shift the boundaries of the Indian reserve, this commitment was not at all clear to residents in the area. Uncertainty regarding the ownership of strips of land on all four sides of township 46 in range 20 persisted. In 1911, Reverend G.R. Turk applied to the Department of Indian Affairs to purchase a strip of land adjacent to lands already owned by his wife in the south half of section 4 and the northwest quarter of section 18, within township 46, range 20.\(^{453}\) These strips of land would have been at the south and west boundaries of the township, so it is possible that Reverend Turk was looking to purchase the lands at the south and west side in township 46 that were not originally part of the reserve. J.D. McLean, the Assistant Deputy and Secretary, replied that, “as the reserve land goes to the boundary line on both the south and west sides[,] there is no land available by this Department outside of said lines.”\(^{454}\)

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\(^{449}\) Natural Resources Canada, Plan 273 CLSR, “Plan showing the La Corne Indian Reserves No. 100 & 100A, Tps. 46, 47 & 48, R. 19, 20 & 21, W. 2nd. M., Treaty No. 6, N.W.T.,” surveyed by J. Lestock Reid, DLS, September–October 1902 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 1, p. 44).

\(^{450}\) Natural Resources Canada, Plan T481 CLSR, “Plan showing sub-division of Portion of Indian Reserve No. 100A, Tps. 46, 47 & 48, R. 19, 20 & 21, W. 2nd. M., Treaty No. 6, N.W.T.,” surveyed by J. Lestock Reid, DLS, September–October 1902 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 4, p. 2).

\(^{451}\) Draft sale notice signed by J.D. McLean, Secretary, Department of Indian Affairs, February 21, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 795); Revised sale notice, J.D. McLean, Secretary, Department of Indian Affairs, March 20, 1903, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, p. 828).

\(^{452}\) Natural Resources Canada, Plan T481 CLSR, “Plan showing sub-division of Portion of Indian Reserve No. 100A, Tps. 46, 47 & 48, R. 19, 20 & 21, W. 2nd. M., Treaty No. 6, N.W.T.,” surveyed by J. Lestock Reid, DLS, September–October 1902 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 4, p. 2); see also copy of plan attached to letter from J.D. McLean, Secretary, to David Laird, Indian Commissioner, February 28, 1903, LAC, RG 10, vol. 3562, file 82, part 9 (ICC Exhibit 1, pp. 797–98).


Around the same time period, in 1911, the Department of the Interior resurveyed township 46, range 19, directly east of the surrendered portion of IR 100A. The survey plan shows the encroachment of IR 100A on the western boundary of the township; in addition, the east halves of sections 6, 7, 18, 19, 30, and 31 in range 19 are noted as containing less than the full 160 acres for each quarter section.\(^{455}\)

On January 8, 1912, the Department of the Interior wrote to the Department of Indian Affairs inquiring what action had been taken to make the boundaries of the reserve and township coincide.\(^{456}\) The Secretary replied that since there was a “small discrepancy” between the reserve and township surveys, “the matter was simply rectified by adopting your survey” and “[n]o further action was taken by this Department.”\(^{457}\) He later reiterated that changing the limits of the reserve simply required “adopting the townships lines as originally surveyed, thus eliminating some small strips of land.”\(^{458}\)

Between 1912 and 1927, actions were taken by the Departments of the Interior and Indian Affairs, as well as by the Saskatchewan government, to close various road allowances within the 100A Strip.\(^{459}\)

In July 1912, R.C. Purser, DLS, resurveyed township 46, range 19, W2M. His instructions state that, since the reserve boundaries were changed in 1902, “there is now a strip along the west of township 46, range 19 which is Dominion lands and has not been surveyed,” and he was to establish the western boundary of the township.\(^{460}\) During his survey, he located the iron

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\(^{455}\) Department of the Interior, Surveys Branch, Survey Plan of Township 46, Range 19, West of Second Meridian (second edition), approved May 4, 1911 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14e, p. 47).

\(^{456}\) F. Nelson, for Assistant Secretary, Department of the Interior, to J.D. McLean, Assistant Deputy Minister and Secretary, Department of Indian Affairs, January 8, 1912, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14h, p. 16).

\(^{457}\) J.D. McLean, Assistant Deputy and Secretary, to the Secretary, Department of the Interior, January 20, 1912, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14h, p. 20).

\(^{458}\) J.D. McLean, Assistant Deputy and Secretary, to P.G. Keyes, Secretary, Department of the Interior, April 2, 1912, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14h, p. 19).

\(^{459}\) Notice of Transfer by the Government of the Province of Saskatchewan, Department of Public Works, November 7, 1912, no file reference available (ICC Exhibit 1, p. 1152); Order in Council, August 15, [1916], no file reference available (ICC Exhibit 1, pp. 1260–61); Acting SGIA to the Governor General in Council, August 3, 1916, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14h, p. 25); E. Deville, Surveyor General, Department of the Interior, Topographical Surveys Branch, to the Assistant Deputy and Secretary, Department of Indian Affairs, July 12, 1916, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14h, p. 23); Saskatchewan Provincial Order in Council 574/18, April 12, 1918, no file reference available (ICC Exhibit 1, pp. 1284–85); Minister of Highways, Province of Saskatchewan, to the Lieutenant Governor in Council, March 8, 1918, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14h, p. 28); H.S. Carpenter for Acting Chairman, Board of Highway Commissioners, Province of Saskatchewan, to the Secretary, Department of the Interior, October 18, 1916, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14h, p. 26); Order in Council PC 317, February 8, 1918, no file reference available (ICC Exhibit 1, p. 1283); Department of the Interior, Survey Plan of Township 46, Range 19, West of Second Meridian (fourth edition), approved October 2, 1918 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14e, p. 53).

\(^{460}\) Surveyor General to R.C. Purser, DLS, June 27, 1912, no file reference available (ICC Exhibit 1, p. 1146).

In February 1917, Walter H. Meyers, an agent for one of the landholders in the surrendered township, complained to the farm instructor at Fort à la Corne that squatters were living on a narrow strip of land immediately south of “your reserve” (presumably the unsurrendered portion of IR 100A). The strip, referred to as “No man’s land,” was described as being about 5 or 6 chains wide and 6 miles long. Meyers requested that the department have this narrow strip added to the reserve and a fence erected to keep out the squatters.\footnote{463}{Walter H. Meyers, Real Estate Agent, to Mr. Rothwell, Farm Instructor, Fort à la Corne, February 28, 1917, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1277).} Indian Agent Charles P. Schmidt forwarded the letter to the department and inquired about the ownership of the strip in question.\footnote{464}{C.P. Schmidt, Indian Agent, to the Secretary, Department of Indian Affairs, March 28, 1917, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1278).} The Secretary, mistaking the location of the land in question, replied that the land had all been sold owing to the adjustment made by the department.\footnote{465}{C.P. Schmidt, Indian Agent, to the Secretary, Department of Indian Affairs, April 5, 1917, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1279).}

The matter arose again in 1923, when the Agent was again asked to bring the matter to the department’s attention by the same landholder. Meyers confirmed that the strip of land lying south of the James Smith reserve and north of township 46, range 20, W2M, did not belong to him.\footnote{466}{J.D. McLean, Assistant Deputy and Secretary, to C.P. Schmidt, Indian Agent, Duck Lake Agency, April 5, 1917, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1279).} Agent Schmidt commented that the strip in question was known in the neighbourhood as “No Man’s Land,” and was presently occupied by squatters.\footnote{467}{J.D. McLean replied on March 21, 1923, that the narrow strip between the northern boundary of township 46 and the southern boundary of “Reserve No. 100 ” had been added to the reserve. He commented that “all the land which is there which is not sold is Indian land,” and, therefore, the squatters were residing on the reserve. He also noted that a very small strip north of section 36 in township 46, range 20, had been designated as...\footnote{468}{C.P. Schmidt, Indian Agent, to the Secretary, Department of Indian Affairs, February 24, 1923, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1301).}
fractional section 36A and was under the jurisdiction of the Department of the Interior.\textsuperscript{468}

In 1958, the owner of sections 7 and 18 in township 46, range 19, inquired whether he could acquire ownership of a 3-chain-wide strip lying between his land and the lands in range 20, and known as fractional sections 7A and 18A. He mentioned that a title search indicated that the lands were still held by the Crown as an Indian reserve. W.C. Bethune, Chief of the Reserves and Trusts branch, replied that his department had been unable to determine the status of the land.\textsuperscript{469} Bethune referred the matter to the Chief Surveyor, commenting that “we are inclined to assume that the land was never part of the reserve and by some error was never brought under the provisions of the Land Titles Act of Saskatchewan.”\textsuperscript{470}

After considering the matter, Surveyor General R. Thistlewaite replied that a search of the available records “does not enable us to answer conclusively.”\textsuperscript{471} He explained, however, that

we do recognize the possibility of an interest in these parcels on behalf of the Crown Canada by virtue of their having been included in I.R. 100A as set apart by P.C. 1151 of May 18, 1889, and not having been subsequently surrendered by the Indians, or sold by your Branch.\textsuperscript{472}

Furthermore, the eastern boundary of the reserve

is described by metes and bounds from a post and mound to a post and mound. It is apparent that the monuments referred to clearly define the east boundary, and while it was discovered later that this boundary did not coincide with the westerly boundary of Tp. 46-19-W2M, evidence of its position was recognized and recorded by subsequent surveys of that township.\textsuperscript{473}

\textsuperscript{468} J.D. McLean, Assistant Deputy and Secretary, to C.P. Schmidt, Indian Agent, March 21, 1923, LAC, RG 10, vol. 6664, file 109A-9-1A (ICC Exhibit 1, p. 1305).
\textsuperscript{469} W.C. Bethune, Chief, Reserves and Trusts, to Cairns, Gale and Eisner, Barristers and Solicitors, July 28, 1958, no file reference available (ICC Exhibit 1, p. 1365).
\textsuperscript{470} W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, to R. Thistlewaite, Surveyor General, Department of Mines and Technical Surveys, July 30, 1958, no file reference available (ICC Exhibit 1, p. 1366).
\textsuperscript{471} R. Thistlewaite, Surveyor General, to W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, September 2, 1958, no file reference available (ICC Exhibit 1, p. 1367).
\textsuperscript{472} R. Thistlewaite, Surveyor General, to W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, September 2, 1958, no file reference available (ICC Exhibit 1, pp. 1367–68).
He also noted that the fractional sections in range 19 had been surveyed as separate parcels rather than as part of the regular sections, with their eastern boundary being the boundary of the Indian reserve as surveyed by John C. Nelson in 1887. Thistlewaite felt that legal advice was required to determine whether the adjustment made by the Department of Indian Affairs had the effect of changing the original and confirmed reserve boundaries. He also noted in his letter that, according to Department of Indian Affairs files, the land gained by the change had already been sold for the benefit of the Band.\textsuperscript{474}

In 1985, a survey of the 100A Strip was completed by Saskatchewan Land Surveyor Peter Wivcharuk. Plan 71582 of the “resurvey of the boundaries of the Cumberland Indian Reserve No. 100A in Township 46, Range 19, West of the 2nd Meridian” shows road allowances along the eastern and southern boundaries of the strip, although these were closed by Order in Council in 1918. Land within the strip is labelled “Cumberland Indian Reserve No. 100A.” No other significant roads or encroachments appear on this plan.\textsuperscript{475}

As of 1992, according to the James Smith Cree Nation, there were 92.11 acres of encroachments on the 100A Strip, out of a total area of 191.33 acres.\textsuperscript{476} In response to an inquiry from the James Smith Band, the administrator for the Rural Municipality of Kinistino clarified, on June 15, 1989, that the lands within the 100A Strip “have never been assessed or taxed but as you are aware the adjacent farmers have been farming the property.”\textsuperscript{477}

\textsuperscript{474} R. Thistlewaite, Surveyor General, to W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, September 2, 1958, no file reference available (ICC Exhibit 1, pp. 1367–68).

\textsuperscript{475} Natural Resources Canada, Plan 71582 CLSR, “Plan and Field Notes of re-survey of the boundaries of the Cumberland Indian Reserve No. 100A in Township 46, Range 19, West of the Second Meridian,” surveyed by P. Wivcharuk, Saskatchewan Land Surveyor, October 1985 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14e, pp. 71a–87).


\textsuperscript{477} Larry W. Edeen, Administrator, Rural Municipality of Kinistino No. 459, to Delbert Brittain, James Smith Band, June 15, 1989, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 14a).
PART III

ISSUES

The Indian Claims Commission is inquiring into the following five issues:

1. Did the “Peter Chapman Band” become a separate band from the Cumberland House Cree Nation at any time prior to 1902?
   (a) What was required by law to separate these Bands; and
   (b) Were these requirements met?

2. Whether the Cumberland House Cree Nation could lawfully have been divided or split without its knowledge and consent?

3. Whether the Cumberland House Cree Nation could be deprived of its reserve without its knowledge and consent?

4. If the answer to question 1 is that a separate band was not established, then what is the effect on the events of 1902 and, assuming that the Cumberland House Cree Nation is entitled to compensation, what is the appropriate criteria to apply to such compensation?

5. If the answer to question 1 is that a separate band was established, then does the Band split bring an end to the interest of the Cumberland House Cree Nation in IR 100A? (i.e. What Band is the beneficial owner of IR 100A after 1902?) If so, what is the appropriate criteria to apply to compensation for the Cumberland House Cree Nation?
ANALYSIS

We begin our analysis by considering Issues 1 to 3:

1 Did the “Peter Chapman Band” become a separate band from the Cumberland House Cree Nation (CHCN) at any time prior to 1902?
   (a) What was required by law to separate these two bands; and
   (b) Were these requirements met?

2 Whether the Cumberland House Cree Nation could lawfully have been divided or split without its knowledge and consent?

3 Whether the Cumberland House Cree Nation could be deprived of its reserve without its knowledge and consent?

ISSUES 1 TO 3: THE PARTIES’ POSITIONS

The Cumberland House Cree Nation (CHCN) takes the position that its claim arises from the loss of its interest in a portion of its reserve located near Fort à la Corne, Saskatchewan – also identified as the Cumberland Reserve 100A (IR 100A). The CHCN submitted its claim in respect to Cumberland IR 100A in 1986, with a revised submission in September 1988. By letter dated December 10, 1997, signed by John Sinclair, then the Assistant Deputy Minister, Claims and Indian Government, Indian and Northern Affairs Canada, CHCN’s claim was validated, “but not on the basis set forth in the original claim submission filed on behalf of CHCN.”

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478 Written Submission on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 4.
On December 10, 1997, the Assistant Deputy Minister stated:

These materials have also been reviewed by the Department of Justice. Based on a comprehensive review of the facts of the claim presented in the research, our preliminary position is that under the Specific Claims Policy no outstanding lawful obligation is owed by Canada to the Cumberland House Cree Nation either with regard to the surrender of 22,080 acres in the southern portion of IR #100A or with regard to the transfer to the James Smith Band of 19,520 acres through the merger of the Cumberland 100A Band and the James Smith Band in 1902.

However, it is our preliminary position that by 1891, the Cumberland House Band had split into two bands, the Cumberland House Band and the Cumberland 100A Band. One of the consequences of this band split was that the Cumberland House Band lost its interest in Reserve 100A. It is our preliminary position that a lawful obligation is owed by Canada to the Cumberland House Cree Nation for Canada’s failure to fulfill its duty to ensure an equitable division of assets between the two bands.479

In CHCN’s view, the purpose of the Indian Claims Commission’s inquiry “is not to determine whether CHCN has a claim. The fact that CHCN has a valid claim has been recognized by Canada ... The inquiry is to determine the appropriate basis of the claim and the appropriate compensation which flows out of Canada’s breach of its lawful obligation to CHCN.”480 We will therefore begin our analysis of the basis of the claim with a review of the parties’ respective legal positions.

Although Canada and the First Nation agreed on the issues put before this Commission, Canada chose, on delivering its written legal submissions, to depart from a strict analysis of each issue and, in fact, framed other issues. These issues, which Canada says arise in considering Issues 2 and 3, are as follows:

A for which group of Indians was I.R. 100A set apart?
B could Canada reallocate I.R. 100A to the Cumberland 100A Band without amending Order-in-Council 1151 setting that reserve aside for the “Indians of the Cumberland District”?481
C was a surrender necessary?481

In Canada’s view, the evidence is clear that IR 100A was set aside for the entire group of Indians known at that time, variously, as the “Cumberland House

480 Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 5, para. 6.
Band,” the “Cumberland Band,” and “the Indians of the Cumberland District of Treaty No. 5.”

When Treaty 5 was signed in 1875, a group of Indians lived in the general area of the Hudson’s Bay Company (HBC) post at Cumberland House. This group was “sufficiently cohesive” to constitute the larger unified entity known, variously, as the “Cumberland Indians,” the “Cumberland House Band,” the “Indians of the Cumberland District of Treaty No. 5,” and the “Cumberland Band.” At the time of their adhesion to Treaty 5 in 1876, Treaty Commissioner Alexander Morris referred to the entire group as the “Cumberland House Band,” but the signatories to that treaty are referred to as the “Cumberland Band.” At the time of survey of IR 100A, Dominion Land Surveyor (DLS) John C. Nelson indicated he was surveying for “the Indians of the Cumberland District of Treaty No. 5.” In Canada’s view, “it is logical that all of these appellations refer to the larger group of Indians.”

Canada takes the position that “the group of Indians resident at IR 100A did become a separate band; the Cumberland 100A Band was created from the predecessor Cumberland House Band, and the successor Cumberland House Band continued to exist.” The groups of Indians resident at IR 100A formed a new band from an existing band. The original Cumberland House Band continued to exist, although it was composed only of the remnant of its members. The separation of these two bands did not occur as the result of any one act, but became a reality over the period from 1886 to 1891.

Canada argues that band division and creation are a mixed question of fact and law. It directed the panel to consider the following factors in examining the issue of “separateness”:

1. Whether or not the two groups were co-located or were resident at different places;
2. Whether the two Bands had separate leadership;
3. Whether the two groups had separate treaty annuity paylists; and
4. Whether any other official documentation exists that would indicate the two groups are separate Bands.

In its review of the evidence, Canada points first to the geographical distance between the two groups – the Cumberland House Band being some 200 kilometres from Cumberland IR 100A. The Bands functioned, at least de

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facto, under separate leadership, with Albert Flett acting as Chief of the Cumberland House Band and Peter Chapman as the de facto leader of Cumberland IR 100A, once he had resigned from the Cumberland House Band. Also in evidence are the separate paylists for every year from 1886 forward: in Canada’s view, this separation operates as an important indicator of the federal government’s position that the groups were separate enough to warrant separate paylists.488

In support of its conclusion that no one act resulted in the separation of these two bands, Canada points, in evidence, to the various historical documents that indicate the evolution in thinking among both the officials in the Department of Indian Affairs and members of the Cumberland Band located at IR 100A. The culmination of that process resulted in the separation of these two Cumberland Bands by September 1891. Specifically, Canada points to the memorandum from Lawrence Vankoughnet, the Deputy Superintendent General of Indian Affairs (DSGIA), to Sir John A. Macdonald on November 23, 1883, in which he indicates that the group at Fort à la Corne should be designated as the “Fort à la Corne Band of Treaty No. 5,” and to the “Consent to Transfer” membership of Nanequaneum from Beardy’s Band to the Cumberland 100A Band in 1891. This second document was signed only by those who were considered by the Crown to be members of and the councillors of the Cumberland 100A Band.489

Still, Canada admits that there does appear to be confusion in some of the departmental correspondence at the time as to the separateness of these bands. Department officials sometimes used the term “Cumberland Band” as the “shorthand reference” for each group, but, on closer inspection of the context, Canada concludes that two separate groups existed.490 In its submission to the Commission, Canada argues that is reasonable to conclude that “a de facto band split had occurred. The bands had divided themselves in accordance with where they wanted to live. The government of the day recognized this reality. The group of Indians residing at IR 100A did become a separate band in fact and in law within the definition of ‘band’ under the Indian Act.”491 Given this situation, Canada asks: “[C]ould Canada reallocate I.R. 100A to the Cumberland 100A Band without amending Order-in-Council 1151 setting that reserve aside for the ‘Indians of the Cumberland District?’” Canada answers its own question by stating that Canada has, by way of royal

490 Written Submissions on Behalf of the Government of Canada, November 24, 2003, p. 49, para. 84.
prerogative, the ability to create Indian reserves. A corollary right to the
Crown’s prerogative power to establish an Indian reserve is the Crown’s
prerogative power to reallocate an Indian reserve.\footnote{Written Submissions on Behalf of the Government of Canada, November 24, 2003, pp. 54–55, paras. 99–101.} In this case, Canada
concludes: “Steps were clearly taken by the Department to reallocate the
reserve lands. Moreover, there was an intention to reallocate the lands by the
Department in a manner that recognized the factual reality of the time.
Namely, that the Cumberland House Band had formed into two separate
groups.”\footnote{Written Submissions on Behalf of the Government of Canada, November 24, 2003, p. 58, para. 105.}

In contrast, the Cumberland House Cree Nation takes the position that a
separate band, referred to as the “Peter Chapman Band,” was not established
either in fact or in law. It points to the fact that at no time were members of the
CHCN consulted about the division of the band:\footnote{Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 43, para. 98(a).} “There is no evidence that
a vote to approve this development either among the band members or by the
Chief and Council of CHCN took place.”\footnote{Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 43, para. 98(a).} It draws the attention of the panel
to the point that, by 1902, Canada did not recognize any leadership at
CHCN.\footnote{Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 43, para. 98(a).} In addition, “[t]he majority of actions which Canada may point to
when examining the question of the establishment of a separate band appear
to stem from the actions of local Indian agents.”\footnote{Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 43, para 98(b).}

CHCN argues that “the creation of Cumberland [IR] 100A represented the
fulfilment by Canada of a promise made to CHCN when Canada and CHCN
entered into treaty.”\footnote{Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, pp. 43–44, para. 99.} The actions of Canada at the time IR 100A was created
“make it clear that this reserve was being set apart for CHCN as its agricultural
land”\footnote{Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 49, para. 113.} because quality agricultural land was simply not available close to
the more northerly IR 20.

Further, CHCN argues that there was nothing in the \textit{Indian Act} before
1902 which deals with the subject of band split or the creation of a new band.
The only statutory authority appears to be found in section 140. However, this
section does not address the issue of a band split but, rather, the transfer of
members from one band to another. In the First Nation’s view, “if a decision of a band or its council was required to admit a single member or, at times, was necessary before a member could be transferred from a band, then a decision of the band was required in order for it to be split. To hold otherwise would produce an absurd result.”

In the absence of some statutory authority, then, “a split of a band would,” in CHCN’s view, “have been an internal matter for determination by the Band itself. There is, however, no evidence to suggest that CHCN, as a collective, ever agreed to such a split.” In fact, there is no evidence to indicate that such a proposition was ever put to CHCN as a whole. Finally, the Order in Council that confirmed the establishment of the Cumberland 100A reserve “[f]or the Indians of Cumberland District (of Treaty No. 5)” occurred in 1889. “If the band for whose benefit the reserve had been set aside was to be a different band than was described in the original Order in Council, then it would have been reasonable that the Order in Council confirming the establishment of the reserve would have been amended.” It was not.

**DID “PETER CHAPMAN BAND” BECOME SEPARATE FROM CHCN BEFORE 1902?**

We begin our analysis on the basis that three specific and different dates have been argued by the parties in answer to this first issue.

The James Smith Cree Nation (JSCN) will necessarily be affected by the analysis and findings of the panel in this inquiry. For this reason, therefore, its arguments will be considered here. The JSCN relies on the year 1883 as the date by which an entity known as the “Peter Chapman Band” was created and became a separate band from the Cumberland House Cree Nation.

Canada likewise argues that a separate band evolved from the Cumberland House Cree Nation and came to be known at the Cumberland 100A Band. For Canada, the creation of this new band did not result from any one act, but resulted from a series of acts that culminated in the year 1891.

Finally, the Cumberland House Cree Nation argues that a separate band, referred to as either the “Peter Chapman Band” or the “Cumberland 100 A Band,” has at no time been created, but it asks the panel to consider the issue

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502 Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 48, para. 111.
504 Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 49, para. 112.
505 Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 49, para. 113.
506 Order in Council PC 1151, May 17, 1889, pp. 54–55 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 4a).
507 Written Submissions on Behalf of the Cumberland House Cree Nation, August 28, 2003, pp. 50–51, para. 119.
up to July 24, 1902 — the date on which this alleged new band amalgamated with the James Smith Cree Band. We will frame our analysis of Issue 1 on the basis of each respective date.

**In 1883**

A review of the documentary record reveals that the “Cumberland Band” adhered to Treaty 5 in 1876. The historical record is unclear, however, 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 CHCN’s IR 20) or to the larger territory encompassing the various communities that constitute the Cumberland Band in Treaty 5.

We know from a review of the treaty adhesion document of September 7, 1876, that the “Cumberland Band” was represented by Chief John Cochrane and headmen Peter Chapman and Albert Flett.\(^508\) The adhesion defines the Cumberland Band as “the Band of Saulteaux and Swampy Cree Indians residing at ... Cumberland Island, Sturgeon River, Angling River, Pine Bluff, Beaver Lake and the Ratty Country.”\(^509\) The treaty promised a reserve for the Cumberland Band 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.’”\(^510\)

In our view, it is significant that the Crown acknowledged the shortage of land fit for cultivation at Cumberland Lake at the time it entered into Treaty 5 with the Cumberland Band. We find this acknowledgment significant because it implies that Canada understood and accepted the need to find suitable agricultural land elsewhere for the Cumberland Band — a point we will return to later in this report.

While the James Smith Cree Nation has argued that John Cochrane, Albert Flett, and Peter Chapman were “spokesmen for different camps who became Chief and Councillors because it suited the needs of Canada to fit them into the

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\(^508\) 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), 11 (ICC Exhibit 13a, p. 9).

\(^509\) 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 (ICC Exhibit 13a, p. 9).

\(^510\) 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 (ICC Exhibit 13a, p. 9).
band structure it wanted to follow in dealing with the Indians of the Cumberland District,” the panel does not intend to go behind either Treaty 5 or its adhesion documents to inquire into how the numerous bands who signed treaty came to be organized. The history of treaty making is, in our view, beyond the scope of this inquiry and not necessary for us to make a determination regarding the events at issue in this case. We therefore proceed on the basis that the Cumberland Band, as represented by the three above-named signatories, signed an adhesion to Treaty 5 in September 1876 and thus entered into a treaty relationship with the Crown on this date.

We see from the evidence that headman Peter Chapman resigned as a councillor of the Cumberland Band by 1880 and moved to Fort à la Corne in 1883. We also see from the evidence that while the designation of headman was a lifetime appointment, Peter Chapman is not referred to in department records as a “headman.”

By the time Peter Chapman migrated to Fort à la Corne in 1883, other families had already begun to move and settle on lands near the James Smith Band at that location. Concurrent with this movement of Cumberland band members, including Peter Chapman, to Fort à la Corne, we see in the evidence Chief Flett’s repeated requests for reserve land at Fort à la Corne — within four years of adhering to Treaty 5 and before a reserve had been surveyed anywhere for the Band. It is clear from the evidence that Chief Flett’s requests were motivated by the lack of quality agricultural lands at Cumberland Lake and by the Band’s desire for better farm land — a fact acknowledged in the treaty itself.

There is no doubt, based on the evidence, that the Cumberland Band requesting reserve land near Fort à la Corne was the same “band” that adhered to Treaty 5 in September 1876. In September 1880, Indian Agent Angus MacKay reported that “a portion of the Cumberland Indian[s] also request permission [sic] to be allowed a Reserve and move from the Cumberland Band to a point between Fort La Corn [sic] and the Forks of the South and North branches of the Saskatchewan [River]. About one half of the Band expressed a desire to move from Cumberland as it is unfit for farming purposes and their fisheries and hunting grounds [are] failing.” The documentary record confirms that Chief Flett made at least three separate requests on behalf of the Cumberland Band for a reserve at Fort à la Corne,

511 Written Submissions on Behalf of the Peter Chapman Cree Nation, regarding IR 100A, August 30, 2003, p. 52, para. 133.
and the local Indian Agent confirmed Chief Flett’s desires to move to Fort à la Corne on no fewer than five occasions during the period 1880 to 1884. There is nothing in the record, either in the documents or in the community’s evidence, to lead the panel to believe that the repeated requests for a reserve near Fort à la Corne were being made by Peter Chapman or that the selection of land at Fort à la Corne made by Chief Flett was for anyone other than the Cumberland Band as a whole. We find that Chief Flett was making these requests in his capacity as Chief for the whole of the Cumberland Band in Treaty 5.

Despite Chief Flett’s repeated requests, the department was consistent in its refusal to grant such requests, explaining that “it would be impossible to keep trace of these Indians and would complicate the Pay sheets.”\(^{513}\) Further, the department emphasized its concern that it was “undesirable that Indians connected with one treaty should be allotted land within the precincts of another Treaty.”\(^{514}\) Moreover, at the time of these repeated requests, the department still had not surveyed a reserve for the Cumberland Band. Concurrent with the Band’s requests that it be allowed to move to Fort à la Corne, the Band expressed its opposition to having a reserve set out at Cumberland Lake because many wanted “to leave that place.”\(^{515}\)

Nonetheless, by 1882 Dominion Land Surveyor W.A. Austin was instructed to survey a reserve for the Cumberland Band at Cumberland, and he arrived to carry out his work on August 9, 1882. Although members of the Cumberland Band initially met Austin with reluctance, they eventually changed their mind and agreed to a reserve at Cumberland Lake. By October 9, 1882, Austin began to survey land at Chief’s Island, Cumberland Island, and on two hay islands. The total land set aside for the Cumberland Band at this time was 6.29 square miles. This land would later be confirmed as IR 20 by Order in Council.\(^{516}\) In his report, Austin calculated that the Cumberland Band had an outstanding treaty land entitlement of 8,867.74 acres.\(^{517}\) It is important to note that Austin’s calculations were based on the Treaty 5 provisions of 160 acres per family of five (or 32 acres per person). With a population of 345, the Cumberland Band was entitled to 11,040.00 acres under this treaty
The poor quality of land at IR 20, however, did not go unnoticed by the department. In the Department of Indian Affairs annual report for 1884, Superintendent General John A. Macdonald referred to IR 20 “at Cumberland” as a “miserable tract of sterile land.”

Following the selection and survey of IR 20 for the Cumberland Band at Cumberland Lake in Treaty 5, DSGIA Vankoughnet reversed his position and decided to grant permission for the Cumberland Band to move to Fort à la Corne. He stated:

[O]wing to ... the utter uselessness for agricultural purposes of the land in the Reserve at Cumberland, the undersigned was led to reconsider the application made by the Cumberland Indians, and in view of the strong desire expressed by them to settle in the locality of the Carrot River for the purpose of cultivating the land and supporting themselves and families, he [Vankoughnet] considers that the point of objection referred to might be waived in this instance, and that the distinction between these Indians and those of Treaty 6 would be probably maintained sufficiently were this Band, if allowed to remove to Carrot River and take up land there, were always designated and known as the “Fort a la Corne Band of Treaty No. 5.”

We note that the first recorded migration of some of the Cumberland band members had begun before the department reversed its position; Charles and Alexander Fiddler were recorded on the August 1882 paylist for the Cumberland Band at Cumberland House as having “left reserve and gone to La Corne – Treaty No. 6.” In 1883, 30 families asked for permission to move, where “nine of their number had already settled”; in 1885, 14 families from the Cumberland Band were paid on the James Smith Band’s Treaty 6 paylist. By December 1885, 17 families were residing near James Smith, and Inspector Herchmer expected “30 additional families next summer.”

The James Smith Cree Nation takes the position that the families from the Cumberland Band (and elsewhere in the Cumberland District) which took up residence at Fort à la Corne between 1880 and 1883 did so with the intention of becoming a separate band at Fort à la Corne. Further, it was their inherent right to define their own status as a band. As well, at both common

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518 W.A. Austin, DLS, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 167 (ICC Exhibit 1, p. 78).
519 John A. Macdonald, SGIA, to the Governor General, January 1, 1885, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884, xli (ICC Exhibit 1a, p. 30). During this same period when the Hon. John A. Macdonald is reporting as the SGIA, he also held the office of Prime Minister.
521 Submissions on Behalf of the Peter Chapman Cree Nation, IR 100A Inquiry, p. 57, para. 154.
law and within the meaning of the *Indian Act*, the Band at Fort à la Corne met the definition of a “band” by 1883 — they became “a body of individuals who exist as a collective, cohesive and identifiable community.”522 The James Smith Cree Nation points to the following factors in demonstrating such a community:

- a) Was resident in the same area…;
- b) Was composed of Swampy Cree people;
- c) Was composed of Indians who had connections by kinship or personal relations with each other;
- d) Was composed of Anglicans;
- e) Had an influential leader in Peter Chapman;
- f) Was identifiable as a group which was distinct from the James Smith Band which also resided at Fort a la Corne.523

In our view, while these listed factors are possible indicators for defining a “cohesive and identifiable community,” the act of a number of families migrating to a single location in 1883 does not, in and of itself, create a band separate from the band in which the majority of members originated from — in this case, the Cumberland Band at IR 20. By 1883, what we see in the evidence are the beginnings of what would become the gradual migration of some of the members of the Cumberland Band to Fort à la Corne.

In the *Young Chipeewayan Inquiry*, the Indian Claims Commission considered whether the Young Chipeewayan Band continued to exist following the migration of its members to other bands. In that case, the Commission said:

We would observe that it is not possible to prescribe rigid *indicia* which need always be present for a group of individuals to constitute a “band,” as the factors relevant to this question may vary from case to case.524

Without rigid indicia, the panel questioned whether the common law meaning of a “band” assisted the claimants. As noted then by the Young Chipeewayan panel, and equally noted here, there is no Canadian authority to assist us in understanding whether a “band” can have a common law existence, separate and distinct from the licensure of the *Indian Act*. Furthermore, although bands are regulated by the *Indian Act* regime, they do

522 Submissions on Behalf of the Peter Chapman Cree Nation, IR 100A Inquiry, p. 57, paras. 156–57.
523 Submissions on Behalf of the Peter Chapman Cree Nation, IR 100A Inquiry, p. 58, para. 159.
not necessarily owe their existence to that legislation. In Young Chipeewayan, the panel took note of Jack Woodward, in *Native Law*, who explained that “the question of whether a body of Indians is a ‘band’ is a question of fact that must be determined prior to the determination of other substantive issues in a lawsuit.”

In this case, it is a question of fact that must be resolved with respect to the particular history of the Indians of the Cumberland District.

The James Smith Cree Nation asserts that when Peter Chapman, his friends and family, and other Indians from the Cumberland District emigrated to the Fort à la Corne area, at least by 1883, they became a self-generated band given official recognition by the Department of Indian Affairs in 1883. With the greatest of respect, we do not believe that the evidence can support such a conclusion. Rather, based on the evidence, we see the first recorded migration of Cumberland band members to Fort à la Corne on the August 1882 paylist for the Cumberland Band at Cumberland House — where notations show that Charles and Alexander Fiddler had “left reserve and gone to La Corne – Treaty No. 6.”

In February 1883, Agent McKay reported that “last summer, I noticed that several Indians had left their Reserves, and on enquiring ascertained that they had left and were receiving payments in Treaties 4 and 6.” The Cumberland Band’s paylist for 1883 shows nine families absent, including Peter Chapman, who were later paid at Fort à la Corne in 1885 on the James Smith Band’s paylist. On November 30, 1883, Inspector McColl reported that the Chief of the Cumberland Band, “on behalf of thirty families,” asked for permission to move to La Corne, “where nine of their number had already settled.”

We interpret this evidence to indicate that, by the end of 1883, nine families originally from the Cumberland Band were living at Fort à la Corne and were later paid on the James Smith paylist. There is no evidence that would lead us to conclude that the requests for a reserve were being initiated by a group of Indians seeking to assert themselves as a separate band in 1883. Rather, we see the requests for a reserve being communicated by Chief Flett and variously described as “the Cumberland Band request,” “about one half of the band,” “my people,” and “a number of the Cumberland Band.” It is apparent that each request is motivated by the

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526 Treaty annuity paylist, Cumberland Band paid at Cumberland, 1882, no file reference available (ICC Exhibit 8, p. 26).
527 James F. Graham, Indian Superintendent, to SGIA, April 17, 1883, LAC, RG 10, vol. 3634, file 6441 (ICC Exhibit 1, p. 81).
“utter uselessness for agricultural purposes of the land in the Reserve at Cumberland.” By 1883, IR 20 at Cumberland Lake had been, albeit reluctantly, surveyed and set aside for the Cumberland Band, whose population in 1882 had been 345. The total land set aside for the Cumberland Band at that time was 6.29 square miles (or 4,025.6 acres), and, as noted by Surveyor Austin, the Cumberland Band still had an outstanding treaty land entitlement of 8,867.74 acres.

Based on the totality of evidence leading up to and including 1883, there is nothing to indicate that the intention of the families relocating to Fort à la Corne from the Cumberland District was for the purpose of establishing their own band. Rather, they were motivated by the lack of quality farm land to support themselves at Cumberland Lake. Although we do not believe that the evidence supports a finding that a separate band was established by 1883, Canada has asserted that the year 1891 marks the date on which a separate band was established. We will now turn to our analysis of this period.

In 1891

Canada submits that while IR 100A was set aside for the whole of the Cumberland Band that adhered to Treaty 5, the group of Indians resident at IR 100A formed a new Band (the Cumberland 100A Band), created from an existing Band (the original Cumberland House Band). At the same time, the original Band continued to exist, although it was now composed only of the remnant of its members. Furthermore, the separation of the Cumberland 100A Band from the Cumberland House Band did not occur as the result of any one act, but became a reality over the period from 1886 to 1891. In considering the “separateness” of the two groups, Canada refers to certain factors that should be taken into account:

(a) Whether or not the two groups were co-located or were resident at different places;
b) Whether the two Bands had separate leadership;
c) Whether the two groups had separate treaty annuity pay lists; and

529 L. Vankoughnet, DSGIA, to John A. Macdonald, SGIA, November 23, 1883, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 98–100);
530 W.A. Austin, Dominion Land Surveyor, to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 167 (ICC Exhibit 1, p. 78); Natural Resources Canada, Field book 132 CLSR, W.A. Austin, “Field Notes of Indian Reserves at Cumberland, Birch River, The Pas, Bear Island Lake, Chimawawin,” 1882 (ICC Exhibit 10c, p. 6). The total reserve acreage reported by Austin in his survey report and field book do not reconcile with the final reserve acreage appearing on the survey plan for IR 20.
d) Whether any other official documentation exists that would indicate the two groups are separate Bands.\textsuperscript{532}

We are assisted by these factors, just as we found the indicia of the James Smith Cree Nation informative for considering a group to be a “cohesive and identifiable community.” We would also add another important consideration: whether reserve lands had been surveyed and set aside, and for whom. We will now review the evidence in addressing these indicia.

\textbf{Distance between the Two Groups}

There is little doubt that the Cumberland Band at IR 20 and those members settling at Fort à la Corne were separated by a great distance, particularly for the late 19th century. In the 1880s, a distance of 200 kilometres was significant, even though each group settled along the Saskatchewan River and, in all probability, enjoyed easier transportation along this waterway. Nonetheless, neither group was in close proximity to the other, and each was administered by a different Indian agency: the Pas Agency for the Cumberland Band, and the Duck Lake Agency for the Fort à la Corne residents. In spite of the 200 kilometres, there is no indication in the evidence that this distance was considered a serious impediment by the First Nation. In fact, the land at Fort à la Corne was chosen by the Cumberland Band and accepted by Canada as land fit for cultivation. In its submission, Canada makes no further argument as to the significance of the distance between these two groups. Without further assistance from the parties, we assign little, if any, weight to the simple fact that these groups settled at least 200 kilometres apart. Likewise, we do not believe that, had these groups settled at a closer distance, we would be compelled to find that this fact tips the balance of “separateness.”

\textbf{Leadership}

We agree with Canada’s inclusion of the matter of leadership as one factor in determining separateness. A review of the evidence, however, does not indicate that the department was prepared to acknowledge a Chief and council at IR 100A separate from the leadership of the Cumberland Band at IR 20. On the contrary, what we see in the evidence is the department’s total denial of separate leadership at IR 100A, on the basis that this group’s need for leadership was satisfied by the appointment of the Chief and council for

\textsuperscript{532} Written Submissions on Behalf of the Government of Canada, November 24, 2003, p. 46, para. 77.
the Cumberland Band at IR 20. Peter Chapman, originally a headman of the Cumberland Band in Treaty 5, resigned his position in 1880. While all parties may speculate as to the reasons behind his resignation, there is no evidence that would assist us in understanding his motivation for doing so. We are left with the simple fact that, in 1880, he resigned his position. Further, after his move to Fort à la Corne in 1883, there is some evidence to suggest that he was informally acknowledged by at least Indian Agent McKenzie and Surveyor Nelson as Chief, yet this practical recognition was never formalized. Indeed, it was contradicted by the department in Ottawa. When Agent McKenzie referred to the Cumberland IR 100A residents as “Peter Chapman’s Band” in one of his 1888 monthly reports, the department wrote to the Assistant Indian Commissioner, Hayter Reed, to clarify the matter, saying, “As respecting the Band designated by Mr. McKenzie as ‘Peter Chapman’s,’ the Department has no knowledge of them under that designation.”

Reed replied that the group referred to was the “section of the Cumberland Band, whose reserve is adjoining that of James Smith.” Further, while Surveyor Nelson reported that he “explained to [Peter] Chapman, who is looked upon as chief of the band” by the Cumberland contingent at La Corne, we see in the evidence that the residents at Fort à la Corne were denied their request for a Chief and councillors separate from the Cumberland Band at Cumberland Lake. In the department’s view, “[t]his Band is a fragment of the Cumberland Band of Treaty No. 5 which has already the number of Chiefs and Councillors allowed a Band.” Finally, we know that Peter Chapman was never paid as either a Chief or a headman on the IR 100A paylists. Thus we find that leadership at Fort à la Corne, separate and apart from the Chief and council at IR 20, was not recognized by the department at any point during the relevant period.

We now turn to the matter of separate paylists.

**Separate Paylists**

We know from the documentary evidence that the families that first migrated to Fort à la Corne were recorded as being absent on the 1882 Cumberland Band IR 20 paylist. These first families were paid with the James Smith Band in 1885. In September 1886, the “Cumberland Band paid at Fort la Corne” received its own paylist entitled “Treaty No. 6.” In 1886, 17 families appeared

534 Hayter Reed, Assistant Indian Commissioner, to John A. Macdonald, SGIA, April 16, 1888, LAC, RG 10, vol. 3793, fl. 40008 (ICC Exhibit 1, pp. 269–70).
on this list –16 of these families were from the Cumberland Band in Treaty 5, and one, John Constant, was from The Pas Band. Further, while the residents at IR 100A and IR 20 had separate paylists between the years 1886 and 1902, we do not place great weight on these paylists as evidence of “separateness.” As we have seen in many other cases, treaty annuity paylists are but one indicator of the department’s administration of the members residing on a reserve. Rather than evidence the Crown’s position that the groups were separate enough to warrant separate paylists, we believe that separate lists were created out of the administrative reality that these reserves were being administered by different agencies – Duck Lake and the Pas – within two different treaty areas. In addition, we believe that the separation of paylists, rather than providing evidence of the separation of bands, was the administrative instrument through which the department, in permitting members of the Cumberland Band of Treaty 5 to move to Fort à la Corne within Treaty 6, could be assured that “the distinction between these Indians and those of Treaty 6” could be maintained.

Creation of a Reserve at Fort à la Corne

As noted previously, we believe that, in addition to the four factors listed by Canada, it is also necessary to consider the establishment of IR 100A in deciding on the separateness of these two groups. From at least 1880, Chief Flett made repeated requests for a reserve at Fort à la Corne. In response, the Department of Indian Affairs continued to correspond with the Department of the Interior for available lands for a reserve at a location agreeable to the “Cumberland Band.” Nowhere in the historical record is there evidence of department officials consulting with the residents of Fort à la Corne on the location of a reserve.

In Carry the Kettle First Nation, this Commission considered the elements necessary to create a reserve under treaty to include:

- consultation and selection;
- survey; and
- acceptance.  


Based on the evidence in this inquiry, we find that, at all times, it was the Cumberland Band at IR 20 that requested, selected, and finally accepted the land as a reserve at Fort à la Corne. As previously stated, between 1880 and 1884, the Indian Agent expressed the Cumberland Band’s desire to move to Fort à la Corne on no fewer than five occasions. Beginning in December 1883, DSGIA Vankoughnet informed the Department of the Interior of the wish to secure a reserve near Fort à la Corne “for the Cumberland Band of Indians in exchange for the Reserve or part thereof occupied by them at Cumberland.”

On the suggestion that a reserve could be set aside south of Chakastaypasin’s IR 98 reserve, the Department of the Interior offered five sections of land, or 3,200 acres, to the Department of Indian Affairs for a reserve. DSGIA Vankoughnet was prepared to accept this land as sufficient until Chief Flett, in 1885, rejected this offer and again expressed the Cumberland Band’s desire to settle at Fort à la Corne. In the face of Chief Flett’s refusal, DSGIA Vankoughnet wrote to Inspector McColl in June 1885 to ascertain whether townships 46 and 47, range 20, immediately south of James Smith’s reserve, was the “locality in which the Cumberland Indians wish to have a Reserve made for them.”

On August 26, 1885, Agent Reader confirmed this location as the land desired by the “Cumberland Band,” and Vankoughnet accepted the offer of this land from the Department of the Interior on October 2, 1885. Yet it would be another year and a half before Surveyor Nelson proceeded to Fort à la Corne, on July 25, 1887, “to lay out a reserve for the contingent of the Cumberland Band and such other Indians as may be assigned locations therein.” Nelson’s field notes refer to IR 100A as being “for Indians of the Cumberland District.” By June 21, 1888, the department forwarded Nelson’s tracing of the IR 100A plan of survey “for the Cumberland Band of Indians on the Carrot River near Fort a la Corne” to the Department of the Interior and explained that the temporary reserve surveyed by Nelson was settled on by five “heads of families of the Cumberland 

538 L. Vankoughnet, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, December 6, 1883, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, pp. 105–6).
541 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, August 26, 1885, LAC, RG 10, vol. 3736, file 27580; L. Vankoughnet, DSGIA, to A.M. Burgess, Deputy Minister of Interior, October 2, 1885, LAC, RG 15, vol. 311, file 68309 (ICC Exhibit 1, p. 172).
contingent under Chapman, and if available for Indian Reserve purposes should form part of the Reserve.”

We also believe it is significant to consider the size of IR 100A. On being instructed to “lay out a reserve for the contingent of the Cumberland Band,” we believe Surveyor Nelson relied on the Cumberland Band’s base population of 345 people, for a total area of 65 square miles, as being “for the Indians of the Cumberland District.” If the department intended, in agreeing to set aside a reserve at Fort à la Corne, the creation of a reserve for only those people resident at that location at the time of survey, Canada had the authority to limit the size of the reserve finally confirmed. It did not. Further, at the time of its creation, IR 100A was clearly intended for the whole of the Cumberland Band, which the department expected would migrate over time. In 1882, when Surveyor Austin surveyed 2,172.53 acres for a reserve for the Cumberland Band in the vicinity of Cumberland House, he noted that 8,867 additional acres were “to be surveyed for the Cumberland Band to bring the acreage to 11,040” (sufficient under Treaty 5 for 345 people – the population of the Cumberland Band in that year). In 1887, Surveyor Nelson surveyed a reserve of 41,600 acres at Fort à la Corne.

In 1889, when the department was considering a surrender or an exchange of land at IR 100A, it had occasion to revisit the size of IR 100A. The department noted that the area taken up by IR 100A was 65 square miles, or 41,600 acres. According to the terms of Treaty 6, which entitled Treaty 6 Indians to 1 square mile for every family of five, or 128 acres per person, 41,600 acres was equivalent to 325 persons. During the 1880s, approximately 75 people were settled at Fort à la Corne. The size of the survey raises the question of why the department would set aside a reserve of 65 square miles for 75 people. We can interpret the record today to see that, clearly, the department and the Dominion Land Surveyor were in error in relying on the provisions of Treaty 6 to survey and set aside land for a Treaty 5 band, albeit in an area covered by Treaty 6. Nonetheless, IR 100A was confirmed by Order in Council on May 17, 1889, “[f]or the Indians of Cumberland District (of Treaty No. 5).”

The James Smith Cree Nation argues that the reserve that came to be established at Fort à la Corne and known as IR 100A was set aside for those

543 W.A. Austin, for the Deputy Minister of Indian Affairs, to Mr McNeill, June 15, 1888, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 277–78).
545 Order in Council PC 1151, May 17, 1889, p. 52 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 4a).
Indians of the Cumberland District who chose to move to Fort à la Corne and reside on IR 100A; it was never intended to be the reserve set aside for those Indians who chose to remain in the area of Cumberland House. Further, all Indians who remained in the Cumberland House area retained their right to have land set aside for them according to the terms of Treaty 5, and, today, they have an outstanding treaty land entitlement. With respect, we do not believe this argument can be substantiated from the evidence.

As we noted earlier in this report, many terms were applied by the Department of Indian Affairs when referring to the Cumberland Band, and these terms appear to have been used interchangeably. Based on the totality of evidence, we find that IR 100A was created by Canada to fulfill its obligation to the Cumberland Band as a whole, in spite of the use of the phrase “Indians of the Cumberland District” found in the Order in Council. That IR 100A was created for the whole of the Cumberland Band has been conceded by Canada in its 1987 preliminary legal opinion and in this inquiry.546

**Official Documentation**

Finally, Canada has included in its indicia of “separateness” whether any other official documentation exists that would indicate that the two groups are separate bands. We believe it is important to include in our review of the official documentation the continued movement between the reserves at IR 20 and IR 100A after 1891, as well as the surrender of 640 acres at IR 20 in 1894.

In 1888, the year after Nelson’s survey, Indian Agent Reader asked the department whether those who still wished to leave IR 20 and settle at IR 100A could do so. We note that he believed that “the desire to leave this district, and settle on the new Reserve[,] is on the increase.” The department responded that “any members of the Cumberland Band may remove to the reserve referred to.”547 By January 1889, the department informed the Inspector of Indian Agencies “that any members of the Cumberland Band may remove to the Reserve referred to [at Fort à la Corne].”

The department was anything but consistent in its interpretation of the free movement of members from IR 20 to IR 100A. In regard to the “transfer of four families from Cumberland to La Corne” in July 1889, Indian Commissioner Forget instructed Agent McKenzie “that in [the] future, you will

547 J. Reader, Indian Agent, Pas Agency, to E. McColl, Inspector of Indian Agencies, October 4, 1888, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, p. 303).
try to discourage these changes, especially those from another Agency.”

Thus, in a span of six months, the department shifted its view from one of free movement to one of discouraging migration from IR 20 to IR 100A.

In deciding on the issue of whether the “Peter Chapman Band” became a separate band from CHCN, we believe it is significant to determine whether the department considered the movement of people from Cumberland IR 20 to Cumberland IR 100A to be “transfers” (i.e., the movement of members from one band to another) or simply the movement of members within the same band. There is nothing in the evidence that would lead us to believe that the department considered the movement of members from the Cumberland IR 20 at Cumberland Lake to IR 100A at Fort à la Corne to be anything other than the migration of members within a band. During the course of legal argument, Canada acknowledged that, during the relevant period (1886–91), there was no statutory provision regarding the transfer of Indians from one band to another. In fact, it was this lack of express authority which precipitated the introduction of section 140 into the Indian Act in 1895 (the amendment to the Indian Act which formalized the procedure for transfer of membership between bands). We note that although section 140 was not introduced until 1895, the department did express in 1889 an informal practice regarding the transfer of Indians between bands. Viewing the transfer of Indians between bands to be permissible “in exceptional cases,” DSGIA Vankoughnet stated the department’s practice for handling such transfers to “require the written consent of a majority of the voting members of both the originating and receiving bands” after a “full explanation that the transferee would be entitled to a share in all lands and privileges of the receiving Band.”

This informal practice, requiring the consent of both the originating band and the receiving band, would, in this case, have required the consent of the whole of the Cumberland Band, as the lawful owners of IR 100A, to any transfers into IR 100A. No such consents were sought or obtained.

Today, Canada relies on the September 4, 1891, Consent to Transfer form admitting Nanequaneum from Beardy’s Band into “the Band of Indians ... owning Cumberland Reserve 100A” as evidence of an action of a new band, separate from its predecessor. On its face, this document appears to represent the consent of five members of the Cumberland Band residing at IR 100A, and

two non-members also residing at Fort à la Corne, to admit a new member into a band. With respect, we reject Canada’s reliance on this single document as proof of the separateness of two bands. We have said, and Canada has conceded, that IR 100A was created for the whole of the Cumberland Band. According to Canada’s practice, before 1895, the receiving band would have been the Cumberland Band as a whole. We can find no evidence of the Cumberland Band being informed of, consulted with, or having provided its consent to the transfer of Nanequaneum from Beardy’s Band. The panel cannot accept Canada’s argument that a group of members of the Cumberland Band and other non-members are entitled to make decisions with respect to IR 100A (such as the decision to admit a person into the Band who, by their admission, is entitled to take an interest in IR 100A) without including the entire Band, including those at IR 20. Treaty 5 requires the whole band’s consent, and not individuals chosen by Canada. For Canada to initiate and rely on the decision of some of the members as evidence of a separate band, without obtaining the express consent of the whole band, is a breach of treaty. Further, the panel cannot accept Canada’s reliance today on what amounts to an administrative act (the Consent to Transfer) as justification for the creation of a band or as extinguishing the whole of the Cumberland Band’s interest (including those at IR 20) in IR 100A, without their knowledge and consent (to the alleged Consent to Transfer).

In 1891–1902
The parties have framed the issue of whether the “Peter Chapman Band” became a separate band at any time before 1902, and we have addressed the dates argued by the James Smith Cree Nation (1883) and by Canada (1891). We will next consider whether there are any circumstances before 1902 which lead us to conclude that a separate “Peter Chapman Band” evolved at IR 100A.

With regard to transfers, what we see during this period is the department’s effort to make a distinction – not between the Cumberland Band at IR 20 and the Cumberland Band at IR 100A, but between the whole of the Cumberland Band and the Chakastaypasin members moving to Fort à la Corne. In 1886, a separate paylist was created for the Cumberland band members resident at Fort à la Corne. As we have stated previously, rather than express an intention to separate IR 20 residents from IR 100A residents into two bands, we view the creation of a separate paylist as a matter of administering these groups from two different agencies and two different treaty areas. Our view is supported by the fact that, in 1892, Indian Commissioner Hayter Reed received instructions from DSGIA Vankoughnet to
keep the Cumberland Band separate on the paylists, since “[t]hese Indians are still adherents to Treaty No. 5 no matter where they reside.” These instructions referred to separateness not as between the whole of the Cumberland Band at IR 20 and those at IR 100A, but rather as between those Cumberland Band residents at IR 100A and other Indians moving into the area, primarily from Chakastaypasin IR 98. Further, we view all transfers between 1891 and 1902 into IR 100A to be as equally invalid as the 1891 transfer of Nanequaneum.

We also believe it is significant to consider the actions of the department in deciding to take a surrender of 640 acres at IR 20 in 1894, as revealing its contemporaneous thinking about IR 100A and its ownership. In 1892, a petition from 21 “Half-breeds of Cumberland” living near the HBC settlement at Cumberland House asked that the portion of IR 20 occupied by them be withdrawn from the reserve. On December 6, 1892, Surveyor T.D. Green wrote a memorandum to the Deputy Minister of Indian Affairs regarding this proposal. He recommended that the surrender be taken “in view of the fact that the Indians of Cumberland District have 65 square miles of good farming lands reserved for them on the Carrot River near Fort a la Corne.” In 1894, a surrender of 640 acres at IR 20 was accepted by Order in Council 3147.

Based on the totality of the evidence, we see nothing in this period that alters our view that a separate band was neither created nor evolved at IR 100A from the original Cumberland Band that adhered to Treaty 5 on September 7, 1876.

Conclusion to Issues 1 to 3

1. Did the “Peter Chapman Band” become a separate band from the Cumberland House Cree Nation at any time prior to 1902?

2. Whether the Cumberland House Cree Nation could lawfully have been divided or split without its knowledge and consent?

3. Whether the Cumberland House Cree Nation could be deprived of its reserve without its knowledge and consent?

550 L. Vankoughnet, DSGIA, to Hayter Reed, Indian Commissioner, April 22, 1892, LAC, RG 10, vol 3736, file 27580 (ICC Exhibit 1, pp. 359–60).

551 H.T. Vergette, Head of Land Titles Section, DIAND, to Acting District Supervisor, Prince Albert Indian District, February 4, 1970 (ICC Exhibit 4).
As previously referred to, Canada takes the position that “the Department of Indian Affairs originally contemplated that IR 100A was intended to be set apart for more than just the group of 17 families, almost all from Cumberland House, who already had relocated and become resident on IR 100A before 1889 when that reserve was set apart.”\footnote{Written Submissions on Behalf of the Government of Canada, November 24, 2003, p. 53, para. 95.} Further, Canada states, “[t]he evidence is clear that Departmental officials originally expected that it was entirely possible that the whole group of Indians located in 1875 in the area around Cumberland House would eventually relocate to IR 100A.” The totality of the evidence indicates that IR 100A was set aside for the entire group of Indians known at that time as the “Cumberland House Band” or the “Cumberland Band” or “the Indians of the Cumberland District of Treaty No. 5” who adhered to Treaty 5 in 1876.\footnote{Written Submissions on Behalf of the Government of Canada, November 24, 2003, p. 54, para. 95.}

As previously described, Canada takes the position that a separate band had evolved at IR 100A by 1891. Thus, Canada argues that it is “unnecessary for an amending Order in Council to be passed which directly addresses the issue of reallocation or division of a reserve or reserves among successor Bands.”\footnote{Written Submissions on Behalf of the Government of Canada, November 24, 2003, p. 55, para. 98.} In argument, Canada relies on the Crown’s royal prerogative for its ability to create Indian reserves. A corollary right to the Crown’s prerogative power to establish an Indian reserve is, in Canada’s argument, the Crown’s prerogative power to reallocate an Indian reserve. Further, the Crown’s royal prerogative can be limited only by express statutory authority. All parties agree that the \textit{Indian Act} is silent on reserve creation and “reallocation.” For Canada, then, the prerogative power of the Crown provided the authority to reallocate IR 100A among successor bands.

In response, the Cumberland House Cree Nation refutes Canada’s reliance on those historical documents, prepared primarily by the Indian Agents, as evidence of a de facto separation within the Band. In addition, CHCN argues that Indian Agents could not exercise the type of authority necessary to give rise to a claim that involves the exercise of a prerogative of the Crown.\footnote{Reply Submission on Behalf of the Cumberland House Cree Nation, December 12, 2003, p. 16, para. 51.} The CHCN argues that there is not a single historical document that might be construed as discussing or approving a split of the Cumberland Band. In any event, CHCN argues that even if the Band were to be split, the members of CHCN could still not be deprived of their interest in the reserve. In CHCN’s view, “[i]t does not necessarily follow that[,] because Canada can create an Indian reserve[,] it retains the prerogative to reallocate reserve land. Part of
the process of reserve creation involves obtaining the agreement of a band to accept the reserve set apart for it. Once the reserve is set apart, the band acquires rights to that reserve, both under treaty and, it is submitted[,] under the Indian Act. Once the band’s interest in the reserve has been created, the band can only be deprived of that interest if it agrees. It is no longer simply an exercise of royal prerogative.”

With the greatest of respect, we disagree with Canada’s analysis of the evidence and, therefore, with the conclusions that result. We do not agree that the Cumberland House Band had formed two separate groups: that the Cumberland 100A Band was created from the predecessor Cumberland House Band, and that the successor Cumberland House Band continued to exist. Based on the totality of evidence, we find that IR 100A was surveyed and set aside for the whole of the Cumberland Band and that it was settled on by the contingent of Cumberland House Cree Nation (IR 20) members who chose to migrate from the Cumberland District to Fort à la Corne. At all relevant times, Canada administered these reserve lands for the Cumberland band members of Treaty 5. Although the distance of 200 kilometres between these two reserves (IR 20 and IR 100A) is substantial, there is ample evidence to lead us to conclude that members continued to move back and forth, during the relevant period, as members of the same band.

In addition, we look to the leadership at both locations. Peter Chapman may have been looked upon as the de facto leader while he was alive, but, on his death in 1892, there is no evidence that the department sought to replace him. Rather, what we see is the department’s shift in terminology – from sporadic references to the “Peter Chapman Band” between 1886 and 1895 to the exclusive use of the terms the “Cumberland Band” or the “Cumberland 100A Band.” As well, on Peter Chapman’s death, there is no evidence of the department’s attempt to re-establish the leadership at IR 100A as separate and apart from that at the Cumberland House Cree Nation at IR 20. In fact, no leadership was formally recognized for the Indians residing at IR 100A, on the basis that their leadership existed at IR 20. Furthermore, we see from the evidence that, at IR 20, once Chief Albert Flett was admitted to an asylum in the fall of 1896, the Department of Indian Affairs gave no authorization until 1910 to elect a new Chief. Further, with the exception of Jeremiah Crane's
appointment as “acting headman” in 1899, the evidence available indicates that no other councillors were appointed between 1901 and 1910. 557

Having found that a separate Band was not created at any time, it must be concluded that the Crown continued its treaty relationship with the Cumberland Band created by the negotiated adhesion between the Cumberland Band and the Crown to Treaty 5. In our view, the terms of this treaty limit the exercise of the Crown’s royal prerogative, especially where that prerogative is being exercised to deprive a band of its interest in or use of its reserve land. As regards the surrender of land, Treaty 5 clearly states, “reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty’s Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.” 558

Thus, the treaty expressly requires the consent of the Cumberland Band before Canada can lawfully dispose of its interest. In our view, the express language of the treaty must prevail over the exercise of the Crown’s prerogative, particularly where the exercise of prerogative operates to deprive the Band of its interest in its treaty reserve land without its knowledge or consent. We further accept and acknowledge that, in an exchange between Commissioner Holman and counsel for Canada during oral submissions into the James Smith Cree Nation IR 98 Inquiry (which involved Treaty 6), Canada admitted that a treaty such as Treaty 5 is a limit on the exercise of the royal prerogative:

Commissioner Holman: You make the argument that the Crown used its prerogative right to create the reserves and it has a corollary right to take away the reserve – if I’m reading that right – and that the only limitation on the Crown’s prerogative is statute. But when the Crown commits itself, as it does in a treaty, and it’s spelled out in a treaty what is required for the disposition or to take away a reserve, is that not also a limitation on the Crown’s prerogative?

Mr. Winogron: Absolutely. 559

557 E. McColl, Inspector of Indian Agencies, to Hayter Reed, Deputy Superintendent General, May 26, 1897 (ICC Exhibit 1, p. 487); J. Reader, Indian Agent, Pas Agency, to SGIA, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1886, 74 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 257); Indian Agent to J.D. McLean, Secretary, September 24, 1910, LAC, RG 10, vol. 3943, file 121698-28 (ICC Exhibit 1, p. 1111); J.D. McLean, Secretary, to Fred Fischer, Indian Agent, November 16, 1910, LAC, RG 10, vol. 3943, file 121698-28 (ICC Exhibit 1, p. 1119); Treaty Annuity Paylist, “Cumberland Band Paid at Cumberland Reserve,” 1882, no file reference available (ICC Exhibit 8, p. 114).

558 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), 5 (ICC Exhibit 13a, p. 4).

Finally, Canada asks whether a surrender was necessary. Canada takes the position that the reallocation of the reserve (IR 100A) between two successor bands, which were formerly one band, is not an “alienation” as defined in section 39 (the surrender provision of the *Indian Act*). Accordingly, Canada holds the view that “the surrender provisions did not apply to the reallocation by the Crown of the reserves of the predecessor Cumberland House Band as between the successor Cumberland House Band and the successor Cumberland 100A Band.”

For CHCN, IR 100A was set apart for the use of CHCN. A transfer of an interest (a reallocation) to some other group, even if it was a subgroup of CHCN, would trigger the requirements of a vote under the *Indian Act*. No such vote was held. Under sections 25 and 26 of the *Indian Act*, 1876, no portion of a reserve could be “sold, alienated or leased until it has been released or surrendered to the Crown.” CHCN argues that “the concept underlying the giving of a surrender or release involves the party having an interest in the reserve that is to be given up[,] or affected to be entitled[,] to agree or disagree through the process of meeting and voting.”

We agree with the submissions of the Cumberland House Cree Nation where they state: “The clear intent of the Treaty was to set aside land for a band. The band could not be deprived of that land without its consent.” Further, we agree that “the removal of the band’s interest in its reserve must be construed as a ‘disposal.’”

As regards the “disposal” of reserves established pursuant to Treaty 5, the treaty states:

> Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty’s Government of the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

Thus, where the Cumberland Band is disposing of its reserve lands to any third party, whether this party is another First Nation or not, the consent of both the Band and the Crown is required. We agree with the Cumberland House Cree Nation submission that, “[o]nce the band’s interest in the reserve

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561 Written Submission on Behalf of the Cumberland House Cree Nation, August 28, 2003, p. 59, para. 146.
563 *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), 5 (ICC Exhibit 13a, p. 4).
has been created, the band can only be deprived of that interest if it agrees. It
is no longer simply an exercise of royal prerogative.”Canada therefore had
an obligation to inform the Cumberland Band of its intention to create a
separate band that would take an interest in IR 100A and to seek its consent to
any disposition of this interest in IR 100A. The evidence is unequivocal that
Canada did not seek the consent of the whole of the Cumberland Band. This
fact has, in recent submissions, been conceded by the Crown. Whatever its
prerogative may be, Canada cannot disregard its treaty obligations to an
existing band with a Chief and a council.

ISSUES 4 AND 5: ANALYSIS

4 If the answer to question 1 is that a separate band was not
established, then what is the effect on the events of 1902
and, assuming that the Cumberland House Cree Nation is
entitled to compensation, what is the appropriate criteria to
apply to such compensation?

In our view it would be premature for this panel to make any findings or
recommendation on the applicable compensation criteria at this time.

5 If the answer to question 1 is that a separate band was estab-
lished, then does the Band split bring an end to the interest
of the Cumberland House Cree Nation in IR 100A? (i.e. What
Band is the beneficial owner of the IR 100A after 1902?) If
so, what is the appropriate criteria to apply to compensation
for the Cumberland House Cree Nation?

Based upon our findings to Issues 1 through 3, it is not necessary to address
this issue.

564 Reply Submission on Behalf of the Cumberland House Cree Nation, December 12, 2003, p. 17, para. 55.
CONCLUSIONS AND RECOMMENDATION

We find that no separate band was created or evolved, in fact or in law, from the original Cumberland Band that was a signatory to Treaty 5. Further, we find that IR 100A was selected, surveyed, and accepted as a reserve for the whole of the Cumberland Band by both the Band and Canada. It was a breach of Canada’s treaty obligation to have assigned an interest in IR 100A to a group of people whom it was prepared to accept as separate from the original treaty owners of IR 100A without the knowledge and consent of the whole of the Cumberland Band. Finally, Canada is in breach of its fiduciary duty for its failure to have protected the Cumberland Band’s interest in its reserve at IR 100A.

Consequently, we find that Canada owes an outstanding lawful obligation to the Cumberland House Cree Nation for the loss of its interest in and the use of IR 100A from 1891 forward. We are mindful that, since at least 1891, IR 100A has been occupied by members and non-members of the Cumberland Band. We do not suggest that we are recommending the displacement of the current residents of IR 100A. Canada is, however, obliged to put the Cumberland House Cree Nation in the same position in which it would have been had the breach of treaty and of fiduciary responsibility not occurred.

We therefore recommend to the parties:

That the Cumberland House Cree Nation’s claim regarding Indian Reserve 100A be accepted for negotiation under Canada’s Specific Claims Policy.
FOR THE INDIAN CLAIMS COMMISSION

Renée Dupuis  
Chief Commissioner  

Alan C. Holman  
Commissioner  

Dated this 17th day of March, 2005.
APPENDIX A

RULING ON APPLICATION FOR LEAVE TO INTERVENE

Via facsimile

June 4, 2001

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

- AND -

Mr. Tom J. Waller
Olive Waller Zinkhan & Waller
2255 Thirteenth Avenue
Regina, SK S4P 0V6

- AND -

Ms. Uzma Ihsanullah
DIAND - Department of Justice
10 Wellington Street - 10th Floor
Hull, QC, K1A 0H4

Dear Sirs and Madame:

Re: In the Matter of the Cumberland House Cree Nation Inquiry into IR 100A Lands and the James Smith Cree Nation - Peter Chapman IR 100 A Lands Inquiry

The Commission Panel, consisting of Commissioners Prentice, Augustine and Dupuis have carefully considered the application of the Cumberland House Cree Nation seeking leave to intervene in the Commission’s proceedings into the claim of the James Smith Cree Nation regarding certain lands described as the “IR 100 A Lands”.

...
The Commissioners have concluded that the inquiry claim advanced by the James Smith Cree Nation and the claim advanced by the Cumberland House Cree Nation (which is also before this Commission and which also relates to the IR 100 A Lands) are based upon a common evidentiary and factual background. It also seems clear to the Commissioners that the findings of fact which the Commission may make in one of these inquiries, will have a direct bearing upon the factual and legal arguments available in the other. As such, the Commissioners are concerned that unless the Commission proceeds with considerable caution, there is risk of prejudice to both of the First Nations, and perhaps to Canada as well.

The Commissioners have therefore decided to convene a single fact finding process and to include both the James Smith Cree Nation and the Cumberland House Cree Nation as full participants in that process. Obviously, Canada would also be a full participant. The facts, to be found by the Commission, will be based upon that fact finding process and will subsequently apply to the inquiry claims of both the James Smith Cree Nation and the Cumberland House Cree Nation. The Commissioners wish to emphasize, however, that they are not merging or “joining” these two inquiries, but are merely engaging a single, common fact finding process which will provide an evidentiary basis for the two separate claims.

The Commission has the requisite authority to proceed in this manner. As a Commission constituted under the Inquiries Act, the Commission is not bound by the strict rules of evidence and procedure and the Commissioners are authorized to “adopt such methods as we (the Commissioners) consider expedient for the conduct of the inquiry and to sit at such times and in such places as they may decide”. In discharging its mandate to inquire and report on whether a claimant has a valid claim for negotiation under the Specific Claims policy, the Commission is mindful that the procedures adopted must be appropriate to the circumstances and respect the fundamental principle of fairness.

The Commission’s procedural flexibility allow for, and in this case requires, that the Commission undertake this common fact finding session. These two claims are so interrelated in their factual history that the Commission would run the risk of prejudicing the Cumberland House Cree Nation if it were to consider evidence heard in the James Smith Cree inquiry, without also permitting the participation of the Cumberland House Cree Nation in that
context. The same obviously applies in respect of the inquiry claim of the Cumberland House Cree Nation, which would require the participation of the James Smith Cree Nation, so as to avoid prejudice to them. It is therefore important that the Commission proceed with care and in a manner which ensures fairness, consistency and which respects the right of everyone to be heard.

We have therefore instructed our legal counsel to meet with representatives of both the Cumberland House and James Smith Cree Nations to discuss the logistical arrangements for this process. Generally speaking, we anticipate traveling to each First Nation to convene a “Community Session” to hear from the community elders. In that context, each First Nation would be afforded the right to make submissions to the Commission and each First Nation would be afforded the right, within reason and with due regard to the direction of the Commissioners at that time, to participate in the questioning of the community participants, through Commission Counsel. Canada will obviously be a full participant during this entire process.

The separate inquiries of the James Smith Cree Nation and the Cumberland House Cree Nation will, however, retain their separate status and identity thereafter. We do not intend to transform these two separate inquiries into a single exercise.

Once the fact finding process has been completed the Commission will proceed with full consideration of the James Smith Cree Nation’s claim and the Cumberland House Cree Nation’s claim. In that context, the Commission will convene separate “Oral Sessions” to receive written and oral argument from each First Nation relative to the issues which are pertinent to their claim. Obviously, at that time, we would expect that First Nation and Canada to address the information and evidence collected by the Commission during the fact finding process. Once again, Canada would obviously participate in both inquiries at that time. It may be, that at that time, it will be in the best interests of all participants that the James Smith Cree Nation and the Cumberland House Cree Nation both be afforded certain limited rights to participate as an “intervenor” in the Oral Session relating to the other’s claim. If that were to happen, we would expect the limited participation of that other First Nation to be directed towards assisting the Commission - as opposed to an adversarial intervention directed towards the claimant First Nation. While we are not deciding that matter at this time, this would seem to us to be a fair and
consistent approach. We would, however, ask our counsel to discuss this matter with the representatives of each First Nation at the close of the fact finding process. The Commissioners will, at that time, address the issue if the parties cannot agree.

The Commission’s decision to proceed with a common fact finding exercise followed by legal argument will require the careful planning and the cooperation of all participants to ensure that each aspect of these inquiries proceeds concurrently and without prejudice to the other. The Commission is prepared to convene, where necessary, a planning conference of the James Smith Cree Nation, the Cumberland House Cree Nation and Canada to arrange for the most equitable and systematic manner of carrying out its decision. The Commission’s Counsel will be in contact with each First Nation and Canada to arrange for this planning conference at a time convenient to all.

Yours truly,

[Signature]

Kathleen N. Lickers on behalf of
Commissioners Prentice, Augustine & Dupuis

cc: Chief Delbert Brittain, Peter Chapman Band
Chief Pierre Settee, Cumberland House Cree Nation
Commissioner James Prentice
Commissioner Roger Augustine
Commissioner Sheila Purdy
Commissioner Renee Dupuis
APPENDIX B

INDIAN CLAIMS COMMISSION

INTERIM RULING

JAMES SMITH CREE NATION – PETER CHAPMAN IR 100A

CUMBERLAND HOUSE CREE NATION – IR 100A

The Commission panel has met and considered the December 20, 2001 objections of Mr. Waller to certain parts of the testimony of Mr. James Burns and the matter of questions to Sol Sanderson raised by Canada’s counsel in her objections of December 5, 2001 and by Mr. Selnes on December 20, 2001. The answer of the panel follows.

The Commission accepts that Mr. James Burns appeared before the Commission as a witness to give evidence of his knowledge and experience regarding the matters at issue in this inquiry. Mr. Burns was not appearing as an expert but as an Elder of the James Smith Cree Nation. His testimony has been accepted as evidence.

Generally speaking, the Commission is not bound by the strict rules of evidence used in the courts. The practice adopted by this Commission is to allow hearsay evidence and to hear opinion evidence from a broad range of witnesses, some of who would be considered experts and others not. The reason is simple. The Commission, in conducting its investigation into the facts and matters in issue, is willing to listen to a range of experience in expectation that in doing so, we will come to a greater understanding of the case. In so saying, it is the responsibility of the Commissioners in each case, to weight the evidence presented.

In this case, the Commission is cognizant that we have undertaken a single fact finding process in an effort to create a common evidentiary basis for these two claims.

On June 4, 2001, we explained our view that these two claims are so interrelated in their factual history that the Commission would run the risk of prejudicing each First Nation if it were to consider evidence heard in the
other’s inquiry without also permitting the participation of the alternate First Nation in that context. Obviously what the Commission determines as evidence has a direct bearing to this single fact finding process.

As we said in June 2001, the Commission must proceed in a manner which ensures fairness, consistency and which respects the right of everyone to be heard. In this regard, we accept all of the testimony of Mr. James Burns as evidence including the two areas objected to by Mr. Waller but we will allow the Cumberland House Cree Nation to introduce further evidence if they believe such evidence is needed.

The Commission therefore directs that upon completion of the James Smith Cree Nation Community Sessions, and all witnesses brought forward by James Smith Cree Nation have testified, further evidence maybe brought forward by the Cumberland House Cree Nation in a separate session, with James Smith Cree Nation present and participating.

The Commission further directs that in advance of this additional session, Cumberland House Cree Nation must indicate to the Commission the manner and form such evidence will be brought forward. As stated, James Smith Cree Nation will be present at this additional session and will be afforded the opportunity to raise questions, as was the case at Cumberland House Cree Nation and is now the case with Cumberland House Cree Nation participation at James Smith Cree Nation.

As for the matter of questions for Chief Sol Sanderson, the Commission has no questions on any aspect of his November 20, 2001 presentation.

FOR THE INDIAN CLAIMS COMMISSION

Renée Dupuis  

Alan Holman

[January 24, 2002]
cc: Chief Delbert Brittain, Peter Chapman Band
    Chief Walter Constant, James Smith Cree Nation
    Chief Sol Sanderson, Chakastaypasin Band
    Chief Pierre Settee, Cumberland House Cree Nation
    James Burns, James Smith Cree Nation
    Tamantha Bedard, DIAND, Specific Claims Branch
APPENDIX C

CHRONOLOGY

CUMBERLAND HOUSE CREE NATION: IR 100A INQUIRY

1 Planning conferences
   Saskatoon, May 16, 2000
   Saskatoon, March 20, 2001
   Prince Albert, August 30, 2001
   Prince Albert, November 21, 2001
   Ottawa, May 16–17, 2002
   Prince Albert, August 27, 2002

2 Community session
   Cumberland House Cree Nation, November 19, 2001

   The Commission heard from Chief Pierre Settee, Joseph Laliberte,
   Angus Seewap, Thomas Laliberte, Horace Greenleaf, Marcel McGilli-
   vary, Rose Dussion, Lena Sarah Stewart, and Rodney Settee.

3 Interim rulings
   Ruling In the matter of an Application to the Indian Claims
   Commission for Leave to Intervene in the Inquiry of James Smith Cree
   Nation – IR 100A, June 4, 2001

   Interim Ruling concerning the testimony of Mr. James Burns and the
   matter of questions to Chief Sol Sanderson, January 24, 2002

4 Written legal submissions
   Application for leave to intervene

   • Letter, Kathleen Lickers, ICC Commission Counsel, to Chief
     Walter Sewap, Cumberland House Cree Nation, and Tom
     Waller, Counsel for the First Nation, inviting CHCN make
     application for leave in the JSCN, Peter Chapman IR 100A
     Inquiry, December 13, 2001
CUMBERLAND HOUSE CREE NATION – IR 100A INQUIRY

- Cumberland House Cree Nation’s Application to Intervene, April 23, 2001
- Responding Submissions on Behalf of the James Smith Cree Nation, May 14, 2001
- Reply on Behalf of the Cumberland House Cree Nation, May 22, 2001
- Reply on Behalf of the James Smith Cree Nation, May 22, 2001
- ICC, Summary of the Briefs Submitted by the CHCN, JSCN, Canada, May 27, 2001

Submissions with respect to testimony of Mr James Burns and the matter of questions to Chief Sol Sanderson

- Letter, Tom J. Waller, Olive, Waller, Zinkhan & Waller, Counsel for Cumberland House Cree Nation, December 20, 2001
- Letter, Uzma Ihsanullah, Department of Justice, DIAND, December 5, 2001

Submissions to oral session

- Written Submissions on Behalf of the Cumberland House Cree Nation, August 29, 2003
- Written Submissions on Behalf of the James Smith Cree Nation, September 2, 2003
- Reply Submissions on Behalf of the Cumberland House Cree Nation (to DOJ and JSCN), December 15, 2003
• Reply Submissions on Behalf of the James Smith Cree Nation (to DOJ and CHCN), December 15, 2003
• Further Written Submissions on Behalf of the Cumberland House Cree Nation, February 2, 2004

5 Oral legal submissions

Saskatoon, January 14, 2004

6 Content of formal record

Note: The formal record for this inquiry is supported by the record as it also appears in the James Smith Cree Nation – IR 100A Inquiry. It includes the following materials:

• the document collection (7 volumes of documents, with annotated indices) (Exhibits 1 and 1a) (These are identical to Exhibits 1 and 1a in the James Smith Cree Nation: IR 100A Inquiry.)
• Exhibits 2–14 tendered during the inquiry
• transcript of community session (1 volume) (Exhibit 12a)
• transcript of oral session (1 volume)

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

JAMES SMITH CREE NATION
CHAKASTAYPASIN IR 98 INQUIRY

PANEL
Chief Commissioner Renée Dupuis
Commissioner Alan C. Holman

COUNSEL
For the James Smith Cree Nation
William A. Selnes

For the Government of Canada
Robert Winogron / Uzma Ihsanullah

To the Indian Claims Commission
Kathleen N. Lickers

MARCH 2005
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SUMMARY

JAMES SMITH CREE NATION
CHAKASTAYPASIN INDIAN RESERVE 98 INQUIRY
Saskatchewan

The report may be cited as Indian Claims Commission, James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (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); Band – Migration – Membership; Reserve – Abandonment – Surrender – Disposition – Proceeds of Sale – Trespass; Indian Act – Surrender – Band Membership; Fiduciary Duty – Pre-surrender – Post-surrender – Protection of Reserve Land; Fraud; Specific Claims Policy – Beyond Lawful Obligation – Fraud; Royal Prerogative; Practice and Procedure – Intervenor; Saskatchewan

THE SPECIFIC CLAIM
In May 1984, the James Smith Cree Nation (JSCN) submitted a claim to the Minister of Indian Affairs and Northern Development challenging the validity of the surrender and sale of the Chakastaypasin Band’s Indian Reserve (IR) 98. The claim regarding the validity of surrender was rejected. On January 19, 1998, Canada offered to negotiate a beyond lawful obligation regarding the land sales on the grounds that senior federal officials were involved in fraudulent activities in connection with the sale of 71 of the 114 quarter sections of the reserve at below fair market value. The offer to negotiate, however, was conditional upon the identification of all potential beneficiary First Nations and agreement among the beneficiaries regarding how any compensation would be divided. On June 18, 1999, the Indian Claims Commission (ICC) accepted the JSCN’s request to conduct an inquiry into the surrender and sale of IR 98. On November 1, 2002, the panel ruled that the other Host Bands would be allowed to submit evidence and submit legal arguments but would not be included as parties to the inquiry.
BACKGROUND
The Chakastaypasin Band signed Treaty 6 in 1876. On May 17, 1889, IR 98 was confirmed by order in council for the Band. Following the North-West Rebellion in 1885, some members of the Band fled from the reserve, but others stayed. In the months following the rebellion, the Department of Indian Affairs sought to implement policies to punish those Indians labelled “rebels” and to reward those determined to be “loyal.” The Chakastaypasin Band was branded as “rebel,” and the department decided to “break up the Band” and “amalgamate them with others.” Within three years of this decision, the department would come to rely upon band members’ “transfer” to other bands as resulting in the abandonment of IR 98, thus opening the way for the complete surrender of IR 98 in 1897.

ISSUES
Was a surrender of Chakastaypasin IR 98 required prior to the sale of those lands? If the answer is yes, then what were the requirements of surrender? If the answer to Issue 1 is no, did the fact that Canada took a surrender nevertheless create a fiduciary obligation on the part of Canada? Did Canada breach any obligation which may arise under Issue 2 or 3? Is the effect of any breach such that it invalidates the surrender of IR 98 or gives rise to a claim for damages? What were the obligations of Canada in disposing of IR 98, including Sugar Island? Did Canada breach any further obligation concerning the sale of IR 98? What obligations did Canada have regarding Sugar Island prior to the alleged surrender of 1897? Did Canada breach these obligations?

FINDINGS
The physical relocation of band members does not in and of itself prove the transfer of membership. For the individuals and families of the Chakastaypasin Band transferring to IR 100A, what is required by section 140 of the Indian Act is evidence of the consent of the receiving band at IR 100A. In this case, the receiving band is the whole of the Cumberland Band, including those resident at IR 20. There is no evidence of this consent, and, therefore, there were no valid transfers from Chakastaypasin into IR 100A.

The nine signatories to the IR 98 surrender document were all members who allegedly transferred to IR 100A. The Department of Indian Affairs was aware, however, of members residing at other locations at the time of the surrender. Canada had an obligation to seek the consent of all eligible voters to the IR 98 surrender, not just those resident at IR 100A. Canada cannot rely upon its prerogative power to take control of the Band’s reserve lands. A surrender vote is required. There is no evidence of the government’s attempts to meet with or seek the consent of these other members outside IR 100A. The surrender is therefore invalid.
In disposing of IR 98 lands, Canada owes a treaty, statutory, and fiduciary duty to administer reserve land sales as a prudent fiduciary to maximize the Band’s benefit. Canada breached these duties when it permitted the sale in 86 of the 114 quarter sections at below fair market value. Further, we are unable to conclude, on the basis of the evidence, fraud beyond the transactions to which Canada has admitted a beyond lawful obligation.

Finally, Canada owes a treaty, statutory, and fiduciary obligation to protect reserve lands, once created, from exploitation. We find Canada in breach of these duties for permitting a continuous trespass to IR 98 lands and resources.

**RECOMMENDATION**

That the James Smith Cree Nation’s Chakastaypasin Indian Reserve 98 claim be accepted for negotiation under Canada’s Specific Claims Policy.

**REFERENCES**

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

**ICC Reports Referred To**

- Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry (Ottawa, February 1997), reported (1998) 8 ICCP 3;
- Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 209;

**Cases Referred To**

- Snake v. The Queen, 2001 FCT 858;
- Fales v. Canada Permanent Trust Co., [1977] 2 SCR 302;

**Treaties and Statutes Referred To**

- 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);
- Indian Act, RSC 1886; 1888 Indian Land Regulations.
Other Sources Referred To

Counsel, Parties, Intervenors
W. Selnes for the James Smith Cree Nation; U. Ihsanullah and R. Winogron for the Government of Canada; D. Kovatch for the One Arrow First Nation; R. Cherkewich for the Muskoday First Nation; D. Knoll and D. Gerecke for the Sturgeon Lake First Nation; B. Slusar for the Kinistin Saulteaux First Nation; K.N. Lickers to the Indian Claims Commission.
KEY HISTORICAL NAMES CITED

Adams, Charles, Acting Indian Agent for the Carlton District, 1886; purchased part of one quarter section within the surrendered Chakastaypasin IR 98 in 1902.

Adamson, A.J., purchased 11 quarter sections in the Chakastaypasin IR 98 sale in 1901.

Allan, D.J., Superintendent of Reserves and Trusts, Indian Affairs Branch, in 1950.

Big Head, see Kahtapiskowat.


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. A number of spelling variations of this name appear in the documents.

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.

Chisholm, W.J., Inspector of Indian Agencies, Battleford Inspectorate, in 1903.


Daly, Thomas M., Superintendent General of Indian Affairs and Minister of the Interior, October 1892–April 1896.

Davis, Thomas O., Member of Parliament for Prince Albert and a member of the Davis group; also purchased lands in the Cumberland IR 100A sale in 1903.
Davis group, group of 16 Prince Albert residents, including Member of Parliament Thomas O. Davis, who tendered for Chakastaypasin IR 98 lands in 1901; they were successful in the purchase of 14 parcels in the sale.

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

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

Glass, Floyd B., purchased Sugar Island in July 1956.

Gordon, William, settler from Boucher settlement (near Chakastaypasin IR 98).

Green, T.D., Dominion Land Surveyor, carried out subdivision survey of Chakastaypasin IR 98 in 1898.

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. A number of spelling variations of this name occur in the documents. The names Kahtapiskowat and Big Head appear interchangeably throughout the historical record.

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

Lamont, J.H., Prince Albert attorney and a member of the Davis group; also purchased lands in the Cumberland IR 100A sale in 1903.

Macarthur, James, Indian Agent for the Duck Lake Agency, 1903–12.

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.
Macdonald, R.C., Winnipeg resident who offered to purchase the entire Chakastaypasin IR 98 in early 1901; purchased 14 quarter sections in the IR 98 sale in late 1901.

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

McDonald, Kenneth, purchased four quarter sections in the Chakastaypasin IR 98 sale in 1901.

McGibbon, Alexander, Inspector of Indian Agencies and Reserves, North-West Territories, in 1889–96.

McKenna, J.A.J., Assistant Indian Commissioner in 1904–6.

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

McLean, J.D., Secretary for the Department of Indian Affairs; later promoted Assistant Deputy and Secretary for the same department.

Mitchell, J.W., and J.C. Neeley, offered, or an offer was made in their names, to purchase the entire Chakastaypasin IR 98 in 1900–1.

Newcombe, E.L., Deputy Minister of Justice in 1897.

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

Ostrander, J.P.B., Regional Supervisor of Indian Agencies, Saskatchewan, in 1949–50.

Pedley, Frank, Deputy Superintendent General of Indian Affairs, November 1902–October 1913; previously held the positions of Superintendent of Immigration and Inspector of Immigration Offices within the Department of the Interior.

Ponton, A.W., Dominion Land Surveyor, surveyed IR 100 for the James Smith Band and completed the survey of IR 98 for the Chakastaypasin Band in 1884.
Rae, J.M., Indian Agent for the Carlton District, 1880–83, 1885 to early 1886, late 1886 to 1887.

Reed, Hayter, Acting Assistant Indian Commissioner, 1883–84; Assistant Indian Commissioner, 1884–88; Indian Commissioner, 1888–93; Deputy Superintendent General of Indian Affairs, 1893–97.

Sifton, Clifford, Superintendent General of Indian Affairs and Minister of the Interior, November 1896–February 1905.

Smart, James A., Deputy Superintendent General of Indian Affairs, July 1897–November 1902.

Smith, J.W., purchased a majority of the lands in the Chakastaypasin IR 98 sale in 1901. It was later discovered by the Ferguson Commission that these tenders were submitted on behalf of DSGIA James A. Smart, Superintendent of Immigration (and later SGIA) Frank Pedley, and Immigration Inspector William J. White, as represented by Toronto lawyer A.C. Bedford-Jones.

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.

Von Racjs, Zoltan, offered to purchase the entire Chakastaypasin IR 98 in 1899 on behalf of a group of settlers.


Walker, James, Acting Indian Agent and Inspector of the North-West Mounted Police in 1877.
As a panel, we have proceeded concurrently throughout the Indian Claims Commission (ICC) Inquiries into the James Smith Cree Nation: Indian Reserve (IR) 100 A 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.

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

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

BACKGROUND TO THE INQUIRY

On May 17, 1889, Order in Council 1151 confirmed Indian Reserve (IR) 98 for the Chakastaypasin Band, in accordance with the terms of Treaty 6. Located on the “South Branch” on the South Saskatchewan River, just south of Prince Albert, the reserve was surveyed for 12 families under Chief Chakastaypasin and contained an area of 62 square kilometres.\(^1\)

Despite the Department of Indian Affairs’ “incapacity to furnish enough material for agriculture” and its general reluctance to provide agricultural support to this group, members of the Chakastaypasin Band worked to build houses and cultivate their reserve land in the years after they signed Treaty 6 in 1876. When the North-West Rebellion broke out in March 1885, however, the Chakastaypasin Band was directly affected, and the uprising, led by Louis Riel, became a pivotal event in its history. Because the battle sites at Duck Lake and Batoche were not far from IR 98, members of the Band feared for their lives during the hostilities. Leaders of the uprising sent runners to the reserve seeking assistance in the fight and threatening those who refused. They told the band members “they would be massacred by the soldiers in the event of the insurgents being defeated, whether they had fought or not.”\(^2\)

In this atmosphere of fear, many members of the Chakastaypasin Band fled the reserve, and yet some remained. Chakastaypasin headman Kahtapiskowat, or Big Head, and his family were among those who stayed. In the months following the rebellion, the Department of Indian Affairs tried to implement a policy of “punishing” those Indians it labelled as “rebels” and rewarding those it determined to be “loyal.” The Chakastaypasin Band was initially branded as “rebels,” and, by June 1885, the Department of Indian Affairs

\(^1\) Order in Council PC 1151, May 17, 1889, p. 50 (ICC Exhibit 6b). This same Order in Council confirmed IR 100A “[f]or the Indians of Cumberland District (of Treaty No. 5).”

\(^2\) John A. Macdonald, Superintendent General of Indian Affairs (SGIA), to the Governor General, January 1, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1885*, xii.
categorically decided that the Band had “violated the terms of the Treaty made with them” and that it was advisable to “break up the band” and “amalgamate them with others.”

Within three years of this decision, the Department of Indian Affairs came to rely on the Band’s voluntary “transfer” of its members to other bands as proof that it had “abandoned” IR 98, thereby opening the way for the complete surrender of IR 98 on June 23, 1897. At issue in this inquiry is the propriety of that 1897 surrender.

In May 1984, the James Smith Cree Nation (JSCN) submitted a claim under the Specific Claims Policy regarding the surrender and sale of IR 98. On June 27, 1994, the First Nation submitted a revised claim in which it submitted that “Canada breached its lawful and beyond lawful obligations to the Chacastapasin Band in obtaining the alleged surrender and disposition of Chacastapasin Reserve #98.” On February 6, 1996, the Manager of Specific Claims West, Gay Reardon, informed the James Smith Band that Canada owed no outstanding lawful obligation with regard to the surrender and sale of the reserve. On April 11, 1997, Anne-Marie Robinson of the Specific Claims Branch clarified that “the taking in 1897 of the surrender of reserve #98 was not necessary,” and therefore that the First Nation’s arguments that Canada had breached its fiduciary obligations by obtaining the surrender had not been addressed.

On January 19, 1998, Assistant Deputy Minister John Sinclair offered to negotiate a settlement on “a ‘beyond lawful obligation’ basis on the grounds that senior federal officials were involved in fraudulent activities in connection with the sale of 71 quarter sections of the reserve, below the appraised value.” However, the offer to negotiate was conditional on the identification of all the “potential beneficiary First Nations” and agreement among the beneficiaries regarding how any compensation would be divided among them.

3 Edgar Dewdney, Indian Commissioner, to SGIA, June 19, 1885, Library and Archives Canada (LAC), RG 10, vol. 3714, file 21088-2, and vol. 3584, file 1130 (ICC Exhibit 1, pp. 188, 193).
4 Anne-Marie Robinson, Acting Director, Policy and Research Directorate, Specific Claims Branch, Department of Indian Affairs and Northern Development (DIAND), to Chief Terry Sanderson, James Smith Cree Nation, April 11, 1997 (ICC Exhibit 4b, p. 2).
5 Gay Reardon, Manager, Specific Claims Branch West, DIAND, to Chief Terry Sanderson, James Smith Cree Nation, February 6, 1996 (ICC Exhibit 4a, p. 2).
6 Anne-Marie Robinson, Acting Director, Policy and Research Directorate, Specific Claims Branch, DIAND, to Chief Terry Sanderson, James Smith Cree Nation, April 11, 1997 (ICC Exhibit 4b, p. 4).
7 John Sinclair, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chief Eddie Head, James Smith Cree Nation, January 19, 1998 (ICC Exhibit 4c, p. 1).
8 John Sinclair, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chief Eddie Head, James Smith Cree Nation, January 19, 1998 (ICC Exhibit 4c, p. 2).
The James Smith Cree Nation submitted additional arguments in 1995 and 1997, to which Paul Cuillerier, the Director General of the Specific Claims Branch, replied in detail on December 29, 1998. Canada took the position that it owed no outstanding lawful obligation to the JSCN, he said, or to any other First Nation with respect to the surrender of IR 98 in 1897. As a result of the “abandonment” of IR 98 and the addition of the names of its members to other paylists, “the Chacastapasin Band ceased to exist.”

Canada also argued that Big Head’s insistence on receiving compensation for IR 98 had led, in part, to the taking of the surrender in 1897, although the surrender was not required. With respect to fiduciary obligations, Canada held that “there was no band to whom Canada could owe a fiduciary obligation, and no band whose best interests could be served.” Finally, Mr Cuillerier stated:

> It is Canada’s position that the benefits received by the former Chacastapasin Band members were in excess of what they were entitled to as a matter of law. Even if Canada were to conclude that it had breached a fiduciary duty to the Chacastapasin Band members, it would be Canada’s position that the overall benefits received by former Chacastapasin Band members surpass any losses which they might have incurred.

On March 31, 2003, Canada completed its review of the portions of the claim relating to Sugar Island, located at the western edge of the territory occupied by the Band. Assistant Deputy Minister Michel Roy informed the James Smith Cree Nation that “the Crown’s failure to attempt to sell the Sugar Island lots when there was an apparently adequate market for them was a breach of its fiduciary duty to act in the best interests of the Indians, in the manner of a reasonable and prudent person.” However, other aspects of the claim relating to Sugar Island were rejected. Canada took the position that it owed no outstanding lawful obligation with respect to “treaty, statutory or fiduciary obligations obliging Canada to pro-actively protect the timber on Sugar Island during the pre-surrender period.” In addition, Mr Roy stated

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9 Paul Cuillerier, Director General, Specific Claims Branch, DIAND, to Chief Eddie Head, James Smith Cree Nation, December 29, 1998 (ICC Exhibit 4d, p. 5).
10 Paul Cuillerier, Director General, Specific Claims Branch, DIAND, to Chief Eddie Head, James Smith Cree Nation, December 29, 1998 (ICC Exhibit 4d, p. 4).
11 Paul Cuillerier, Director General, Specific Claims Branch, DIAND, to Chief Eddie Head, James Smith Cree Nation, December 29, 1998 (ICC Exhibit 4d, p. 6).
12 Paul Cuillerier, Director General, Specific Claims Branch, DIAND, to Chief Eddie Head, James Smith Cree Nation, December 29, 1998 (ICC Exhibit 4d, p. 7).
that “the evidence provided does not support the undervalue sale allegation” in the post-surrender period.\textsuperscript{15}

On June 18, 1999, the Indian Claims Commission accepted the request of the James Smith Cree Nation to conduct an inquiry into the surrender and sale of IR 98. As a result of Canada's invitation to seven other Host Bands to participate in this inquiry, the panel heard argument from the parties and these other Host Bands on the question of adding the other Host Bands as parties to this inquiry. On November 1, 2002, the panel ruled that these seven “Host Bands”\textsuperscript{16} would be allowed to submit evidence and make legal arguments, but would not be included as parties to the inquiry.\textsuperscript{17}

The events at issue in this claim share their history with the other James Smith Cree Nation claim involving IR 100A. By necessity, this panel has worked carefully and diligently to ensure that our findings in each case, and the reasons that support them, are cogent, consistent, and coherent.

A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix B of 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.”\textsuperscript{18} 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.\textsuperscript{19} The term “lawful obligation” is defined in *Outstanding Business* as follows:

\textsuperscript{15} Michel Roy, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chiefs Sol Sanderson, Walter Constant, and Delbert Brittain, James Smith Cree Nation, March 31, 2003 (ICC Exhibit 4f, p. 2).
\textsuperscript{16} The “Host Bands” are the Fishing Lake, Gordon, Kinistin, Muskoday, One Arrow, Sturgeon Lake, and Yellow Quill First Nations.
\textsuperscript{17} ICC, *James Smith Cree Nation: Chakastaypasin IR 98 Surrender – Interim Ruling* (Ottawa, November 2002) reproduced as Appendix A to this report.
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.20

Furthermore, Canada is prepared to consider claims based on the following circumstances:

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

It should also be explained that, when the original mandate of the Commission was still under discussion, Tom Siddon, then Minister of Indian Affairs and Northern Development, wrote to then National Chief Ovide Mercredi of the Assembly of First Nations setting out the basis for what the Commission first referred to as its “supplementary mandate” in the Athabasca Denesuline Inquiry Claim of the Fond du Lac, Black Lake and Hatchet Lake First Nations:

If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.21

In an October 1993 letter to the Commission, the Minister of Indian Affairs, Pauline Browes, reiterated the position taken by her predecessor. Minister Browes’s letter makes two key points in relation to the Commission’s jurisdiction:

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(1) I expect to accept the Commission’s recommendations where they fall within the Specific Claims Policy; (2) I would welcome the Commission’s recommendations on how to proceed in cases where the Commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair ...”

HISTORICAL BACKGROUND

FROM TREATY 6 TO THE SURVEY OF IR 98, 1876–85

Treaty 6, 1876
On August 23 and 28, 1876, Treaty Commissioner Alexander Morris and “the Plain and Wood Cree and the other Tribes of Indians” living in what are now the central portions of Saskatchewan and Alberta concluded Treaty 6 near Fort Carlton.23

Treaty 6 provided for reserves of one square mile (or 640 acres) for each family of five “or in that proportion for larger or smaller families.” It stipulated that these “reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty’s Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.”24 Provisions were also made to grant farming implements, tools, oxen, and seed to “any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land.” These articles were “to be given once [and] for all for the encouragement of the practice of agriculture among the Indians.”25 Treaty 6 bands were also promised yearly annuities, a medicine chest, assistance during “pestilence” or “famine,” and provisions to help those making the transition to agriculture.26

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23 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), 1 (ICC Exhibit 6a, p. 1).
24 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 6a, p. 3).
25 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), 4 (ICC Exhibit 6a, p. 4).
26 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), 3–4 (ICC Exhibit 6a, pp. 3–4).
Chief Chakastaypasin and four headmen – Kahtapiskowat, Kahkeeneequanasum, Napatch, and Musinowkeemow – signed the treaty on behalf of the Chakastaypasin Band.27

The James Smith Band and Treaty 6, 1876
Chief James Smith signed Treaty 6 on behalf of his Band at the same time as the Chakastaypasin Band.28 Smith and his people chose to have their reserve surveyed on the Saskatchewan River near Fort à la Corne, approximately 50 kilometres from the Chakastaypasin reserve. The survey was completed in 1884, and IR 100 was confirmed by Order in Council on May 17, 1889.29

Cumberland Band Adhesion to Treaty 5, 1876
In September 1875, Treaty Commissioner Alexander Morris and “the Saulteaux and Swampy Cree tribes of Indians” inhabiting an area of 260,000 square kilometres surrounding Lake Winnipeg in Manitoba signed Treaty 5 at Beren’s River and Norway House.30 On September 7, 1876, the “Cumberland Band,” represented by Chief John Cochrane and headmen Peter Chapman and Albert Flett, signed an adhesion to Treaty 5 at The Pas.31 The adhesion defines the “Cumberland Band” as “the Band of Saulteaux and Swampy Cree Indians residing at ... Cumberland Island, Sturgeon River, Angling River, Pine Bluff, Beaver Lake and the Ratty Country.”32 IR 20 was surveyed for the Cumberland Band in 1882 at Cumberland Lake in Treaty 5 territory.33

Beginning in 1882, some members of the Cumberland Band moved to Fort à la Corne and settled near the site of the future James Smith reserve. They received their own paylist in 1886, and IR 100A was surveyed in 1887 for “the

27 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), 5–6 (ICC Exhibit 6a, pp. 5–6); Treaty annuity paylist, Chakastaypasin Band, 1876, no file reference available (ICC Exhibit 12a, p. 206).
28 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 6a, pp. 5, 7).
30 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), 3, 7 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 2a, pp. 3, 7).
31 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, James Smith Cree Nation IR 100A Inquiry, Exhibit 2a, pp. 10–11).
32 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 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 2a, p. 10).
33 W.A. Austin, Dominion Land Surveyor (DLS), to SGIA, April 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 159–68 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 1, pp. 70–78).
contingent of the Cumberland Band and such other Indians as may be assigned locations therein.”

The reserve was confirmed by Order in Council on May 17, 1889, “[f]or the Indians of Cumberland District (of Treaty No. 5).”

Survey of Chakastaypasin IR 98, 1876–78

At the time of treaty, the Chakastaypasin Band occupied a large territory that stretched from Red Deer Hill in the west to the Carrot River valley in the east. Both Cree and Saulteaux (Plains Ojibway) people were represented in the Band, according to Kinistin First Nation member Louise Smokeyday. They lived a traditional way of life that included hunting, fishing, trapping, and gathering, and the seasons dictated their movement among the traditional campsites within this territory. One of these camps was located on or near the site of what came to be the Chakastaypasin reserve. Sugar Island, located at the western edge of this area, was traditionally used for making maple sugar in the spring by various Saulteaux bands, and Lieutenant Governor David Laird promised the Chakastaypasin Band that it would be reserved for them.

In October 1876, Treaty Commissioner W.J. Christie reported that Chief “Cha-kas-ta-pasin” wanted his reserve “behind Prince Albert settlement on the south side of South Branch,” where “they have had Houses and Gardens ... for some time.” The South Branch was situated just south of Prince Albert, on the Saskatchewan River. Acting Indian Agent James Walker reported again in August 1877 that “Chakastaypasin and band have taken up their reservation” on the “south side of the South Branch” and had 20 acres under cultivation.
In the fall of 1878, Dominion Land Surveyor Elihu Stewart arrived at the South Branch to survey Chakastaypasin IR 98, based on instructions he had received from Lieutenant Governor David Laird. He reported that “the number of souls in the band for which this survey has been made is 110.” To calculate the area of the lands to be set aside, Stewart added 10 per cent to the population of 110 “for increase,” arriving at a total base population of 121.

Based on instructions from David Laird, Stewart ran the southern boundary of the reserve to include what he believed was Sugar Island. His report noted that in the midst of the survey, “the Chief of this Band[,] who with nearly all his followers had been absent from the locality,” arrived to meet him. The Band informed him that he had misidentified Sugar Island, which was actually a large island farther south on the river. Stewart reported that “after further consultation with the Chief and members of his band as well as with settlers in the vicinity I was convinced that the upper island was the one mutually agreed upon between His Honor and the Chief, to form part of the Reserve.”

Stewart resurveyed the southern boundary of the reserve in order to include “the island on which they made sugar in the spring” and the lands opposite the island, which “the Indians had selected for their settlement and on which a little improvement had been made.” To compensate for the additional lands added to the southern portion of the reserve, Stewart proposed that the eastern boundary surveyed by him be moved westward to an existing meridian line. In his report, he noted that “this I was assured by the Chief would be satisfactory to the Band.” However, because the season was too far advanced to finalize the survey at this time, Stewart left the eastern boundary undefined on the ground. His proposed boundaries were apparently accepted, though, as they were used in a description prepared by

45 Natural Resources Canada, Plan 1034 CLSR, “Plan of the Chacastapasin Indian Reserve No. 98 on the South Saskatchewan River,” surveyed by E. Stewart, DLS, October 1878 (ICC Exhibit 6b, item 7, p. 1).
the department in 1880. He reported: "[T]he soil in and about this Reserve is excellent and the country well watered[,] though considerable alkali is met with." The official plan of the reserve identified Sugar Island and noted that it was to be "included in Reserve."

Stewart’s report, field notes, and final plan do not mention the size of the surveyed reserve. According to the Treaty 6 formula of 640 acres per family of five (or 128 acres per person), a band of 121 people would have been entitled to 15,488 acres, or 24.2 square miles, of reserve land. Inspector T.P. Wadsworth noted in April 1884 that the Chakastaypasin reserve “contains about 15,500 acres.”

Stewart reported that “so far, the members of this Band have [scarcely] commenced to practice any of the arts of civilized life, but they are a rather superior band of Indians and as far as I could observe need only a good example set them ... to very much improve their present condition.” He also noted that his mistake about the lands the band members desired for their reserve might have been avoided “had their improvements been sufficient to show where they intended to permanently settle.”

Almost immediately after the survey of IR 98, it became apparent that nearby settlers opposed the inclusion of Sugar Island within the reserve. Dominion Land Surveyor J. Lestock Reid notified the Surveyor General on January 28, 1879, that settlers in the area were circulating a petition to the Minister of the Interior, asking that “no island in the Saskatchewan river be granted to Indians as Reserves.” He explained that the settlers on the South Branch obtained their building timber from Sugar Island, as there was no other timber for logs “within available distance.” On May 20, 1879, the Indian Superintendent at Battleford confirmed Lieutenant Governor Laird’s promise that two islands in the South Saskatchewan River should be reserved: one was to be included in the John Smith reserve (now the Muskodoy

52 [Lindsay Russell], Dominion Lands Office, Surveys Branch, November 9, 1880, LAC, RG 10, vol. 6663, file 109A-3-1 (ICC Exhibit 1, pp. 42–43).
53 Natural Resources Canada, Field book 434 CLSR, Elihu Stewart, DLS, “Field Notes of Chacastapasin Reserve,” 1878 (ICC Exhibit 6b, item 6, p. 60).
54 Natural Resources Canada, Plan 1034 CLSR, “Plan of the Chacastapasin Indian Reserve No. 98 on the South Saskatchewan River,” surveyed by E. Stewart, DLS, October 1878 (ICC Exhibit 6b, item 7, p. 1).
55 T.P. Wadsworth to the Deputy Minister, April 22, 1884, LAC, RG 10, vol. 5736, file 27580 (ICC Exhibit 1, p. 118).
56 Natural Resources Canada, Field book 434 CLSR, Elihu Stewart, DLS, “Field Notes of Chacastapasin Reserve,” 1878 (ICC Exhibit 6b, item 6, p. 60).
57 Natural Resources Canada, Field book 434 CLSR, Elihu Stewart, DLS, “Field Notes of Chacastapasin Reserve,” 1878 (ICC Exhibit 6b, item 6, p. 60).
reserve), and the other in Chakastaypasin’s reserve. However, the Superintendent noted that the islands “are not always called by the same names[,] which prevents us from knowing precisely which Islands were promised to the Indians by His Honor.” In November 1880, the Dominion Lands Office prepared a description of the Chakastaypasin reserve, noting that Sugar Island was included “as agreed upon at the date of the Treaty.”

Although Sugar Island was reserved for the Chakastaypasin Band, settlers from surrounding areas continued to take timber from the island. The Band complained to the Indian Agent in the spring of 1882 that settlers were stealing timber from Sugar Island, a claim that was substantiated following an investigation by the farming instructor.

Chakastaypasin Population and Land Use, 1876–85
The Chakastaypasin Band entered Treaty 6 with 82 people in 1876 and grew to a population of 107 by 1880. Thereafter, the population was reduced to a total of 69 people in 1884, although only 52 were paid that year. Most of this decrease can be accounted for by the disappearance of 19 families from the Chakastaypasin paylist without explanation during this period. Eleven of these families moved to the James Smith paylists between 1878 and 1883, and the others married into other bands, died, or have not been traced.

During the same period, the Chakastaypasin band members made slow but steady progress in agriculture. However, they were somewhat hampered in the transition to agriculture by a lack of implements, work animals, and adequate farm instruction. The implements promised under Treaty 6 were not delivered until August 1877, a full year after treaty was signed and too late in the season to do any farming that year. At the beginning of the 1878 season, the Chakastaypasin Band received seed and provisions as promised by the treaty in roughly equal proportion to the surrounding bands. However, a

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60 Office of the North-West Indian Superintendency, to L. Vankoughnet, Department of the Interior, May 20, 1879, LAC, RG 10, vol. 3680, file 12185 (ICC Exhibit 1, p. 25e).
61 [Lindsay Russell], Dominion Lands Office, Surveys Branch, November 9, 1880, LAC, RG 10, vol. 6663, file 109A-3-1 (ICC Exhibit 1, p. 43); unidentified author and recipient, November 19, 1880, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 54).
64 James Walker, Acting Indian Agent and Inspector of the North-West Mounted Police, to the Lieutenant Governor of the North-West Territories, August 18, 1877, LAC, RG 10, vol. 3656, file 9092 (ICC Exhibit 1, p. 20).
“Statement showing distribution of Implements, Cattle, Seed, Grain, &c.” to the Indians of Treaty 6 up to June 30, 1878, shows that the Chakastaypasin Band received fewer implements than most of the surrounding bands within the Treaty 6 area. It is not certain whether the Band ever received the other implements, as later statements show only what the department spent generally on implements and cattle for the entire Treaty 6 area in the following years.

A farming instructor was assigned to the Chakastaypasin, John Smith, James Smith, and Sturgeon Lake reserves in 1880, but his efforts were focused on the John Smith reserve, where he was stationed. Out of these four bands, the John Smith Band was the only one to have made any substantial gains in agriculture by the end of 1881. Indian Agent J.M. Rae reported in early 1881 that the Chakastaypasin band members were recovering from sickness and had not received much aid, but they were anxious to put in a large crop. They had 22 acres broken that year, but frost destroyed much of the crop. In the fall of 1881, a number of chiefs living near Carlton, including Chief Chakastaypasin, repeated their requests from a year earlier for more working animals, as well as implements to assist those trying to get started in agriculture. Chief Chakastaypasin stated: “Farming implements and animals is what we require, also the help that these others have asked for. We want help besides what was given at the Treaty.” The Chakastaypasin Band itself

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66 “Statement showing distribution of Implements, Cattle, Seed, &c. to Indians of Treaty No. 6 up to the 30th June, 1878,” Canada, Report of the Deputy Superintendent General of Indian Affairs for the Year Ended December 31, 1878, 62–63 (ICC Exhibit 15, pp. 5–6); David Laird, Lieutenant Governor and Indian Superintendent of the North-West Territories, to SGIA, December 5, 1878, Canada, Report of the Deputy Superintendent General of Indian Affairs for the Year Ended December 31, 1878, 37 (ICC Exhibit 15, p. 2).


70 Carlton Indian Office to unidentified recipient, March 23, 1881, quoted in John A. Macdonald, SGIA, to the Governor General, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, x (ICC Exhibit 1, p. 74).

71 Statement of Farming Agencies and Indian Reservations, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, 44 (ICC Exhibit 1, p. 88); Carlton Indian Office to unidentified recipient, October 1, 1881, quoted in John A. Macdonald, SGIA, to the Governor General, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, xiii (ICC Exhibit 1, p. 78).

72 W. Palmer Clark, Indian Agent, Carlton District, to SGIA, September 1, 1880, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1889, 102 (ICC Exhibit 1, p. 41); Summary of the Council held at Carlton, undated, LAC, RG 10, vol. 3768, file 33642 (ICC Exhibit 1b, pp. 3–15).

73 Summary of the Council held at Carlton, undated, LAC, RG 10, vol. 3768, file 33642 (ICC Exhibit 1b, p. 10).
had only one yoke of oxen for its own use by this time, although it received a second yoke in 1882.74

Up until late 1880, the Chakastaypasin Band had little supervision. From 1876 until late 1880, a succession of different Indian agents were responsible for the Band. The same agent had broad responsibility for all the operations in the entire Treaty 6 area – an impossible requirement that seems to have contributed to the high turnover.75 In 1880, the Treaty 6 territory was broken down into three smaller areas, including the Carlton District. The Indian agent for the Carlton District was stationed at Prince Albert and was responsible for a number of bands, including the Chakastaypasin and the James Smith bands.76 J.M. Rae held this position from late 1880 until 1883. He was known for his “strict economy,” and he kept the issue of implements and rations to a bare minimum during his tenure.77 His successor, J. Ansdell Macrae, noted that “owing to the close economy practised by Mr. Rae in the conduct of agricultural operations, the Indians had, during the year 1883, no more implements than were indispensable for the required purposes.” By the end of the season, he noted, many implements “had become useless and beyond repair.”78

As early as 1878, Chakastaypasin families began leaving the reserve to live with other bands. Harold Kingfisher’s great-grandparents, Ooteepayinisew and Nesoquam, were paid with the Chakastaypasin Band in 1876 and 1877, but they moved to the James Smith band paylist in 1878 to stay with Ooteepayinisew’s brother, Chekoosoo.79 The stories passed down to Mr Kingfisher say that rations and many other items were withheld from the Band at IR 98, causing families to leave the reserve. He explained:

They starved them out, they didn’t give them rations. They didn’t give them rations they were supposed to have got, like they were doing to other First Nations

74 Carlton Indian Office to unidentified recipient, May 28, 1881, quoted in John A. Macdonald, SGIA, to the Governor General, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881, xi (ICC Exhibit 1, p. 76); Statement of Farming Agencies and Indian Reservations, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1882, 270–71 (ICC Exhibit 1, pp. 105–6).
78 J. Ansdell Macrae, Indian Agent, to SGIA, August 11, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884, 78 (ICC Exhibit 1, p. 134).
communities. But Chak wasn’t getting them rations, they were eventually pushing them out slowly. That was in the early years, and then when the Rebellion came along already my grandparents had moved to James Smith.80

However, Ooteepayinisew and Nesoquam continued to plant crops at IR 98 for a number of years and had a cabin at the reserve.81 It is unclear when they stopped using the land at IR 98, but it may have been sometime around the North-West Rebellion in 1885. Mr Kingfisher described how, during the uprising, they hid on the reserve in a dugout concealed with logs,82 and, later, how the North-West Mounted Police would come around the reserve looking for “renegades” and steal from their gardens.83 He says that Nesoquam went to Sturgeon Lake around the time of the rebellion and was afraid to return to the Chakastaypasin reserve.84

By 1883, the Inspector of Indian Agencies, T.P. Wadsworth, reported that, although the Band was “still very backward in farming,”

they have made considerable progress since my last visit, having about twenty-five acres under crop. Big Head, a headman with three married sons and two sons-in-law have built houses and broken land at intervals along the river front. The chief lives five miles back from the river, and has ten acres in wheat, barley and potatoes.85

By the end of 1884, department officials reported that few Chakastaypasin band members were living on the reserve.86 That year, Inspector T.P. Wadsworth noted that although the Chakastaypasin reserve was excellently suited for agriculture, “scarcely half” of the Chakastaypasin Band actually resided there.87 Wadsworth remarked that because of the band’s small size, “the Department have never considered them of sufficient importance to go to the expense of sending them a Farming Instructor.”88

84 ICC Transcript, May 27–29, 2003 (ICC Exhibit 17b, pp. 162, 164, Harold Kingfisher, Sturgeon Lake First Nation). Nesoquam was paid on the Sturgeon Lake band paylist from 1881 on.
85 T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, October 9, 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883, 120–21 (ICC Exhibit 1, pp. 102–3).
86 John A. Macdonald, SGIA, to the Governor General, January 1, [1885], Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884, is (ICC Exhibit 15, p. 28).
87 T.P. Wadsworth, Inspector of Indian Agencies, to the Deputy Minister, April 22, 1884, LAC, RG 10, vol. 3786, file 27580 (ICC Exhibit 1, p. 118).
88 T.P. Wadsworth, Inspector of Indian Agencies, to the Deputy Minister, April 22, 1884, LAC, RG 10, vol. 3786, file 27580 (ICC Exhibit 1, p. 119).
Indian Agent J. Ansdell Macrae reported in August 1884 that “very few” of the Chakastaypasin members lived on their reserve, but that “such as do are maintaining a steady rate of progress.” He also commented: “Nothing prevents all of our Indians from being settled on their reserves, except our incapacity to furnish enough material for agriculture. They are all desirous of settling, but have not the wherewithal to enable them to commence farming.” He specifically noted that the “wandering members” of Chakastaypasin’s Band would “doubtlessly come in and settle when the Government decides to put them actively to work.”

By this time, at least 16 families had already moved to other bands or otherwise disappeared from the Chakastaypasin band paylists. As noted above, Harold Kingfisher’s relatives were among those who had moved to another band, although they continued to plant gardens at IR 98.

In the same letter, Macrae also reported a “constant feud” between two factions of the Chakastaypasin Band. He explained that the factions were “headed respectively by one of the councillors and the chief, and when it becomes necessary to commence more active agriculture, a better chief will have to be elected.” Kahtapiskowat was the only headman paid with the Chakastaypasin Band at this time, so it is likely that he was the councillor or headman referred to by Macrae. Chakastaypasin elder Patrick Stonestand and Sturgeon Lake elder Harold Kingfisher recall hearing about disagreements among the Band’s leaders; some of the stories suggest that the conflict was related to the succession of leadership within the Band. However, other Chakastaypasin elders do not recall hearing about such conflict within the Band or among its leaders.

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Map 2: Indian Reserve 98
recommended that Sugar Island be reserved for the Chakastaypasin Band, if it had not already been done. He noted that the island was “well covered by timber, which being scarce in their vicinity is likely to be encroached upon by white settlers,” and reported that the Crown Timber Agent had received applications from settlers asking for permits to cut timber on the island.\textsuperscript{96} Macrae recommended that the timber on Sugar Island be sold to fund the purchase of cattle and other items for the Chakastaypasin Band, explaining that because of damage to the timber caused by erosion and fire, the band members “would be more benefited by a discriminating disposal being made of it now, than by any attempted preservation for future use.”\textsuperscript{97} Hayter Reed, the Acting Assistant Indian Commissioner, concurred with Macrae’s recommendations in a letter to the Deputy Superintendent General of Indian Affairs (DSGIA), Lawrence Vankoughnet.\textsuperscript{98} Vankoughnet replied only to confirm that Sugar Island was already reserved for the Chakastaypasin Band, but that the other islands should be left open to the public, “as the wood being scarce in that locality the public generally should have the benefit of any surplus over and [above] what the Indians actually require.”\textsuperscript{99}

In August 1884, Surveyor A.W. Ponton arrived at the Chakastaypasin reserve to complete the survey of the reserve first started by Elihu Stewart in 1878. He reported that the eastern boundary by this time “was so grown with brush that nothing remained to show its existence but a post lost in the bushes.”\textsuperscript{100} Once this marker was located, he ran a short line from the eastern boundary “westerly to the River” to enclose the reserve. He did not state the final acreage of the reserve, but noted in his report that the boundaries resulted in a reserve acreage with “no appreciable difference” from the first survey.\textsuperscript{101} Ponton’s revised survey plan of the Chakastaypasin reserve included Sugar Island within the limits of the reserve.\textsuperscript{102}

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\textsuperscript{96} J. Ansdell Macrae, Indian Agent, to the Indian Commissioner, January 15, 1884, LAC, RG 10, vol. 3576, file 280 (ICC Exhibit 1, p. 107).
\textsuperscript{97} J. Ansdell Macrae, Indian Agent, to the Indian Commissioner, January 15, 1884, LAC, RG 10, vol. 3576, file 280 (ICC Exhibit 1, pp. 107–8).
\textsuperscript{98} Hayter Reed, Acting Assistant Indian Commissioner, to SGIA, February 20, 1884, LAC, RG 10, vol. 3677, file 11466 (ICC Exhibit 1, p. 111).
\textsuperscript{99} L. Vankoughnet, DSGIA, to Hayter Reed, Acting Assistant Indian Commissioner, March 11, 1884, LAC, RG 10, vol. 3676, file 280 (ICC Exhibit 1, p. 114).
\textsuperscript{100} A.W. Ponton, Indian Reserve Surveyor, to Edgar Dewdney, Indian Commissioner, December 31, 1884, LAC, RG 10, vol. 3682, file 12628 (ICC Exhibit 1, pp. 150–51).
\textsuperscript{101} A.W. Ponton, Indian Reserve Surveyor, to Edgar Dewdney, Indian Commissioner, December 31, 1884, LAC, RG 10, vol. 3682, file 12628 (ICC Exhibit 1, p. 151).
\textsuperscript{102} Natural Resources Canada, Plan 53186 CLSR, “Treaty No. 6, Plan, Indian Reserve No. 98, Chief Chacastapasin, drawn from surveys by E. Stewart, DLS, 1878, and A.W. Ponton, DLS, 1884,” March 19, 1885 (ICC Exhibit 6b, item 8, p. 1).
\end{flushleft}
Chakastaypasin IR 98 was confirmed by Order in Council PC 1151, dated May 17, 1889. The Order in Council stated that the reserve was surveyed for 12 families under Chief Chakastaypasin and described the reserve as containing an area of twenty-four square miles, more or less; and containing moreover, Sugar Island at the south-western corner of this reserve.

The country is high and rolling and the soil a rich black sandy loam. About half the reserve is covered with poplar, generally running in ridges with open glades between.103

THE NORTH-WEST REBELLION AND ITS AFTERMATH, 1885–88

The North-West Rebellion (or Riel Rebellion) broke out in March 1885, and, although the fighting lasted less than two months, it was a pivotal event for the Chakastaypasin Band. The sites of the battles at Duck Lake and Batoche were not far from IR 98. Leaders of the uprising sent runners to many reserves in the North-West, asking for assistance in the fight and threatening those who refused, stating “that they would be massacred by the soldiers in the event of the insurgents being defeated, whether they had fought or not.”104 John A. Macdonald, the Prime Minister and Superintendent General of Indian Affairs (SGIA), noted that the mood on the reserves in the North-West during 1885 was tense and uneasy, especially in areas near the conflict or on the travel routes for government soldiers.105

Elders’ testimony recounted that many members of the Chakastaypasin Band left their reserve in order to avoid being drawn into the conflict, motivated both by loyalty to the treaty and by fear stemming from threats made by the scouts who came to their reserve.106 As elder Robert Constant put it, “They didn’t want to shoot the queen. They honoured the treaty, because they made the treaty.”107 There is testimony of one family hiding on the reserve at some point during the rebellion, but others left the reserve because they were afraid of being found if they hid there.108

103 Order in Council PC 1151, May 17, 1889, p. 50 (ICC Exhibit 6b).
104 John A. Macdonald, SGIA, to the Governor General, January 1, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1885, xii.
105 John A. Macdonald, SGIA, to the Governor General, January 1, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1885, xii–xiii.
107 ICC Transcript, June 27–28, 2001 (ICC Exhibit 16a, p. 49, Robert Constant).
On May 6, 1885, Indian Commissioner Edgar Dewdney issued a notice ordering “all good and loyal Indians”\(^\text{109}\) to remain on their reserves:

Whereas, the troubles in the North have necessitated the bringing of large bodies of troops into the country to suppress the troubles, and punish those causing them, and when these troops meet any Indians off their Reserves they may be unable to tell whether they are hostile or friendly, and may attack them;

And Whereas, runners are constantly being sent by Riel throughout the country spreading lies and false reports, trying to induce different bands of Indians to join him, by threat and otherwise;

And Whereas, it is the intention of the troops to arrest and punish such runners wherever the same may be found, and it will be necessary for them, in order to accomplish this, to arrest all Indians, or any suspicious persons whom they may see, in order to ascertain whether or not they are runners from Riel;

And Whereas, it is expedient that all good and loyal Indians should know how to act under the present circumstances so as to secure their own safety and the good will of the Government;

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.\(^\text{110}\)

It is uncertain if all members of the Chakastaypasin Band had already left their reserve by this time.

At the end of the North-West Rebellion, a number of Indian “rebels,” including three prominent Chiefs, were tried and imprisoned for their alleged role in the uprising. A few were sentenced to death by hanging for their involvement in the rebellion, and their penalties were carried out in November 1885.\(^\text{111}\)

**The Chakastaypasin “Rebels”**

The Department of Indian Affairs initially branded the entire Chakastaypasin Band as “rebels,” guilty of involvement in the rebellion, although there is no information to suggest the basis for the charges. The nearby One Arrow, Beardy’s, and Okemasis bands were also accused of involvement in the

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\(^{109}\) The terms “loyal” and “rebel” are based on the department’s use in correspondence during this period. For ease of reference, these terms are used in this report. The Indian Claims Commission does not intend to pass any judgments on the involvement or non-involvement of any Chakastaypasin members by the use of these terms.

\(^{110}\) Edgar Dewdney, Indian Commissioner, May 6, 1885, LAC, RG 10, vol. 3584, file 1130 (ICC Exhibit 1, p. 163).

uprising. Indian Commissioner Dewdney informed the SGIA in June 1885 that the Chakastaypasin Band had “violated the terms of the Treaty made with them” and that it would be advisable to break up the Band and amalgamate it with others. He also recommended that annuities be withheld from “Indians who have participated in any way whatever in the late Rebellion,” both as a means of punishment and a way to recover the costs for damage to government property. On June 27, 1885, Dewdney instructed the Indian Agent at Prince Albert that, “[w]ith regard to rations, those Indians who have behaved well must be well looked after, while those who have given the trouble should only receive such assistance as actual humanity necessitates.”

In his July 29, 1885, memorandum on the “Future Management of Indians,” Hayter Reed, the Assistant Indian Commissioner, outlined a number of recommendations for dealing with those “who during the late troubles [had] been disloyal or troublesome,” including:

- the abolishment “in so far as compatible with the treaty” of the “tribal system,” by deposing the Chiefs and councilors of “rebel tribes” and dealing directly with individuals;
- withholding annuity money from bands or individuals who participated in the rebellion;
- withholding rations from certain bands “unless they are reduced to an extreme state by starvation and really cannot provide for themselves”;
- strict requirements “that each and every Indian now works for every pound of provisions given to him”;
- disarmament of rebel bands and withholding of ammunition; and
- directions that “no rebel Indians should be allowed off the reserves without a pass signed by an [Indian Department] official.”

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112 Edgar Dewdney, Indian Commissioner, to SGIA, August 27, 1885, LAC, RG 10, vol. 3710, file 19550-3 (ICC Exhibit 18b, p. 13).
115 Edgar Dewdney, Indian Commissioner, to the Indian Agent, June 27, 1885, LAC, RG 10, vol. 1591 (ICC Exhibit 1, p. 194).
116 Hayter Reed, Assistant Indian Commissioner, to the Indian Commissioner, July 29, 1885, Glenbow Archives, Edgar Dewdney Papers, document M320, box 4, file 66, pp. 1414–19 (ICC Exhibit 18a, pp. 1–6).
Aside from these general suggestions, Reed made a specific recommendation for dealing with the One Arrow and Chakastaypasin bands:

One Arrow’s [Band] should be joined with that of Beardy & Okemasis, and their present Reserve be surrendered. Chakastaypasin’s [Band] should be broken up, and its reserve surrendered; the [Band] being treated as suggested with One Arrow’s. Neither of these [bands] are large enough to render it desirable to maintain instructors permanently with them, and as they are constituted of bad and lazy Indians, nothing can be done without constant supervision for them. The action suggested therefore would have been wise in any case; their rebellion justifies the pursuit.117

Other department documents provide a different view of the Chakastaypasin Band and its role in the uprising. In August 1885, Indian Commissioner Dewdney remarked that “a few of these men I think were loyal but are not deserving of any special recognition.”118

Hayter Reed’s recommendations for the “future management of Indians” were generally upheld by the SGIA. On October 28, 1885, Indian Commissioner Dewdney was informed that the SGIA “considers that Chakastapaysin’s Band should be broken up; the [Reserve of this band] when the members of the same are distributed among other Bands to be handed over to the Government and the necessary addition to be made to the Reserves to which they may be moved ....”119

With respect to the pass system, Lawrence Vankoughnet, the DSGIA, felt that the system “should be introduced as far as practicable in the loyal Bands as well,” but that it “should not be insisted upon as regards loyal Indians” if they resisted on the basis of their treaty rights.120 The pass system was a means of reinstating and strengthening government control over Indian movements and whereabouts following the rebellion. Indian Agents received books of passes in 1886, and the system was strictly enforced, especially in the years immediately following the rebellion.121

117 Hayter Reed, Assistant Indian Commissioner, to the Indian Commissioner, July 29, 1885, Glenbow Archives, Edgar Dewdney Papers, document M320, box 4, file 66, pp. 1417–18 (ICC Exhibit 18a, pp. 4–5).
118 Edgar Dewdney, Indian Commissioner, to SGIA, August 27, 1885, LAC, RG 10, vol. 3710, file 19550-3 (ICC Exhibit 18b, p. 14).
119 L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, part IB (ICC Exhibit 1, p. 206). Words in brackets are modified from plural to singular, since these directions also apply to the One Arrow Band.
In February 1886, Commissioner Dewdney issued a notice to “the Indians of the North West Territories” informing them that the government intended to send “a large number of soldiers and police into the country” in order to “keep the peace,” and that “any Indians found with fire-arms, off his Reserve, without permission of the Agent, will be liable to arrest.”122

Government Treatment of “Rebel” and “Loyal” Chakastaypasin Band Members

Four families (17 people), including Chief Chakastaypasin and his family, were denied annuity payments from 1885 to 1889 because the government viewed them as “rebels.”123 In addition to the policies designed to punish those who had taken part in the rebellion, it was determined that rewards should be offered for “the good conduct of loyal Indians.”124 Commissioner Dewdney notified the Acting Agent at Prince Albert on May 25, 1886:

“Big Head” or Kah-tip-is-kee-wat from Chakastapaysin’s Band behaved himself in such a manner during the Rebellion as to merit recognition and I would accordingly beg that you will place his name upon the list of those to be rewarded for loyalty, the present which it is proposed to give him being two heifers.125

This decision seems to mark the start of a more cordial attitude towards the “loyal” elements of the Chakastaypasin Band, especially those members associated with Big Head. Although no band members received annuities on the Chakastaypasin 1885 paylist, six Chakastaypasin families, including Big Head, appeared on the James Smith paylist for 1885 and were paid annuities.126 One family also received annuities in 1885 with John Smith.127 It should be noted that while some families received their annuities with other bands in 1885, the Indian Agent was later informed that he did not have the

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122 E. Dewdney, Lieutenant Governor and Indian Commissioner, to the Indians of the North-West Territories, February 16, 1886, LAC, RG 10, vol. 1598 (ICC Exhibit 1, pp. 224–25).
123 Treaty annuity paylists, Chakastaypasin Band, 1885–89, no file reference available (ICC Exhibit 12a, pp. 215, 216, 218, 220). The families denied annuities were no. 1 – Chief Chakastaypasin; no. 6 – Pascal; no. 7 – Madeline; and no. 31 – Edward Koopekeweyin.
124 L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, part 1B (ICC Exhibit 1, p. 208).
125 E. Dewdney, Indian Commissioner, to the Acting Indian Agent, May 25, 1886, LAC, RG 10, vol. 1591 (ICC Exhibit 1, p. 234).
126 Treaty annuity paylist, James Smith Band, 1885, LAC, RG 10, vol. 9418 (ICC Exhibit 12a, p. 300). The six Chakastaypasin families appearing on this paylist were no. 2 – Big Head; no. 21 – Asnieapow; no. 8 – Kasookakecseycloek; no. 35 – Katapiskwat’s 2nd Son; no. 14 – Nanapatam; and no. 27 – Kootapachekeyin.
127 Treaty annuity paylist, John Smith Band, 1885, no file reference available (ICC Exhibit 21d, p. 11). See no. 27 – Kootapachekeyin.
authority to pay them that year. However, two Chakastaypasin families received arrears for 1885 the following year, and another family received arrears for 1885 in 1887. On the 1886 Chakastaypasin paylist, the Indian Agent noted that two additional families “were due” arrears for 1885. It appears, however, that they never received them.

**Location of Chakastaypasin Band Members, 1885–87**

The evidence regarding the location of Chakastaypasin band members during the period 1885–87 is very sketchy. James Smith and Chakastaypasin elders testified that Chakastaypasin band members left IR 98 after receiving threats from scouts involved in the uprising. It appears that many initially went to the area near Stoney Creek and the Carrot River valley, one of their traditional hunting territories. The Carrot River ran through what would later become the northern township of IR 100A, south of the James Smith reserve. Stoney Creek was located a little farther south, outside the boundaries of the future IR 100A. Some families scattered to other reserves initially, including John Smith’s and James Smith’s reserves, most likely to join relatives in those places for safety while the fighting was going on. Oral tradition mentions that Chakastaypasin members also went to the Montreal Lake, Sturgeon Lake, One Arrow, and Kinistin Bands, and some went as far south as the Touchwood Hills.

128 Treaty annuity paylist, James Smith Band, 1885, LAC, RG 10, vol. 9418 (ICC Exhibit 12a, p. 300); Treaty annuity paylist, John Smith Band, 1885, no file reference available (ICC Exhibit 26d, p. 11); unidentified author and recipient, undated, no file reference available (ICC Exhibit 27a, p. 3).
132 Although the panel is satisfied that members moved at least to the bands involved in this inquiry, we have not been asked to perform independent research to identify all the “Host Bands.” Therefore, we are relying on research previously completed by these parties. Those involved in the inquiry have self-identified as “Host Bands.”
Many elders recall that Chief James Smith invited the Chakastaypasin families who went to Stone Creek to camp on the James Smith reserve until the fighting subsided.\textsuperscript{138} In November 1885, six Chakastaypasin families were paid their annuities with James Smith.\textsuperscript{139} The evidence suggests that many of those who initially went to James Smith were part of Big Head’s extended family.\textsuperscript{140} In 1886, the Losses Claims Commission, a body set up to provide compensation to those who lost property during the rebellion, received a claim from Big Head for his personal property and cattle. The Agent noted that Big Head’s cattle were taken “after he had driven them down to La Corne, 50–60 miles from his reserve.”\textsuperscript{141}

Kinistin elder Louise Smokeyday maintained that “the Saulteaux portion” of the Chakastaypasin Band “came to their relatives at Kinistin” who lived in the Stone Creek area.\textsuperscript{142} The oral history passed down to Kinistin elders says that Chief Chakastaypasin came to stay with his relatives at Stone Creek after his “land was taken.”\textsuperscript{143} Indian Agent R.S. McKenzie reported in 1888 that the Chakastaypasin band members, “with the exception of Big Head and eighteen souls,” left their reserve in 1885 and had been living near the Carrot River ever since, “making a living by hunting,” and that they could not “be induced to return to their reserve, preferring to live off it.”\textsuperscript{144}

A tabular statement in the 1885 Annual Report notes that 12 members of the Chakastaypasin Band were “with Red Lake Saulteaux.”\textsuperscript{145} No further information is available to explain this remark. The Chakastaypasin paylists during this period are of little assistance in determining where band members were living. The 1885 paylist simply lists the same families who were paid in 1884 and the “money due them if paid in 1885.”\textsuperscript{146} Seven families received their annuities at Fort à la Corne and at the John Smith reserve that year, but


\textsuperscript{139} Treaty annuity paylist, James Smith Band, 1885, LAC, RG 10, vol. 9418 (ICC Exhibit 12a, p. 300).


\textsuperscript{141} Charles Adams, Acting Indian Agent, to George Young, Secretary, Losses Claims Commission, July 31, 1886, no file reference available (ICC Exhibit 1, pp. 250–51).

\textsuperscript{142} ICC Transcript, May 27–29, 2003 (ICC Exhibit 17b, pp. 31, 67, Louise Smokeyday, Kinistin First Nation).

\textsuperscript{143} ICC Transcript, May 27–29, 2003 (ICC Exhibit 17b, p. 34, Louise Smokeyday, Kinistin First Nation).


\textsuperscript{145} “Number of Indians in the North-West Territories, and their Whereabouts in October, 1885,” Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1885, 218 (ICC Exhibit 15, p. 45).

\textsuperscript{146} Treaty annuity paylist, Chakastaypasin Band, 1885, no file reference available (ICC Exhibit 12a, p. 215).
the whereabouts of the remaining nine families during 1885 cannot be
determined from the documentary evidence. After 1885, the 12 “loyal”
families received their annuities each year on the Chakastaypasin band paylist
(and later on the Cumberland Band 100A paylist), and they can be traced. The
four “rebel” families were listed on the same Chakastaypasin band paylist in
1885 and 1886, and on a separate Chakastaypasin Band “rebel” paylist in
1887 and 1888. However, the statistics were not updated for “rebel” members
from 1885 until 1889, making it impossible to trace these four Chakastaypasin families during this four-year period. In fact, when their
annuities were reinstated in 1889, two of these families had disappeared.

The evidence regarding the location and activities of Chakastaypasin
members during the year 1886 is very unclear. A new Acting Indian Agent,
Charles Adams, was appointed in February 1886 and remained in that
position until August of the same year. After hearing in early spring that
Indian Department property was being stolen from IR 98, Adams dispatched
someone to investigate. He later reported that, during this investigation, “no
Indians were on the reserve[,] as they had not returned since fleeing from the
French at the commencement of the rebellion,” and that their farm
implements had been left out and frozen into the ground. It is not known
who was stealing from the reserve or how that information came to the
attention of the Indian Agent. In May, Adams reported that “the
Chakastaypasin band at La Corne came in there to plant a little stuff and of
course made a call on us for provisions.” It is uncertain whether Adams
was referring to band members planting gardens at IR 98 or somewhere near
Fort à la Corne.

In June and July 1886, a series of department correspondence shows that
instructions were given to amalgamate the Chakastaypasin Band with the
bands at Fort à la Corne. In June, Acting Indian Agent Adams wrote to the farm
instructor at Fort à la Corne to inform him “that in accordance with the
recommendation of the Indian Commissioner, Big Head and his band are to
be amalgamated with James Smiths band – you will therefore give them the

147 Treaty annuity paylist, James Smith Band, 1885, LAC, RG 10, vol. 9:418 (ICC Exhibit 12a, p. 300); Treaty annuity
paylist, John Smith Band, 1885, no file reference available (ICC Exhibit 26d, p. 11); Treaty annuity paylist,
Chakastaypasin Band, 1884, no file reference available (ICC Exhibit 12a, p. 214); Treaty annuity paylist,
Chakastaypasin Band, 1886, no file reference available (ICC Exhibit 12a, p. 216).
148 E. Dewdney, Indian Commissioner, to Acting Indian Agent, August 24, 1886, LAC, RG 10, vol. 1591 (ICC
Exhibit 1, p. 253).
149 Charles Adams to J.M. Rae, Indian Agent, January 2, 1887, LAC, RG 10, vol. 1591 (ICC Exhibit 1, pp. 316–17).
150 Charles Adams, Acting Indian Agent, to the Indian Commissioner, May 31, 1886, no file reference available
(ICC Exhibit 1, pp. 236–37).
151 Charles Adams, Acting Indian Agent, to the Indian Commissioner, May 31, 1886, no file reference available
(ICC Exhibit 1, p. 236).
same attention as the other, distributing provisions, etc. proportionally.” 152 Assistant Indian Commissioner Hayter Reed wrote to Adams in July, stating that, “if it is at all feasible this band may settle on John Smith's and P. Chapman's reserves as you mention[,] although it would be better if they were a little scattered with different bands.” 153 Reed also told Adams to “let them have a yoke of oxen from those now on hand,” if they need one so much,” and to allow them to take their farming implements from IR 98 to Fort à la Corne. 154 On the same day, Reed instructed that the Chakastaypasin Band “may settle with any other band they choose and the increased land can be added to such Reserve for them and they may be aided as others are.” Reed also refers in this letter to “the old Reserve,” noting that it is still Indian land and therefore not open to settlement. 155

An undated letter, written by Charles Adams sometime in mid-June 1886, recounts a visit with Big Head. The legibility of this letter is extremely poor, but it appears to refer to an agreement by Big Head to move to Fort à la Corne, near the James Smith reserve. The letter does not give any reason for Big Head's agreement to the move. However, Adams informed the Indian Commissioner that “[t]he old man is glad to get down [to] La Corne i.e. if he can get land,” and that he communicated his request for assistance with the move and compensation for buildings and improvements “on the old reserve.” 156 Adams also noted in this letter that Big Head had left IR 98 at the time of the rebellion and was only “now to [Prince] Albert on a visit.” 157 Many years later, Charles Adams explained that the Chakastaypasin Band made a request in 1886 for its reserve to be exchanged for one near Fort à la Corne:

To my knowledge when Acting Ind. Agent in '86, the Chakastaypasin Indians petitioned Gov't for land at La Corne, in lieu of this reserve. They rec’d answer in affirmative, as they did not like living here on account of the late rebellion, the

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152 Acting Indian Agent to George Goodfellow, Farming Instructor, June 17, 1886, no file reference available (ICC Exhibit 1, p. 238).
153 Hayter Reed, Assistant Indian Commissioner, to the Acting Indian Agent, July 10, 1886, no file reference available (ICC Exhibit 1, p. 239).
154 Hayter Reed, Assistant Indian Commissioner, to the Acting Indian Agent, July 10, 1886, no file reference available (ICC Exhibit 1, p. 239); Hayter Reed, Assistant Indian Commissioner, to the Acting Indian Agent, July 10, 1886, LAC, RG 10, vol. 1591 (ICC Exhibit 1, p. 241).
155 Hayter Reed, Assistant Indian Commissioner, to the Acting Indian Agent, July 10, 1886, LAC, RG 10, vol. 1591 (ICC Exhibit 1, pp. 240–41).
party that first petitioned were the “Big Head” party, loyal ones. They lived on the reserve ever since.\textsuperscript{158}

Although there was a move during the summer of 1886 to amalgamate the Chakastaypasin Band with those living at Fort à la Corne, it appears that at least Big Head visited IR 98 in August of that year. Adams wrote to the farm instructor at Fort à la Corne on August 19, 1886, stating:

\begin{quote}
Big Head has been around the South Branch now for quite a long time on the plea that his sons were ill. He is here again and I now give him provisions to go home and make hay. In their work you will see that they are supplied with provisions & anything you may have that they require.\textsuperscript{159}
\end{quote}

Many of the circumstances surrounding this initial effort to move the Band in 1886 are unclear. While the department’s view of the situation was that the Band had agreed to be amalgamated with the bands at Fort à la Corne, and possibly had requested an exchange of its reserve,\textsuperscript{160} the oral history of James Smith and Chakastaypasin elders is less clear about the band members’ motives for leaving IR 98. Some elders say that the Agent or the police ordered or encouraged the Chakastaypasin members to leave IR 98, and that they had no choice about leaving and were not allowed to return.\textsuperscript{161} Other elders refer to a time of starvation and deprivation, although it is not clear when this might have happened or where the Chakastaypasin Band lived at the time.\textsuperscript{162} However, Chakastaypasin elder Raymond Sanderson said that the Indian Agent who encouraged the Chakastaypasin members to leave their reserve was the same Agent who had not supplied them with implements and supplies earlier.\textsuperscript{163}

In any case, it appears that the 12 “loyal” Chakastaypasin families received their annuities on the Chakastaypasin band paylist at Fort à la Corne in September 1886, including Kahtapiskowat.\textsuperscript{164} In December, Agent Rae distributed blankets to the Indians at Fort à la Corne, including some

\begin{footnotes}
\item[158] Charles Adams to T.O. Davis, Member of Parliament, April 6, 1900, LAC, RG 10, vol. 6665, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 1018–19).
\item[159] Charles Adams, Acting Indian Agent, to George Goodfellow, Farming Instructor, August 19, 1886, no file reference available (ICC Exhibit 1, p. 252).
\item[160] Hayter Reed, Assistant Indian Commissioner, to SGIA, April 14, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 388).
\item[161] ICC Transcript, January 28–29, 2003 (ICC Exhibit 16b, pp. 48, 60, Sol Sanderson; p. 111, Raymond Sanderson); Affidavit of James Burns, May 16, 2003 (ICC Exhibit 16c, p. 3).
\item[162] ICC Transcript, June 27–28, 2001 (ICC Exhibit 16a, p. 54, Robert Constant); ICC Transcript, January 28–29, 2003 (ICC Exhibit 16b, p. 208, Jake Sanderson).
\item[164] Treaty annuity paylist, Chakastaypasin Band, 1886, no file reference available (ICC Exhibit 12a, p. 216).
\end{footnotes}
Chakastaypasin members, and reported that many of the people were away hunting when he visited.165

Hayter Reed reported that in the spring of 1887, after having “previously consented to join Peter Chapman’s Band,” “a number of the Chakastaypasin Band” moved to Fort à la Corne to plant gardens and put up houses.166 If this report is accurate, it is not certain where the Chakastaypasin band members were moving from, or exactly where they planted their gardens or built houses that summer. IR 100A was not surveyed until late July of that year, and the surveyor's report does not mention Chakastaypasin band members living at that location during his survey.167 Reed reported that all of those who planted gardens at Fort à la Corne in the summer “returned” to IR 98 in the fall of 1887.168 Indeed, the Chakastaypasin paylist for 1887 notes that the Band was “paid at South Branch” that year (i.e., at IR 98). All the loyal families were paid on this list, except for one that was paid with James Smith.169 A tabular statement of the “Number of Indians in the North-West and their Whereabouts in October 1887” reported the presence of 58 people at the Chakastaypasin reserve.170 Two months later, another tabular statement reported only 35 on the Chakastaypasin reserve “near Fort a la Corne.”171

Creation of the Duck Lake Agency, 1887

By Order in Council PC 1088, dated May 23, 1887, the Carlton (or Prince Albert) District was divided into two smaller agencies, “with a view to closer supervision and better attention being given to the Indians in the Prince Albert and Battleford Districts.”172 The newly created Duck Lake Agency, with headquarters on Beardy’s reserve at Duck Lake, encompassed “the Bands whose Reserves lie south of the River viz: those of James Smith, John Smith, Chakastapaysin, One Arrow, Beardy and White Cap.”173 J.M. Rae continued...
for a short time as Indian Agent, pending the appointment of R.S. McKenzie as the new Indian Agent for the Duck Lake Agency on October 27, 1887.\textsuperscript{174}

\textbf{Movement of Chakastaypasin Members from IR 98, 1888}

In early 1888, Indian Agent R.S. McKenzie reported to Indian Commissioner Reed that there were “two sections” of the Chakastaypasin Band – one section living at IR 98, and another living near Fort à la Corne in the vicinity of James Smith IR 100 and Cumberland IR 100A. McKenzie reported visiting IR 98, which he called “the Chacastipasin or Big Heads Reserve,” where he found only 19 persons in all on this Reserve, as most of them were away hunting at that time. ... I found all the Indians on this Reserve live in one small hut and are a very miserable lot for all I have supplied them with clothing and food. I may say any of the men that were there were old and unfit for work. There were only Big Head and his family staying there.

I must say that I find he has taken good care of the implements they have, and also their cattle look well, and are in good condition.\textsuperscript{175}

McKenzie also stated that he met with “a number of this Band” living at Fort à la Corne who requested “that the Department would take back the Reserve on the South Branch, and give them a Reserve near James Smith’s at La Corne.”\textsuperscript{176} An undated marginal note on McKenzie’s report initialled by Indian Commissioner Edgar Dewdney states: “I think this most desirable.”\textsuperscript{177} McKenzie recommended that their request be granted, “as it will be much more convenient to look after them when they are all together, than in the shape they are at present.” His report concludes with a note that he supplied “the two sections of the Band” with rations and clothing for the winter.\textsuperscript{178}

Hayter Reed forwarded McKenzie’s report to the SGIA on February 13, 1888, explaining that “with regard to the desire of the Chakastaypasin Band of Indians to be allotted a Reserve near James Smith,” permission had already been granted to the previous Agent, “but was not acted upon.”\textsuperscript{179}

\textsuperscript{174} Order in Council PC 3130, October 27, 1887, LAC, RG 10, vol. 3777, file 38047 (ICC Exhibit 1, p. 336).
\textsuperscript{177} Marginal note written by Indian Commissioner Edgar Dewdney on letter from R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Indian Commissioner, January 31, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 343).
\textsuperscript{179} Hayter Reed, Assistant Indian Commissioner, to SGIA, February 13, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 358).
Consequently, Reed instructed the Agent to “induce” those Chakastaypasin members who make a living “by cultivating the soil to join some of the Bands who have a Farming Instructor, and those who mainly depend upon hunting and fishing for a livelihood to join some of the Bands at Fort La Corne.”\(^{180}\)

Lawrence Vankoughnet, the DSGIA, informed Reed on February 23, 1888, that the exchange of IR 98 for a reserve near James Smith “would be most desirable.”\(^{181}\)

Agent McKenzie visited the Chakastaypasin reserve again in March and reported that

in a conversation I had with Big Head and his men they informed me that they were prepared to relinquish the reserve at any time and join Peter Chapman’s Band but that they expected the Dept. to give them something for so doing no matter how small. I told them the Dept. would not in my opinion give them anything but that I would give them provisions to move with. They insisted that I should write to you and that they would wait your reply.\(^{182}\)

McKenzie’s report concludes with a comment about Kahtapiskowat: “I find this Indian rather of a good disposition [,] always being satisfied with what is done for him.”\(^{183}\)

Hayter Reed forwarded this report to the SGIA, commenting that

a number of Chakastipasin’s Band had previously consented to join Peter Chapman’s Band and last spring, had moved there with their families, put up a few houses, and planted barley and potatoes, but returned in the fall. I do not see how any remuneration can be given them for joining, but I have directed the Agent to assist them with provisions &c.\(^{184}\)

On May 23, 1888, McKenzie reported that on a visit to the “South Branch” (the vicinity of IR 98), he found that “Big Head & his band had left on the 9th for La Corne to join Chapman’s Band,” after receiving supplies from the Agency to make the move.\(^{185}\)

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\(^{180}\) Hayter Reed, Assistant Indian Commissioner, to the Indian Agent, Duck Lake Agency, February 13, 1888, LAC, RG 10, vol. 1592 (ICC Exhibit 1, p. 361).

\(^{181}\) [L. Vankoughnet, DSGIA], to Hayter Reed, Assistant Indian Commissioner, February 23, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 366).


\(^{184}\) Hayter Reed, Assistant Indian Commissioner, to SGIA, April 14, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 388).

Settler Requests for Timber Harvesting on Sugar Island, 1888
On February 17, 1888, Indian Commissioner Hayter Reed notified McKenzie that a nearby settler had applied for permission to cut wood on the Chakastaypasin reserve. Reed instructed the agent that “on no account can any outsider be allowed to obtain green wood from any of the Reserves,” and that the cutting of dead timber could be allowed only after obtaining the consent of the Band in writing. Given these facts, he wrote:

> I beg however to point out the proceeds derived from allowing an outsider to cut dead wood, are necessarily small, and that they would have to be forwarded to Ottawa to be invested for the benefit of the Band, thus making the result, unless the cutting were on a large scale, hardly appreciable.

> It is much better therefore to let the Indians perform the labour, and sell the wood to the party requiring it. The Indians cutting should pay some small dues upon the wood, but having done this, they have the balance of what it will fetch, for their own use.

SETTLEMENT OF CHAKASTAYPASIN MEMBERS AT FORT À LA CORNE
It does not appear that the Chakastaypasin people immediately settled on either the Cumberland IR 100A or the James Smith IR 100 reserves at Fort à la Corne. Inspector T.P. Wadsworth reported in July 1888 that “Chief Chacastapaysin and Big Head had about concluded to settle on or near the Cumberland reserve,” and that the group numbered “some fourteen families” in all. The following month, Agent McKenzie reported that Big Head was living “about 15 to 20 miles from La Corne, near Stony Creek.” He also reported that Peter Chapman had informed him that three of “Chakastaypasin’s men” had already “joined” the Cumberland Band at Fort à la Corne. McKenzie expected the rest of the members of the Chakastaypasin Band to join either Peter Chapman’s or James Smith’s Band quite soon, “as the men say they are about tired, following Big Head and Chacastapasin, as they have no settled place, so I think the whole band is about broken up.”

186 Hayter Reed, Assistant Indian Commissioner, to the Indian Agent, Duck Lake Agency, February 17, 1888, LAC, RG 10, vol. 1592 (ICC Exhibit 1, p. 363).
noted in his annual report a few days later, dated September 10, 1888, that “Big Head and his party” had requested permission to join the Cumberland Band and were now “transferred” to that Band and “engaged in farming.”

**Treaty Annuity Paylists, 1888–89**

In 1888, as in the previous year, two separate treaty annuity paylists were created for the Chakastaypasin Band, each listing either the “loyal” or the “rebel” members.

The first paylist is dated October 13, 1888, and indicates that annuities were paid at “Agency.” Only one family received its annuities on this paylist (no. 28 – 1 woman, 1 daughter). Of the remainder, one family was absent (no. 16 – The Mink, who received annuities that year with the Sturgeon Lake Band); one member family had died; six families (including Big Head) had “transferred to the Cumberland Band”; and two families had “transferred to James Smith’s Band.” These “transfers” appear to be supported by the examination of the corresponding paylists of the other bands. The October 1888 paylist for the “Cumberland Band paid at Peter Chapman’s Reserve” shows six Chakastaypasin families grouped at the end of the paylist according to their Chakastaypasin treaty numbers and marked with an “A,” among them Kahtapiskowat, who received the extra annuity as headman. All the Chakastaypasin band members on this paylist have the notation “now transf[erre]d” or “transf[erre]d from Chakastaypasin” beside their names. A seventh family, “transferred” that year from the James Smith Band to the Cumberland 100A paylist, was likely a former Chakastaypasin family, paid under Chakastaypasin ticket no. 13 from 1876 to 1880.

The second Chakastaypasin paylist of 1888 noted the family composition of four families (including Chief Chakastaypasin). The Indian Agent’s remarks

193 Treaty annuity paylist, Chakastaypasin Band, 1888, no file reference available (ICC Exhibit 12a, p. 219). “Paid at Agency” indicates that the band members were paid at the Agency headquarters at Duck Lake.
194 Treaty annuity paylist, Chakastaypasin Band, 1888, no file reference available (ICC Exhibit 12a, p. 219). The paylist states that no. 28 married a member of the One Arrow Band.
197 Treaty annuity paylist, “Cumberland Band Paid at Peter Chapman’s Reserve,” 1888, no file reference available (ICC Exhibit 12a, p. 35); Treaty annuity paylists, Chakastaypasin Band, 1876–80, no file reference available (ICC Exhibit 12a, pp. 206–10); Treaty annuity paylist, James Smith Band, 1881, no file reference available (ICC Exhibit 12a, p. 295); see also Sturgeon Lake First Nation, “Families of the Chakastaypasin Band: Remarks on Homik’s Tracing Study from the Perspective of the Sturgeon Lake First Nation,” revised May 1997 (ICC Exhibit 17c, pp. 65, 82, 85). Note that a few Chakastaypasin families, including this one, are noted on the James Smith paylist as being “from Pas.” The Sturgeon Lake tracing study deals with this issue.
beside each name state that they were “last paid in 1884.” It should be noted that these four families did not receive annuities from the year of the North-West Rebellion in 1885 until the discontinuation of the Chakastaypasin Band annuity paylist in 1889. The annuities of two families were reinstated in 1889: Chakastaypasin and his grandson Neesoopahtawein were paid with the Cumberland Band 100A, and Pascal (no. 6) appeared on the One Arrow paylist. The remaining two “rebel” families disappeared, and no definite records of their whereabouts have been found. Chakastaypasin was no longer recognized as a Chief, and he did not receive the additional annuity associated with that position, but Kahtapiskowat continued to be paid and designated as a headman. A February 1889 statement of chiefs and headmen described Chakastaypasin as a “rebel” who had “not been recognized as Chief since the outbreak,” and Kahtapiskowat as a “loyal” and “good Indian” who had been a headman since the time of treaty.

The October 1889 paylist of the “Chakastaypasin Band paid at La Corne” shows that none of the former Chakastaypasin members were being paid on that paylist. Indian Agent McKenzie reported to the Indian Commissioner on October 23, 1889, that “band No. 98 is now thoroughly broken up” and its members settled with the One Arrow, James Smith, and Cumberland Bands. As noted in the next section, the procedures for the transfer of individuals to other bands were not formalized until 1889. Furthermore, section 140 of the Indian Act, which provided the statutory basis for such membership transfers, did not come into force until 1895.

Department Procedures for Transfers of Band Membership

In late 1888 and early 1889, ongoing correspondence between Indian Commissioner Hayter Reed and department officials led to the establishment

201 Sturgeon Lake First Nation, “Families of the Chakastaypasin Band: Remarks on Homik’s Tracing Study from the Perspective of the Sturgeon Lake First Nation,” revised May 1997 (ICC Exhibit 17c, pp. 69, 98); see also Teresa Homik, “Chacastapasin Tracing Study,” prepared for Specific Claims Branch West, April 1996 (ICC Exhibit 3c, pp. 14–15, 17–18).
204 Treaty annuity paylist, Chakastaypasin Band, 1889, no file reference available (ICC Exhibit 12a, p. 221). The notations on this paylist state that no. 28 was paid at the One Arrow reserve and that no. 16 was absent.
of a procedure for the transfer of membership between bands. On November 12, 1888, a discussion began within the department regarding band amalgamations and membership transfers. In a letter to the SGIA on that date, DSGIA Lawrence Vankoughnet expressed his general opposition to amalgamations, on the basis of his feeling that “the more Indian Bands are kept separate from one another the better, and more especially is this the case where the Bands are divided in religious sentiment.” 206 He did, however, make an exception in cases where at least one party was “small and unprogressive and might be benefitted.” 207 He explained that his general reservations were based on experience in “the older Provinces,” where the practice has almost invariably been productive of very serious complications ... causing bitterness of feeling among the members of the respective Bands in regard to their rights upon the Reserve on which they had been jointly located. ... As a rule, when a Band has been allotted a Reserve, it should be kept strictly to that Reserve, and ... no other Indians than the members of the Band should be allowed to locate thereon. 208

Two weeks later, on November 23, 1888, Vankoughnet informed Indian Commissioner Hayter Reed that “it is contrary to the law” to “transfer” anyone to another band, except in cases where a woman marries into it. 209 Reed disagreed with the department’s thinking on this point. He argued that the Indian Act should be amended to allow “transfers” of membership when necessary, noting that “it has been our endeavour, in the past, to prevent, as much as possible, the removal either permanent or temporary of Indians from one reserve to another; but there were occasionally cases where a judicious discretion had to be exercised.” 210 In support of this proposal, he noted as an example “the breaking up of some of the reserves in the north after the late rebellion, and the consequent scattering of the Indians among other reserves,” a fluid situation that “necessarily” created a large number of applications for transfer. 211

206 L. Vankoughnet, DSGIA, to E. Dewdney, SGIA, November 12, 1888, LAC, RG 10, vol. 3806, file 52332 (ICC Exhibit 1, p. 475).
207 L. Vankoughnet, DSGIA, to E. Dewdney, SGIA, November 12, 1888, LAC, RG 10, vol. 3806, file 52332 (ICC Exhibit 1, p. 476).
209 [L. Vankoughnet, DSGIA], to Hayter Reed, Indian Commissioner, November 23, 1888, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1, p. 481).
210 Hayter Reed, Indian Commissioner, to SGIA, January 21, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1, p. 494).
211 Hayter Reed, Indian Commissioner, to SGIA, January 21, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1, p. 495).
In response, the department argued that if transfers of membership were allowed, there would likely be much confusion regarding land and treaty rights, especially for those joining a band within a different treaty area.\textsuperscript{212} Furthermore, the department stated that the \textit{Indian Act} was designed to protect the rights of Indians owning particular reserves:

\begin{quote}
No end of complicated questions have arisen in connection with the ownership of land and the treaty rights of Indians who were in years gone by irregularly admitted to the membership of Bands in the older Provinces of which they had not originally been members and whose rights and those of their descendants to membership and ownership were subsequently disputed by the original members of the Band.\textsuperscript{213}
\end{quote}

Reed persisted in his attempt to have the department reconsider its position, bringing attention to cases that would benefit from a change in policy. He suggested, as a possible mechanism for such transfers, that a written statement of the person desiring transfer, as well as the consent of the Chief and council of the receiving Band, should be required.\textsuperscript{214}

The department seems to have acquiesced to Reed’s suggestions. In a letter dated March 18, 1889, it was conceded that, in exceptional cases, transfers should be allowed. However,

the circumstances connected with any case of transfer should be of the most exceptional nature to justify the same, and it should be done in the most formal manner, viz. the person whom it is proposed to transfer should be allowed to do so by a vote of the majority of the Indians voting members of the Band to whom this Indian to be transferred belonged, and a paper expressing their consent to his or her being transferred should be signed by the Chief & Headmen [illegible] also the party to be “transferree” should in like manner be admitted only upon a vote of the majority of the voting members of the Band to which he or she is to be transferred consenting to the same and after full explanation [having] been given to the Band that the Indian who it is proposed shall join that Band shall be entitled to share in all land and other privileges of said Band and a document signifying that such consent has been given should be signed by the Chief & Headmen of the Band to which the applicant has been admitted and should be certified by the Agent.\textsuperscript{215}

\begin{footnotes}
\item[212] [L. Vankoughnet, DSGIA], to the Indian Commissioner, January 29, 1889 [in LAC, RG 10, vol. 3807, file 52583-2] (ICC Exhibit 1, pp. 490–91).
\item[213] [L. Vankoughnet, DSGIA], to the Indian Commissioner, January 29, 1889 [in LAC, RG 10, vol. 3807, file 52583-2] (ICC Exhibit 1, pp. 492–93).
\item[214] Hayter Reed, Indian Commissioner, to DSGIA, March 14, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1, p. 506).
\item[215] [L. Vankoughnet, DSGIA], to the Indian Commissioner, March 18, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1, pp. 507–9). Text is as it appears on the document, with “Indians” and “party to be” struck out.
\end{footnotes}
The procedure for handling such transfers – requiring the written consent of a majority of the voting members of both the originating and the receiving bands – appears to be what was to become department practice.

**Settlement of Chakastaypasin Members at IR 100A**

It appears that at least some of the Chakastaypasin members were living at IR 100A and beginning to farm by the spring or summer of 1889. In April 1889, Agent McKenzie reportedly gave Big Head 10 bales of wheat “to get him started as he has not done any farming since the Rebellion.”216 The same letter reports that Chief Chakastaypasin had “come in on to the reserve” at IR 100A after wintering at Stoney Creek, since “he cannot support himself any longer.”217 In reply, Assistant Commissioner A.E. Forget instructed that “as chief Cha-kas-tay-pay-sin has decided to remain on a reserve, he should be put with some other Band.”218 Although Chief Chakastaypasin received his annuities at Fort à la Corne (IR 100A) in the fall of 1889, it appears that he and other Indians from Nut Lake again wintered at Stoney Creek, where they were reported to be in a “very destitute condition.”219 Chief Chakastaypasin returned to IR 100A in May 1890, and McKenzie reported that “Chekastaypasin and his small Band have decided to remain on Reserve and farm in future.”220

In August 1890, McKenzie visited “the South West end of the Cumberland reserve where Big Head and Chakastaypasin reside,” so he could brand cattle. He noted that the Band had done very little farming, due to “only having located themselves on this portion of the reserve some fifteen months past.”221 The 1890 annual report of the Inspector of Indian Agencies, Alexander McGibbon, regarding “Peter Chapman’s No. 100A” noted that “Big Head of the same Band has his place at the extreme South West corner of the Reserve,” where he had 8½ acres planted “near his house” and another 4 acres planted “five miles off.”222 On the day of McGibbon’s visit to this part of

221 R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Indian Commissioner, August 31, 1890, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 571).
the reserve in mid-August, he noted that “twelve lodges or tepees” were camped and that “the Chief” and two others were putting up houses for themselves.\textsuperscript{223} McGibbon may be referring to Chief Chakastaypasin, since Big Head apparently already had a house on the reserve.

It appears that the Chakastaypasin Band was well supplied at Fort à la Corne. A statement of expenses for the Duck Lake Agency in 1890 shows separate issues of cattle to both “Big Head’s Band” and “Chakastaypasen’s Band,” as well as a wagon purchased for Chakastaypasin’s Band.\textsuperscript{224} Inspector McGibbon noted in his 1890 annual report that the Band had 72 head of cattle.\textsuperscript{225} Chakastaypasin and James Smith elders recall that the Chakastaypasin Band received treaty items and supplies for agriculture at Fort à la Corne.\textsuperscript{226}

It is not certain whether Chakastaypasin ever really settled at IR 100A. His death early in 1891 was recorded in the “Register of Indian Deaths for Band 100A” and the 1891 Cumberland 100A paylist,\textsuperscript{227} although the stories passed on by elders say either that the Chief disappeared or that he was buried somewhere outside the reserve.\textsuperscript{228}

The documentary record suggests that the department considered IR 98 “abandoned” by 1890 at the latest. A tabular statement in the annual report that year stated that the reserve was vacant and remarks: “Chief dead, Indians joined John Smith’s and other Bands.”\textsuperscript{229} The oral tradition of Chakastaypasin descendants suggested that some people continued to return to the reserve after 1885 because it was a traditional gathering and fishing area, and relatives were buried there.\textsuperscript{230} Chakastaypasin elder Jake Sanderson testified that the people “always looked after that place” and travelled back and forth to the reserve.\textsuperscript{231} However, many people were afraid to return to IR 98 after

\textsuperscript{222} Alexander McGibbon, Inspector of Indian Agencies, to the Indian Commissioner, September 1, 1890, LAC, RG 10, vol. 3843, file 72695-1 (ICC Exhibit 1, p. 586).
\textsuperscript{223} Alexander McGibbon, Inspector of Indian Agencies, to the Indian Commissioner, September 1, 1890, LAC, RG 10, vol. 3843, file 72695-1 (ICC Exhibit 1, p. 586).
\textsuperscript{225} Alexander McGibbon, Inspector of Indian Agencies, to the Indian Commissioner, September 1, 1890, LAC, RG 10, vol. 3843, file 72695-1 (ICC Exhibit 1, p. 587).
\textsuperscript{227} “Register of Indian Deaths for Band 100A,” entry for March 11, 1891, LAC, RG 10, vol. 9995 (ICC Exhibit 27e, p. 33); Treaty annuity paylist, Cumberland Band Paid at Reserve, 1891, no file reference available (ICC Exhibit 12a, p. 245).
\textsuperscript{229} “Number of Indians in the North-West Territories and Their Whereabouts in 1890,” Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1890}, 207 (ICC Exhibit 1, p. 610).
\textsuperscript{230} ICC Transcript, January 28–29, 2003 (ICC Exhibit 16b, p. 48, Sol Sanderson; p. 84, Terry Sanderson; p. 232, Jake Sanderson).
\textsuperscript{231} ICC Transcript, January 28–29, 2003 (ICC Exhibit 16b, p. 232, Jake Sanderson).
the rebellion. Kinistin First Nation elder Besigan Nippi recalled that people were afraid to return to the reserve because they feared government reprisals, and because people wanted to dissociate themselves from the rebellion.\textsuperscript{232} Yellow Quill Chief Robert Whitehead also stated that many people wanted to dissociate themselves from the rebellion, out of fear that anyone even remotely connected to it would be hanged.\textsuperscript{233}

Other elders spoke of a flood at Sugar Island one spring that killed many people, and how they were told not to go back after this event.\textsuperscript{234} Harold Kingfisher said that First Nations custom prevented people from returning after the flood because so many had died there.\textsuperscript{235} One story mentions that Chief John Smith came to warn the people that a flood was coming,\textsuperscript{236} so this event may have occurred while he was still Chief.\textsuperscript{237} Elder Besigan Nippi says that people were afraid to return to Sugar Island after the rebellion, and that they were told not to go back, although they didn’t know why.\textsuperscript{238} The exact time for this event cannot be determined any more precisely. However, Chakastaypasin elder Jake Sanderson recalls that some people travelled back and forth to do ceremonies for the people who disappeared from Sugar Island and for others buried at IR 98.\textsuperscript{239}

The Cumberland band 100A paylist, dated October 13, 1891, indicates that the former Chakastaypasin members were given new Cumberland band ticket numbers that year.\textsuperscript{240} Quatwaywayweein, the son of Hard Sounding Flute, moved from the James Smith Band to the Cumberland Band in 1891 after marrying the daughter of one of the Chakastaypasin members.\textsuperscript{241} No Consent to Transfer was signed for his entry to the Cumberland Band 100A.

**Big Head’s Reserve**

There are various references in the documents and oral history to “Big Head’s Reserve,” which is said to be somewhere within the present-day James Smith reserve. It is possible that this reference to “Big Head’s Reserve” meant only to

\textsuperscript{232} ICC Transcript, May 27–29, 2003 (ICC Exhibit 17b, p. 78, Besigan Nippi, Kinistin First Nation).
\textsuperscript{234} ICC Transcript, January 28–29, 2003 (ICC Exhibit 16b, p. 151, Albert Sanderson).
\textsuperscript{235} ICC Transcript, May 27–29, 2003 (ICC Exhibit 17b, p. 184, Harold Kingfisher, Sturgeon Lake First Nation).
\textsuperscript{236} ICC Transcript, January 28–29, 2003 (ICC Exhibit 16b, p. 151, Albert Sanderson).
\textsuperscript{237} Treaty annuity paylist, John Smith Band, 1894, no file reference available (ICC Exhibit 26d, p. 45); “Census of Religion of Indians of John Smith’s Band No. 99, Duck Lake Agency,” October 1897, LAC, RG 10, vol. 9994 (ICC Exhibit 27d, p. 16). John Smith was Chief from 1876 until at least October 1897.
\textsuperscript{238} Treaty annuity paylist, May 27–29, 2003 (ICC Exhibit 17b, p. 88, Besigan Nippi, Kinistin First Nation).
\textsuperscript{239} Treaty annuity paylist, January 28–29, 2003 (ICC Exhibit 16b, p. 237, Jake Sanderson).
\textsuperscript{241} Treaty annuity paylist, “Cumberland Band Paid at Reserve,” 1891, no file reference available (ICC Exhibit 12a, p. 247). Quatwaywayweein was the grandson of Kahtapiskowat.
deem the southwest corner of the former IR 100A, where the Chakastaypasin people initially settled, since there is no indication that a separate reserve was set aside. Patrick Stonestand’s father told him that, at the time the Chakastaypasin people came to Fort à la Corne, “we were given a spot to live, or area to live, and a lot of our people just thought it was Bighead reserve, but it was a place where we could live.”

However, even after an 1899 surrender for exchange which relinquished 1½ sections at the southwest corner of the IR 100A, people were said to be from “Big Head's reserve” or from “Katipiskowat’s part of the James Smith reserve.” Martha Opoonechaw-Stonestand says her aunts were born around the turn of the century “on Bighead reserve ... that’s in James Smith someplace, I guess.”

Patrick Stonestand also says that his father was born on Big Head's reserve, although the date is not certain. Lazarus Sanderson’s marriage certificate, dated August 7, 1902, states that he was from “Katipiskawat’s part of the James Smith’s Reserve Fort a la Corne.” Following the alleged amalgamation of the James Smith and Cumberland 100A Bands in 1902, department officials continued to refer to the “Big Head end of the reserve” and to “the Bighead section of the band.” It seems that Big Head and others continued to live at the southern end of the reserve, separately from the James Smith Band.

Discussions about the Surrender of Chakastaypasin IR 98, 1891

In 1891, a brief discussion ensued within the Department of Indian Affairs regarding the possible surrender and sale of IR 98. In response to an apparent inquiry from SGIA Edgar Dewdney on the matter, DSGIA Lawrence Vankoughnet informed him on May 13, 1891, that the reserve had “never been regularly settled upon ... by the Indians who own it.” Nevertheless, he explained that “it was allotted to them under the conditions of the Treaty and I think that as long as there are any of them in existence, even though they may..."
be residing upon other Reserves, we could not legally bring the Reserve into the market without previously obtaining a surrender from them.”

Vankoughnet commented that, if the department felt that taking a surrender was the desirable course of action, “the band anyway is a small one, and I do not anticipate that we would have any difficulty in obtaining their consent to the sale of the Reserve.”

Vankoughnet wrote to Indian Commissioner Hayter Reed the next day to inquire whether the reserve should be sold for the benefit of the Band, and if any difficulty in obtaining a surrender was anticipated. Reed replied on May 20, 1891, to inform Vankoughnet that “the surviving Indians of the Chacastapasin Band” had been “amalgamated” with the Cumberland, James Smith, and One Arrow Bands. With respect to the question of surrender, Reed suggested that a surrender should be taken and that “the Council be summoned at the James Smith’s Reserve.” He did not “anticipate that any difficulty would arise,” but suggested that “in case any might seem to threaten,” both he and the Indian Agent should be given authority to obtain surrender.

Regarding the sale of the lands, Reed concluded: “I would not, although it might be well to take the surrender, recommend that the sale be proceeded with until the settlement of a good deal of the vacant land in the neighbourhood[,] and other changes, make the land more valuable.” In view of the advice that any sale of Chakastapasin lands be delayed, Vankoughnet replied that “the taking of a surrender may also be deferred for awhile.”

**Transfer of Nanequaneum to Cumberland Band, 1891**

By 1889, it appears that most of the Cumberland band members were settled on the northern portion of IR 100A, while most of the Chakastapasin members

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251 Hayter Reed, Indian Commissioner, to DSGIA, May 20, 1891, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 619).
252 Hayter Reed, Indian Commissioner, to DSGIA, May 20, 1891, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 619).
253 Hayter Reed, Indian Commissioner, to DSGIA, May 20, 1891, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 620).
chose to settle separately on the southern portion.\footnote{John C. Nelson, DLS, In Charge of Indian Reserve Surveys, to SGIA, December 30, 1887, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1887}, 275 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 35); Alexander McGibbon, Inspector of Indian Agencies and Reserves, to the Indian Commissioner, September 1, 1890, LAC, RG 10, vol. 3843, file 72695-1 (ICC Exhibit 1, p. 586); see also Justus Wilson, Farmer, John Smith Reserve, to R.S. McKenzie, Indian Agent, Duck Lake Agency, February 24, 1891, LAC, RG 10, vol. 1596 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 1, p. 352); Diary of Justus Wilson, John Smith's Reserve, July 1891, LAC, RG 10, vol. 1596 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 1, p. 355).} For their own convenience and for administrative purposes, however, local department officials reported jointly on the activities and agricultural progress of both groups at IR 100A.\footnote{R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Indian Commissioner, June 1889, LAC, RG 10, vol. 3793, file 46008 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 1, pp. 320–21); R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Indian Commissioner, September 1889, LAC, RG 10, vol. 3793, file 46008 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 1, pp. 330–31); Return showing crops sown and harvested by Individual Indians in Duck Lake Agency, 1890, in Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1890}, 284 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 94); Alexander McGibbon, Inspector of Indian Agencies and Reserves, to the Indian Commissioner, September 1, 1890, LAC, RG 10, vol. 3843, file 72695-1 (ICC Exhibit 1, pp. 585–87); Return showing crops sown and harvested by Individual Indians in Duck Lake Agency, 1891, in Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1891}, 314 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 105); Alexander McGibbon, Inspector of Indian Agencies and Reserves, to SGIA, September 9, 1892, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1892}, 89 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, pp. 108–9).}

On September 4, 1891, Chakastaypasin and Cumberland band members, described as “members of the Band owning the Reserve ... known as Cumberland Reserve No. 100A,” signed a Consent to Transfer for Nanequaneum from Beardy's Band. The Consent stated:

\begin{quote}
We the undersigned Councillors and members of the Band of Indians owning the Reserve situated in treaty No. 6 and known as the Cumberland Reserve No. 100A 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 4th day of September 1891, granted leave to “Nanequaneum” No. 35 of Beardy’s Band No. 97 to be transferred from said band to this our Band of Indians owning the Reserve as situated at Fort a la Corne in Treaty No. 6 and known as Cumberland Reserve to which transfer, we the undersigned hereby give our consent.\footnote{Consent of Band to Transfer, September 4, 1891, LAC, RG 10, vol. 3862, file 83104 (ICC Exhibit 1, p. 632).}
\end{quote}

The consent contains the signatures of five Cumberland members and two Chakastaypasin members, George Sanderson and “Big Head per G. Sanderson.” The department approved the transfer of Nanequaneum to
“Peter Chapman’s Band” on October 20, 1891, and he appeared the next year as ticket no. 105 on the 1892 paylist for “Big Head’s Band 100A.”

Separate Paylists for Big Head Band and Cumberland Band 100A, 1892–96
An important departmental effort to make a distinction between the Cumberland and Chakastaypasin band members living at IR 100A began in 1892, but lasted for only four years. On the instructions of DSGIA Vankoughnet, who was concerned about maintaining the distinction of the Cumberland Band’s Treaty 5 status, Commissioner Hayter Reed informed the Indian Agent in May 1892 that he should keep the Cumberland people separate from all others on the paylists and returns. He conceded that this distinction might be difficult, since “a portion of the Chakastaypsin’s Band, and possibly some other Indians of Treaty Six[,] are merged with them.” That year, a new paylist was created for “Big Head’s Band,” and the Agent’s tabular statements list the “100A Big Head’s” and the “100A Cumberland” bands separately.

Transfers into Big Head’s Band, 1892–95
During the existence of the Big Head band paylist at IR 100A from 1892 to 1896, there were a number of transfers into Big Head’s Band by various methods. In 1890 and 1891, several communications between department officials concerned a man named Paskoostequan, the brother of Chief One Arrow, who wished to enter treaty. The department denied his request, but his wife and three children were admitted to treaty after his death. “Paskoostequan’s widow,” a daughter of Chief Chakastaypasin, appeared on the Big Head band paylist in October 1892 along with two of her children. The Indian Agent’s remark beside her name states that her request to enter treaty

258 Unidentified author and recipient, October 20, 1891, LAC, RG 10, vol. 3862, file 83104 (ICC Exhibit 1, p. 672).
259 Treaty annuity paylist, Big Head Band, 1892, no file reference available (ICC Exhibit 12a, p. 223).
260 [L. Vankoughnet, DSGIA], to Hayter Reed, Indian Commissioner, April 22, 1892, LAC, RG 10, vol. 3736, file 27580 (ICC, James Smith Cree Nation IR100A Inquiry, Exhibit 1, pp. 359–60).
261 Hayter Reed, Indian Commissioner, to the Indian Agent, Duck Lake Agency, May 7, 1892, no file reference available (ICC Exhibit 1, p. 673).
262 Treaty annuity paylist, Big Head Band, 1892, no file reference available (ICC Exhibit 12a, pp. 222–23).
263 “Farming Agencies and Indian Reservations: Approximate Return of Grain and Roots Sown and Harvested,” Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1892, 322 (ICC, James Smith Cree Nation IR100A Inquiry, Exhibit 17, p. 120); “Return showing Crops sown and harvested by Individual Indians in Duck Lake Agency, season of 1892,” Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1892, 378–79 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 122).
without arrears had been granted on September 2, 1891, although 1892 was the first year that her family received annuities. In 1894, her son moved from the One Arrow paylist to her ticket on the Big Head band paylist. No Consent to Transfer forms were signed for his admission to the Band.

On March 26, 1894, a Consent to Transfer form was signed for the admission of Yellow Quill member Mahsahkeeask to “Big Head’s Band No. 100A.” The Consent states:

We the undersigned Chiefs and Councillors of the Band of Indians owning the Reserve situated in Treaty No. 6 and known as Big Head’s Cumberland Reserve No. 100A, 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 twenty-sixth day of March, 1894, granted leave to Mah-sah-kee-ask No. 84 of Yellow Quill’s Band to join our said Band 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.

Three Big Head band members signed the Consent, namely George Sanderson, John Sanderson, and Big Head, along with two members of the Cumberland Band 100A. The Yellow Quill Band signed the corresponding Consent for the transfer on July 16, 1894. In a letter to the DSGIA on September 25, 1894, Assistant Commissioner Forget reported that he had approved Mahsahkeeask’s “transfer” to the Big Head Band “because he has been living on Big Head’s reserve for the last three years, and would not return to Yellow Quill’s reserve, as he said he could not make a living there, and all his wife’s relations live in the neighbourhood of La Corne.” Forget also reported that “this transfer was strongly urged by Indian Agent Mr. McKenzie.” The DSGIA subsequently approved the “transfer” on October 1, 1894.

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265 Treaty annuity paylist, Big Head Band, 1892, no file reference available (ICC Exhibit 12a, p. 223).
266 Treaty annuity paylists, Big Head Band, 1894–95, no file reference available (ICC Exhibit 12a, pp. 227, 230); Treaty annuity paylist, One Arrow Band, 1894, no file reference available (ICC Exhibit 26e, p. 42). It is unknown whether this was Alexander Baldhead, who received his own ticket the following year, or a younger son. See the Sturgeon Lake Tracing Study (ICC Exhibit 17c, pp. 47–48).
267 Consent of Band to Transfer, March 26, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1, p. 686).
268 Consent of Band to Transfer, March 26, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1, p. 686).
269 Consent of Band to Transfer, July 16, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1, p. 689).
270 A.E. Forget, Assistant Indian Commissioner, to DSGIA, September 25, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1, p. 698).
271 A.E. Forget, Assistant Indian Commissioner, to DSGIA, September 25, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1, p. 698).
272 Acting DSGIA to Assistant Indian Commissioner, Regina, October 1, 1894, LAC, RG 10, vol. 3936, file 119149 (ICC Exhibit 1, p. 700).
The final transfer into Big Head’s Band executed during this period was for the admission of Muskochepaketimit of Yellow Quill’s Band into “Big Head’s Band 100A” residing at “Cumberland 100A Indian Reserve.” The wording on the Consent form is the same as that on the Consent for the transfer for Mahsahkeeask, except for the identification of signatories. This form states that the transfer is approved by the “Chiefs and Councillors of the Band of Indians owning the Reserve situated in Treaty No. 6 and known as Cumberland 100A Reserve.” It was signed entirely by members of the Big Head Band, including Kahtapiskowat, who signed as headman. The department approved the “transfer” in October 1894.

Amendment to the *Indian Act*, 1895

In 1895, the *Indian Act* was amended and provisions were added 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 was 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 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.

Transfer of Chakastaypasin Members to Cumberland Band 100A, 1896

Sometime before the fall of 1895, Thomas M. Daly, the SGIA and Minister of the Interior, visited the North-West Territories and took notice of the “very fine tracts of land” within the “unoccupied and unused” Chakastaypasin and Young Chipeweyan reserves. On October 18, 1895, he instructed his Deputy Minister, A.M. Burgess, to “open a correspondence with Mr. Reed as to these reserves being surrendered.” Soon after, on November 9, 1895,

273 Consent of Band to Transfer, September 25, 1894, LAC, RG 10, vol. 3936, file 119588 (ICC Exhibit 1, p. 699).
274 Acting DSGIA to Assistant Indian Commissioner, October [15], 1894, LAC, RG 10, vol. 3936, file 119588 (ICC Exhibit 1, p. 703).
275 *Indian Act*, RSC 1886, c. 43, s. 140, as amended by SC 1895, c. 35, s. 8 (ICC Exhibit 25a, p. 59).
276 J. McTaggart, Dominion Lands Agent, to T. Mayne Daly, Minister of the Interior, October 12, 1895, LAC, RG 15, Series D-II-1, vol. 724, file 390906 (ICC Exhibit 1, p. 717).
277 Marginal note written on letter from J. McTaggart, Dominion Lands Agent, to T. Mayne Daly, Minister of the Interior, October 12, 1895, LAC, RG 15, Series D-II-1, vol. 724, file 390906 (ICC Exhibit 1, p. 717).
Hayter Reed, the DSGIA, wrote to Indian Commissioner A.E. Forget and inquired “whether the members of Chacastapasin Band were formally transferred to the other Bands with which they become amalgamated, and if not to request that the formal application for such transfer and consent of the Bands concerned to receive applicants may be obtained without delay – and transmitted to the Dept.”

On the same day Reed wrote to Burgess and stated:

Relative to the advisability of throwing open for settlement the Reserves set apart for the Bands of Chiefs Young Chippewayan and Chakastapasin respectively; and acquainting me with the Minister's views as to the desirability of these Reserves being surrendered, and in reply to suggest for consideration the question as to whether under the circumstances any necessity exists for taking a surrender at all. With regard to the Indians of Young Chippewayan's Reserve, the question presents itself as to whether the fact of their having been rebels in 1885, and having left the Country after the rebellion would not afford sufficient and reasonable grounds for dispossessing them of such rights as they originally had to the Reserve. As to such of them as have since returned they are in the same position as the Indians of Chacastapasin Band in so much as they have all become amalgamated with or merged to other Bands with the members of which they enjoy equal privileges.

He concluded: “If the matter can be dealt with by Order in Council, there are reasons which would seem to make the adoption of that method preferable to an endeavour to obtain surrender.”

Reed wrote again to Indian Commissioner Forget in January 1896 asking him whether “action has been completed relative to the formal transfer” of the Chakastaypasin members to other bands. He explained that the Department of Indian Affairs intended to hand control of the Chakastaypasin reserve over to the Department of the Interior, “but desires assurance in the direction indicated before proceeding.”

On February 3, 1896, Commissioner Forget instructed the Indian Agent at Duck Lake to immediately “obtain the consent of the councils of the several Bands into which these Indians have gone, to their formal admission thereinto,” since it appeared that “no formal transfer of these Indians to the Bands with which they subsequently amalgamated has apparently ever been

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278 DSGIA to A.E. Forget, Indian Commissioner, November 9, 1895, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 722).
279 Hayter Reed, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, November 9, 1895, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 726).
280 Hayter Reed, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, November 9, 1895, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 727).
obtained.”282 With this letter he enclosed a memorandum “showing the dispersion of the Band as it was in 1888, and tracing each member from that date to 1895.”283 Forget’s tabular statement traces nine of the 10 families who appeared on the 1887 Chakastaypasin band paylist and shows that they were living with the Big Head, James Smith, and One Arrow Bands as of 1895.

In a letter to Commissioner Forget dated February 8, 1896, Hayter Reed confirmed that the department intended to use the provisions of section 140 to obtain control of the Chakastaypasin reserve. He wrote that “the Department does not propose to take any surrender of the Chakastaypasin Reserve ... and it is largely on that account that it desires to have the transfer to other Bands, by which the original owners have forfeited all rights in the Reserve set apart for them, formally completed.”284 In subsequent communications with the Agent, Forget instructed that all Chakastaypasin members should be transferred to the “Cumberland Band No. 100A,” and Big Head’s Band “done away with.”285 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 ... formally transferred” to James Smith.286 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.287

While the Indian Agent and the Indian Commissioner were attempting to organize the formal transfers of Chakastaypasin members, the Department of the Interior continued to press Reed for “early action” in transferring control of the Chakastaypasin and Young Chipeewayan reserves. The Secretary for the Department of the Interior informed Reed on April 22, 1896, that “some applications have been received in this department for portions of the reserves

284 Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, February 8, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 743).
286 F.H. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, April 27, 1896, LAC, RG 10, vol. 1594 (ICC Exhibit 1, p. 758).
in question” and that “with the approach of summer it is expected that other applications will be put in.” Immediately following this communication from the Department of the Interior, Reed wrote to Forget asking him to instruct the Agent “not to allow any evitable delay” in completing the formal transfers. Reed explained to the Department of the Interior that “it is felt desirable to make sure that all necessary formalities have been duly observed” with respect to the transfer of the surviving Chakastaypasin members, in order “to avoid the possibility of complications arising in the future.”

Consents to Transfer Signed by Cumberland Band 100A

On May 18, 1896, Indian 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. He explained that a number of the names on the Consents had never appeared on the Chakastaypasin paylists, but that “these people are descendants or have become members since 1888 and have never been legally transferred to any band, even although some of them have been paid Treaty with James Smith’s Band.” Among those referred to by McKenzie were Chakastaypasin members who had moved to the James Smith paylists before the rebellion in 1885. Others were not former Chakastaypasin band members, but had previously transferred into the Big Head Band or had family connections to members of the Band. A notation on the Consent forms for these individuals states that they wished “to be transferred to Cumberland Band with the remnant of Chakastaypasin 98.”

288 J. Hall, Secretary, Department of the Interior, to Hayter Reed, DSGIA, April 22, 1896, LAC, RG 10, vol. 6665, file 109A-3-1, part 1 (ICC Exhibit 1, p. 755).
290 Hayter Reed, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, April 29, 1896, LAC, RG 10, vol. 6665, file 109A-3-1, part 1 (ICC Exhibit 1, p. 772).
293 Consents of Band to Transfer, May 10, 1896, LAC, RG 10, vol. 6665, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 792–97, 802); see also Sturgeon Lake First Nation, “Families of the Chakastaypasin Band: Remarks on Homik’s Tracing Study from the Perspective of the Sturgeon Lake First Nation,” revised May 1997 (ICC Exhibit 17c, pp. 46–47, 107–10). The members referred to were Paskoostequan’s widow (Balthead), Alexander Balthead, Ooypeeewuahkisewaway (Hard Sounding Flute), Quaytwaywayweein, William Hard Sounding Flute, Mahsakask, and Maskochepatemit.
An additional Consent to Transfer form admitting one former Chakastaypasin member into the James Smith Band was also forwarded at this time, making 23 Consent forms in total. McKenzie noted that The Mink was drawing treaty with the Sturgeon Lake Band, and that the Agent at Carlton was taking care of the formal transfer. It should be noted that some of the original Chakastaypasin members or their descendants who had moved to the James Smith paylists in the early 1880s were overlooked by McKenzie, and Consent forms were not signed for these individuals.

The Consent to Transfer forms admitting the Chakastaypasin band 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.

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 members with an “X” mark. Although the Consent to Transfer forms were evidently signed by Cumberland members, Delbert Brittain says that the elders do not remember having a meeting to accept the Chakastaypasin members into their Band.

In his covering letter forwarding the Consent forms, McKenzie explained that the Cumberland band members had delayed giving their consent because “they wished to know if by so doing they would be allowed to appoint a Chief and Councillors.” However, he was able to get them “to sign the papers

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298 ICC Transcript, June 26, 2002 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18c, p. 46, Delbert Brittain).
without any difficulty” after explaining that their request probably would not be granted, but that he would submit it to the department for consideration. McKenzie reported, however, that the Chakastaypasin members had not yet consented to join the Cumberland Band. He explained that

Chakastapaysin’s or Big Head’s Band state that by joining the Cumberland Band they do not wish to give up their claim to their Reserve and ask to be informed what the Department proposes doing with the Reserve, and what they will receive if they give up their claim to the Reserve. I explained that I was not in a position to give them any information but that I would receive instructions from the Department before they would be asked to sign any document.

In a letter to the DSGIA, Commissioner Forget commented that “it will be seen that these Indians either do not comprehend the full effect of their transferring themselves to another Band or have only accepted the same conditionally.” Reed replied:

With regard to the unwillingness of the members of the Chakastaypasin Band to surrender their title to the Reserve which they have left, and their request to be informed as to what they will receive for relinquishing their claim thereto, the Agent should be instructed to tell them that since by admission to other Bands they share all privileges with the Bands concerned, including the right to the Reserves, they can not, in the opinion of the Department, expect any compensation for relinquishing their own Reserve, and have in fact already done so by leaving it and taking up permanent abode upon others.

They should be reminded that it is somewhat late for them to set up such a claim after they have been virtually members of other Bands for years, which they joined entirely of their own accord, the Department refraining from making any objection; and they should be told, moreover, that in order to complete the transfers and make the privileges accorded them by the other Bands secure they should make no delay with regard to formal application for admission.

The Agent should be further instructed to act promptly in this matter, as the longer time the Indians have to think about and talk it over, and to be influenced by others, the more unreasonable they are likely to become.

By May 10, 1896, the department had obtained the consent of the Cumberland Band 100A to the admission of the Chakastaypasin members into its Band, but did not yet have the consent of Chakastaypasin members themselves for the transfers.

Applications for Admission to Cumberland Band 100A and James Smith Band

On June 5, 1896, Commissioner Forget instructed Agent McKenzie to obtain an application from each Chakastaypasin head of family for admission “into membership in the Band which has consented to receive them,” even though consent for their admission to IR 100A had already been obtained on May 10, 1896. Forget noted that this procedure was “necessary” “in the absence of the customary consent of band to release members applying for transfer, which cannot in this case be procured as the whole band[,] or remnant thereof, is being transferred.”

He wrote: “No time should be lost in having the work completed and the papers forwarded, for the longer the matter is allowed to stand open the more chance there is of the present tendency to opposition developing into a pronounced refusal, and this it is desired to avoid.”

He also instructed the Agent to tell the Chakastaypasin Band that admission into other bands entailed all the privileges including the right to lands, which they enjoyed as members of a separate band, and for this reason they cannot expect compensation where no loss is sustained. ... In any case they have practically relinquished all claim to their old reserve by abandoning it and taking up their abode on others and after years of practical membership in such other bands, which was not opposed by the Department, it is now somewhat late to set up any claims to lands ... They might also be informed that in order to definitely assure themselves of the privileges now offered them in connection with other bands, they had better, in their own interests, make no unnecessary delay in accepting the offer while it remains open.

On receipt of these instructions, Agent McKenzie called a meeting “of the members who were not absent” on June 12 and made an unsuccessful attempt to get their signatures on an application for transfer. He reported that “they flatly refuse unless they are allowed something for the Checastapasins

303 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1, p. 813).
304 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1, p. 813).
305 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1, p. 814).
Reserve,” and that, in any case, only a few members were present.\textsuperscript{306} He suggested that “[t]he only time it will be possible to get the Band together will be at Treaty payments and I am in hopes by that time to induce them to sign the document but I cannot say positively that I shall be able.”\textsuperscript{307} Hayter Reed, the DSGIA, reluctantly agreed to this plan of action, commenting to Commissioner Forget that “apparently nothing can be done in the matter pending the fresh effort to be made by the Agent later on, but you will see that it is not lost sight of.”\textsuperscript{308} However, he instructed that, “should the Agent find it less difficult to get the Indians to make individual applications,” he should pursue that course rather than trying to get all the signatures on a single application.\textsuperscript{309} Forget communicated these instructions to the Agent, informing him that since it was “useless” to approach the Chakastaypasin members as a whole “except in making the trial you suggest at the approaching treaty payments,” the Agent should “take the members individually and endeavour to win them over one by one, obtaining their signatures as occasion offers.”\textsuperscript{310}

The Department of the Interior notified the Department of Indian Affairs on July 8, 1896, that another application had been received for land within the Chakastaypasin reserve and inquired as to the status of the reserve.\textsuperscript{311} In response, Hayter Reed informed Deputy Minister Burgess that “unforseen difficulties” had arisen in completing the formal transfers, but that he hoped these would be “overcome” at the next treaty payments in the fall.\textsuperscript{312}

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.\textsuperscript{313} No information is available regarding the circumstances surrounding the signing of these applications or any meetings that may have


\textsuperscript{308} Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, July 2, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 816).

\textsuperscript{309} Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, July 2, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 816).

\textsuperscript{310} A.E. Forget, Indian Commissioner, to the Indian Agent, Duck Lake Agency, July 6, 1896, no file reference available (ICC Exhibit 1, p. 817).

\textsuperscript{311} John R. Hall, Secretary, Department of the Interior, to D.C. Scott, Secretary, Department of Indian Affairs, July 8, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 818).

\textsuperscript{312} Hayter Reed, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, July 10, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 820).

\textsuperscript{313} Application for admission to “Cumberland Band No. 100A,” October 15, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC 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 Exhibit 1, p. 837).
taken place to discuss the transfers. Chakastaypasin and James Smith elders do not recall stories of a meeting or a vote to transfer Chakastaypasin members to another band or any talk of “becoming one band.” It is unclear from their statements whether the elders were referring to the 1896 transfer to the Cumberland Band or the 1902 amalgamation with the James Smith Band.

The application for admission to the “Cumberland Band No. 100A” is a single sheet with the names of 27 Chakastaypasin members, 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.

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.

No annuity payments are recorded on the paylist for “Big Head’s Band Paid at Fort a La Corne,” dated October 14 and 15, 1896. Each name has a note beside it, stating that its ticket had been “transferred to Cumberland Band No. 100A” and referencing the Indian Commissioner’s letter dated June 5, 1896, as the authority for the transfer. As mentioned previously, this letter contained instructions from Forget to Agent McKenzie to “obtain the signatures of each head of family or adult member thereof, to an application to be transferred to and admitted into membership in the Band which had consented to receive them.” The paylist shows that 17 families, containing 48 people, were transferred from Big Head’s Band to the Cumberland Band 100A at that time.

The paylist for the “Cumberland No. 100A Band, Paid at Reserve Fort a la Corne,” on October 14 and 15, 1896, reflects the transfers of the 17 families.


316 Surrender for sale of Chakastaypasin IR 98, June 23, 1897, no file reference available (ICC Exhibit 1, p. 899).

317 Treaty annuity paylist, Big Head Band, 1896, no file reference available (ICC Exhibit 12a, pp. 231–32).

318 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1, p. 813).

319 Treaty annuity paylist, Big Head Band, 1896, no file reference available (ICC Exhibit 12a, pp. 231–32).
from the Big Head band paylist. In addition, 10 families (28 people) from the James Smith Band also appear on this paylist, with a note stating that they were now “transferred” to the Cumberland Band and referencing the Commissioner’s letter dated June 5, 1896. In all, 27 families (with 76 people) transferred to the Cumberland Band 100A at that time.\textsuperscript{320} The James Smith band paylist also notes the transfer of one person from Big Head’s Band to the James Smith Band on the same date, citing the same Commissioner’s letter as the authority for the transfer.\textsuperscript{321}

Although all 27 Chakastaypasin families who applied for admission to the Cumberland Band on October 15, 1896, were added to the Cumberland 100A paylist and said to be “transferred,” it was noted that Consent forms had been obtained for the transfer of only 24 of these families. Some confusion was caused by variant spellings of names on the Consent forms and the application for admission, but it was finally determined that four additional Consents to Transfer and one application for admission were required to complete the formal transfers. The Indian Commissioner instructed the Agent on December 10, 1896, to obtain them “with as little delay as possible.”\textsuperscript{322}

On February 2, 1897, a single Consent to Transfer was obtained from the Cumberland Band 100A for the admission of three outstanding Chakastaypasin members. The Consent, signed by 10 Cumberland members with an “X” and certified by Agent McKenzie, has similar wording to the other Consent to Transfer forms. This form, unlike the previous 23 Consent forms, has no signature of an interpreter or other witness.\textsuperscript{323}

Also on February 2, Paskoosequuan’s widow applied for admission to the Cumberland Band 100A. Her application has the same wording as the application signed by the other 27 Chakastaypasin families and is signed by Agent R.S. McKenzie. Again, there was no signature of an interpreter or other witness on this application, unlike the other applications for admission.\textsuperscript{324} Her admission to the Cumberland Band 100A had previously been consented to in May 1896.\textsuperscript{325}

\begin{thebibliography}{9}
\bibitem{321} Treaty annuity paylist, James Smith Band, 1896, no file reference available (ICC Exhibit 12a, p. 349).
\bibitem{322} F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, December 10, 1896, no file reference available (ICC Exhibit 1, p. 841).
\bibitem{323} Consent of Band to Transfer, February 2, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 854).
\bibitem{324} Application for admission to the “Cumberland Band,” February 2, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 852).
\bibitem{325} Consent of Band to Transfer, May 10, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 802).
\end{thebibliography}
On February 25, 1897, the Indian Commissioner informed McKenzie that the consent of the Cumberland Band was still outstanding for the admission of one final Chakastaypasin family whose name appeared on the October 15, 1896, application for admission. A blank Consent form was supplied to the Agent on March 9. On March 12, 1897, the Consent to Transfer for the admission of “Nahmeenahweekahpahweeweequan” to the “Cumberland Band No. 100A” was signed by nine Cumberland Band 100A members and certified by Agent McKenzie. No other witness or interpreter signed the Consent form. With this final Consent form signed, the formal transfer, under section 140 of the Indian Act, of 27 Chakastaypasin families to the Cumberland Band 100A and one family to the James Smith Band was complete.

Transfers of Chakastaypasin Members to Other Bands
Aside from these formal section 140 transfers to the Cumberland and James Smith Bands in 1896 and 1897, only one other Chakastaypasin family was formally transferred under these provisions. On October 23, 1896, the Chiefs and councillors of the William Twatt Band at Sturgeon Lake signed a form consenting to the admission of “The Mink” to their Band. The wording is similar to other Consent to Transfer documents and is signed by three headmen and an interpreter and witnessed by William Badger. The Mink’s corresponding application for admission to that Band was not obtained until July 27, 1897, a month after the surrender of the Chakastaypasin reserve. The wording of this application is different from that of the applications made by other Chakastaypasin members for admission to the James Smith and Cumberland Bands. It reads as follows:

I hereby make application to be transferred from Band No. 98 Chacastapasin Reserve to that of William Twatts Band No. 101, Sturgeon Lake Reserve to which Band I have obtained consent of Headmen & Indians to join. In consideration of this application being granted I waive and give up any claim I may have to said Chacastapasin Reserve. I sign this application is the presence of several Indians.

326 Indian Commissioner to the Indian Agent, Duck Lake Agency, February 25, 1897, LAC, RG 10, vol. 1594 (ICC Exhibit 1, p. 850).
327 E.H. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, March 9, 1897, LAC, RG 10, vol. 1594 (ICC Exhibit 1, p. 856).
328 Application for admission to “Cumberland Band No. 100A,” October 15, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 856); Consent of Band to Transfer, March 12, 1897, in LAC, RG 10, vol. 1594 (ICC Exhibit 1, p. 857).
The application was signed by Indian Agent H. Keith, four headmen, and Rupert Pratt as witness and interpreter. It is interesting to note that although The Mink received treaty with the Sturgeon Lake Band until his death in 1922, he may have lived at the John Smith (Muskoday) reserve at the time this application was signed. Harold Kingfisher related oral history from his mother about The Mink, saying that he was a medicine man who travelled among all the different reserves but who actually lived at the Muskoday reserve, where his daughter Hannah had married. The oral history says that he moved to that reserve as early as 1887, before Hannah was married.

However, other oral evidence suggests that The Mink may have lived at Sturgeon Lake for a number of years before moving to Muskoday.

Forget’s tracing report also noted the woman formerly paid under Chakastaypasin ticket no. 28 who married into the One Arrow Band before 1889. He deemed that a section 140 transfer was not required in her case because she would have given up Chakastaypasin Band membership by her marriage into another band.

Laird’s Tracing of Chakastaypasin Members, 1902
A few years later, following the sale of the Chakastaypasin reserve lands in December 1901, Secretary J.D. McLean wrote to Indian Commissioner David Laird, asking for a statement “showing the name of each individual Indian and the Band to which he now belongs in order that a per capita division may be made” of the sale revenues. Laird forwarded his report on March 26, 1902, explaining that the delay stemmed from the “considerable time” spent searching the records in his office. In order to determine the proper beneficiaries of the sale proceeds, Laird traced the Chakastaypasin members in two categories: “the original owners of the Chacastapasin Reserve as per the annuity pay-sheets of 1884,” and “those Indians who joined the Band previous to the formal transfer dated the 15th of October 1896.”

334 Statement showing “Dispersion and present whereabouts of Chekastapasin’s Band, No. 98,” attached to A.E. Forget, Indian Commissioner, to Indian Agent, Duck Lake Agency, February 3, 1890, no file reference available (ICC Exhibit 1, pp. 738–39).
335 J.D. McLean, Secretary, to David Laird, Indian Commissioner, January 3, 1902, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 1165).
336 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, March 26, 1902, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 1168).
Laird’s report traced each family in detail, where possible, and summarized the number of those eligible from each Band. According to his findings, 83 persons were entitled to a share of the proceeds as of 1901, divided among the One Arrow, John Smith, Sturgeon Lake, Kinistin, Gordon’s, James Smith, and Cumberland Bands. Two other persons paid with the James Smith Band were identified, but not included in the total pending a department decision on their eligibility. Laird was unable to trace seven Chakastaypasin families, as well as the granddaughter of one Chakastaypasin band member and the daughter of a Big Head band member. The department eventually divided the sale proceeds, on the basis of 85 shares, among the bands identified by Laird.

Trespasses on the Chakastaypasin Reserve, 1896–97

Concurrent with the effort to obtain formal transfer of Chakastaypasin members to other bands, local demand for the use of timber and other resources on the reserve continued. In 1895, former Indian Agent Charles Adams requested permission to homestead and build a ferry landing on the northern part of the reserve, and he inquired about how he might obtain a grazing lease there as well. The Acting DSGIA informed Adams in December 1895 that since the question of “throwing open” the reserve “for settlement” was under consideration, his request could not be dealt with at that time. Adams wrote again on March 4, 1896, asking Hayter Reed to “get me permission to build houses and stables, etc. on the Chakastapasin Indian Reserve for the purpose of working a licensed ferry at that place.” Reed informed him on March 10, 1896, that, because “it is intended at an early day to hand over the Chakastapasin Reserve to the Department of the Interior,” his request could not be granted. A few days later, Adams wrote to his Member of Parliament, D.H. MacDowall, saying that he was “inclined to

337 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, March 26, 1902, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 1109–83).
338 The families untraced by Commissioner Laird were Chakastaypasin Band nos. 4, 5, 7, 15, 26, 31, 32 (one granddaughter only), and 34; Big Head Band no. 107 (one daughter only). The Sturgeon Lake First Nation tracing study has successfully traced some of these families and individuals (see ICC Exhibit 17c).
339 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to C.P. Schmidt, Indian Agent, Duck Lake Agency, January 29, 1926, LAC, RG 10, vol. 6663, file 109A-3-1, part 2 (ICC Exhibit 1, p. 1403).
341 Acting DSGIA to Charles Adams, December [23], 1895, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 752).
take chances & build,” and he asked for assurance that he would not “be driven off or have any property confiscated, should I Build on reserve.”344 George Moffatt of the North-West Mounted Police notified the Indian Commissioner in May 1896 that “the man Adams who is running the ferry is at present building upon the Reserve and I make this report in case permission has not been given by you.”345 After being informed of the trespass, DSGIA Reed stated to the Indian Commissioner in June 1896 that Adams was building at his own risk, though “as the ferry is for the convenience of the public[,] the Department does not think it worth while to appear to notice the trespass.”346

As in previous years, settler interest in the timber on Sugar Island continued. In February 1896, William Gordon from the Boucher settlement made an application to “cut and remove 50,000 lenial feet of black poplar logs” on Sugar Island.347 In a letter to the Indian Commissioner regarding this application, Agent McKenzie noted that “the timber on the island referred to is all of very large size, of poor quality and only fit for the purpose named.”348 However, the DSGIA informed Indian Commissioner A.E. Forget that “as it is proposed, at an early day, to hand over this Reserve to the Department of the Interior, [it] is not considered advisable that this Department should grant permission to cut any timber thereon.”349

A few months later, Gordon made another application for permission to cut timber at Sugar Island. When the new SGIA, Clifford Sifton, brought it to Hayter Reed’s attention in January 1897,350 Reed informed Gordon two weeks later that, “as the Indians have not made a formal surrender in accordance with the provision of the Indian Act, no alienation of any part of this Reserve can be made,” and therefore his application could not be granted.351 Gordon quickly replied, saying that, if he could not get a permit, the department should “see that the Island is protected from the wholesale slaughter of logs which is cut year by year without a permit or Limit.” Furthermore, he noted

346 Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, June 2, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 809).
349 DSGIA to A.E. Forget, Indian Commissioner, March 7, 1896, no file reference available (ICC Exhibit 1, p. 748).
that “there is lots of good logs on the island, but these are wasted every year.”

After receiving Gordon’s letter, the Indian Commissioner instructed Agent McKenzie to make a “searching inquiry into the alleged illegal cutting of timber” on Sugar Island. McKenzie reported back to the Indian Commissioner on March 22, 1897. He found that settlers from both of the nearby Halcro and Boucher settlements were cutting timber on Sugar Island and that William Gordon “had cut more timber on that Island than any other man in that locality.” One settler claimed to be unaware that cutting the timber was illegal, since he understood “that the Island had been thrown open.” During his inspection of Sugar Island, McKenzie found that “considerable timber had been taken out, but the fact of the matter is, the timber is so thick and tall that one could hardly see what had been taken. There is an immense quantity of timber here and though there are signs of it having been cut for a number of years, it does not appear to have done any damage.” McKenzie concluded his investigation by visiting T.O. Davis, the Member of Parliament for Prince Albert, who was “conversant with the whole matter.” He concluded his report by stating that “but little damage is done and the settlers have no other place to get their building material.”

In light of McKenzie’s discovery that William Gordon was responsible for much of the cutting, the Indian Commissioner wrote to Gordon on April 12, 1897, saying: “The Department regrets very much to learn this and trusts that henceforth you will be good enough to aid it in the protection of this timber, by assuring yourself that timber cut for you by any person is not taken from any portion of this reserve.” McKenzie was notified on the same day that “notices forbidding trespass” would be sent to him shortly, “to be posted in conspicuous places on the Island.” A few days earlier, on April 7, 1897, the

353 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, March 1, 1897, LAC, RG 10, vol. 1594 (ICC Exhibit 1, p. 855).
359 F. Paget, for the Indian Commissioner, to William Gordon, April 12, 1897, LAC, RG 10, vol. 1594 (ICC Exhibit 1, p. 873).
360 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, April 12, 1897, LAC, RG 10, vol. 1594 (ICC Exhibit 1, p. 874).
department informed the Indian Commissioner that the illegal timber should be seized, but it is unknown whether this action was carried out. There is no evidence that any other action was taken at this time to prevent future cutting on the island.

Surrender of Chakastaypasin IR 98, 1897
In June 1896, a federal election brought the Liberal Party to power, led by Sir Wilfrid Laurier. In November 1896, Clifford Sifton was appointed Superintendent General of Indian Affairs. He, in turn, consolidated the posts of Deputy Minister of the Interior and Deputy Minister of Indian Affairs, and he appointed James A. Smart to the position in April 1897.

On January 13, 1897, Sifton wrote to Hayter Reed to bring his attention to an application from a settler wishing to cut logs on Sugar Island, noting that “the settlers of St. Louis de Langevin have no other available lumber and that the Indians have left the Reserve over ten years.” Reed replied to Sifton on January 26, 1897, outlining the recent history of the Chakastaypasin reserve and the department’s efforts to obtain control of it. Reed explained that, until the department was certain that “the transfers now made embrace all of the original members of the band,” it would be impossible to dispose of the timber without a surrender. On this point, he informed Sifton:

The Department of Justice has given the following opinion with regard to the question as to whether a reserve once given to a band can afterwards be reduced in extent without the sanction of the remaining members,

“There is no provision in the law that I am aware of under which a reserve set apart under this Treaty (No. 6) for a particular band can, on account of a reduction for any cause of the original number of the band, be reduced in extent without the sanction of those who still continue to be members.

The lands in a reserve belong, as a reserve, to the Indians who remain members of the band, and if surrendered and sold or disposed of, the proceeds should be devoted to the use and benefit of such Indians.”

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361 Unidentified author to Indian Commissioner, April 7, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, pt. 1 (ICC Exhibit 1, p. 872).
363 Clifford Sifton to Hayter Reed, DSGIA, January 13, 1897, in LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 843).
364 Hayter Reed, DSGIA, to Clifford Sifton, SGIA, January 26, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 844–45).
365 Hayter Reed, DSGIA, to Clifford Sifton, SGIA, January 26, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 845).
T.O. Davis, MP for Prince Albert, wrote to Sifton on March 31, 1897, reminding him that they had previously spoken about “the opening of the Chakastapasin Reserve” and drawing his attention to the desirability of throwing open the Young Chipeewayan (Stoney Knoll) reserve as well, “as there are no Indians, nor never was to my knowledge on this Reserve.” Davis pointed out that it was the intention of the previous government to open these reserves, and that he hoped Sifton would “have it done as early as possible.”

Sifton replied the next day, saying that he would “give the matter attention.”

In response to Davis’s request, the Minister asked for a report on the status of the Chakastaypasin reserve. Commissioner Forget promptly informed the Superintendent General on April 3, 1897, that, “in so far as can be traced, there only remains one Indian whose transfer to a band in the Carlton Agency is now in process.” However, he did not agree “that such transfers to other bands in any way obviates the necessity for taking a surrender” as required by the Indian Act. At the same time, Forget felt that “nothing should hinder” the opening of the Stoney Knoll reserve for settlement. With respect to the Stoney Knoll reserve, he reasoned:

Although set aside for the use of Indians it [has] never been settled by them. The members took part in the rebellion in ’85 and most of them left the country at the time and such who remained in the country or returned since, have amalgamated themselves with other bands.

Following Forget’s report, Acting Secretary J.D. McLean wrote a memorandum on April 14, 1897, outlining three matters for the Minister’s consideration with respect to the Chakastaypasin reserve:

1st. Is it desirable to abandon control of the Chakastapasin Reserve?
2nd. Is a surrender necessary and if so should an effort be made to obtain one from the Indians interested?
3rd. Should the attempt if made be to get a surrender without compensation, or should the Indians be told that the lands will be sold for their benefit, and in that

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367 Clifford Sifton, SGIA, to T.O. Davis, MP, April 1, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 870).
case will the bands who have adopted the members of the Chakastapasin Reserve, benefit pro rata in the proceeds of the sales.\textsuperscript{371}

McLean noted that he could see “no reason why the Indians should not receive compensation – the owners of the reserve for relinquishing it, and others for taking them in and sharing their lands with them, and thus relieve the Government pro tanto from the burden of contributing to their maintenance.”\textsuperscript{372} A marginal notation initialled by Clifford Sifton stated that the Department of Justice should decide whether a surrender of the Chakastapasin reserve would be necessary.\textsuperscript{373}

On April 17, 1897, “B. Cook” of Prince Albert wrote to Clifford Sifton enclosing a petition for “subdivision of an Indian reserve” and advising that “at an early date further petitions for the same object” would be sent.\textsuperscript{374} The petition, from the “settlers of the Halcro and surrounding settlements,” stated:

That a large section of country known as Chakastapasin Indian Reserve is now and has been for years lying idle. That these vacant sections of country retard development of surrounding settlements … That it is composed almost entirely of valuable farming lands, that would soon be cultivated were settlers allowed to enter for the same. That the Indian band for whom this land was reserved have abandoned the same about 1885 and have never occupied any portion of it since. And we understand have secured another reserve in another section of the country.\textsuperscript{375}

The petition concludes with a request that the reserve be subdivided and “opened to the public for homesteading purposes.”\textsuperscript{376} J.D. McLean replied to Cook on April 28, 1897, saying that the petition would “receive due consideration.”\textsuperscript{377}

On April 26, 1897, the Department of Indian Affairs wrote to E.L. Newcombe, the Deputy Minister of Justice, asking

\textsuperscript{371} J.D. McLean, Acting Secretary, to unidentified recipient, April 14, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 875).
\textsuperscript{372} J.D. McLean, Acting Secretary, to unidentified recipient, April 14, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 875–76).
\textsuperscript{373} Marginal note written by SGIA Clifford Sifton on letter from J.D. McLean, Acting Secretary, to unidentified recipient, April 14, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 875).
\textsuperscript{374} B. Cook to Clifford Sifton, Minister of the Interior, April 17, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 877).
\textsuperscript{375} Petition from “settlers of the Halcro and surrounding settlements” to Clifford Sifton, Minister of the Interior, undated, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 878).
\textsuperscript{376} Petition from “settlers of the Halcro and surrounding settlements” to Clifford Sifton, Minister of the Interior, undated, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 878).
\textsuperscript{377} Acting Secretary to B. Cook, April 28, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 883).
whether or not in your opinion the Crown can resume possession and dispose of an Indian Reserve without first obtaining a surrender from the Indians, under the following circumstances:

The reserve concerned is within the limits of Treaty No. 6 and has for a good many years past been abandoned by the members of the band for which it was set apart, and such members or at any rate all of them who can be traced, have been formally transferred by their own request to other bands, which have consented to receive them into membership. 378

Before a response was received from the Department of Justice, Clifford Sifton submitted a Memorandum to Council on May 3, 1897, recommending that authority be granted “for the relinquishment by the Department of Indian Affairs, and resumption by the Department of the Interior, of the control of the lands” comprising the Young Chipeewayan Stone Knoll reserve. 379 The request was approved by Order in Council on May 11, 1897. 380

Three days after the Order in Council approving the transfer of the Stone Knoll reserve to the Department of the Interior, Newcombe wrote to the Acting Secretary of Indian Affairs, setting out his legal opinion on surrenders as previously requested. He wrote:

As at present advised I do not think that the land in question can, in view of the provisions of the section referred to, be sold or otherwise alienated until the same has been released or surrendered in the manner provided by the Act. The section positively forbids, subject to certain exceptions, which have no application to the present case, the sale, alienation or lease of any reserve or portion of a reserve without such release or surrender.

There does not appear from your statement of the facts to have been anything amounting to a dissolution of the band. As to the members said to have been transferred to other bands, I do not find any express authority for such transfer in the Statutes, and there may be some question as to the legal effect of what has taken place, but in the absence of further information on the subject, I do not think that the lands in the reserve are relieved in the hands of the Crown from the trust in favour of the band, so far as these members are concerned, or that the Crown is dispensed as to them from compliance with Section 39 before disposing of such lands. Then it seems from your statement that there are other members of the band who have not been traced, and therefore may not have been transferred to other bands. 381

378 Acting Secretary to E.L. Newcombe, Deputy Minister of Justice, April 26, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 880).
381 E.L. Newcombe, Deputy Minister of Justice, to Acting Secretary, Department of Indian Affairs, May 14, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 887–88).
It should be noted that section 140 of the *Indian Act*, which provided the statutory basis for membership transfers, had been enacted two years earlier. Acting Secretary J.D. McLean wrote a memorandum on May 26, 1897, asking, in view of the opinion from the Department of Justice,

> whether the Minister desires that an effort should be made to get a surrender of the Chakastapasin Reserve from the Indians interested, in order that the lands comprising it may be sold, and the proceeds placed, pro rata, to their credit and that of the several Bands with whom they have become amalgamated. ... The Indians have already refused to make a gratuitous surrender.\(^382\)

A marginal note on this memorandum with the notation “yes” and initialled “C.S.” indicated Sifton’s agreement with this course of action.\(^383\)

McLean forwarded the Form of Surrender to Agent McKenzie on June 11, instructing him that, “in accordance with the provisions of the *Indian Act*, you will summon a meeting of the Indians formerly owning the Chakaspatasin Reserve and obtain from them their signatures to the enclosed documents.”\(^384\) McKenzie was also instructed to explain “that the moneys which may be derived from the sale of the lands to be surrendered will be placed to their credit and that of the several Bands with whom they have become amalgamated.”\(^385\)

On June 23, 1897, nine former members of the Chakastaypasin Band signed a surrender of Chakastaypasin IR 98. At the time of the surrender, the department was aware of Chakastaypasin members having been dispersed among several bands. In 1896, Indian Commissioner Forget specifically identified Chakastaypasin members living with Big Head’s, James Smith’s, and One Arrow’s Bands.\(^386\) Chakastaypasin members or their descendants were

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382 J.D. McLean, Acting Secretary, to unidentified recipient, May 26, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 894).
383 Marginal note, J.D. McLean, Acting Secretary, to unidentified recipient, May 26, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 894).
385 J.D. McLean, Acting Secretary, to R.S. McKenzie, Indian Agent, Duck Lake Agency, June 11, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 896).
also living in other locations, including the Sturgeon Lake, Gordon’s, and John Smith’s reserves.\(^{387}\) The text of the surrender document is set out below:

Know all Men by these Presents, that we, the undersigned Chief and Principal men of Chacastapasin’s Band formerly resident on our Reserve in the Duck Lake Agency in the Province of Saskatchewan and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lady the Queen, her Heirs and Successors forever, All and Singular, that certain parcel or tract of land and premises, situate, lying and being in the Chacastapasin Reserve in the Duck Lake Agency and Province of Saskatchewan containing by admeasurement twenty four square miles be the same more or less and being composed of the Chacastapasin Indian Reserve No. 98 aforesaid.

To Have and to Hold the same unto Her said Majesty the Queen, her Heirs and Successors forever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

And upon the further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed pro rata to our credit and that of the several Bands with whom we have become amalgamated.

And we the said Chief and Principal men of the said Band of Indians do, on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the disposal of the said land and of the money to be derived from the sale thereof.

In witness whereof, we have hereunto set our hands and affixed our seals this 23rd day of June in the year of Our Lord one thousand eight hundred and ninety seven.\(^{388}\)

The surrender document contains the signatures of nine former Chakastaypasin band members, all of whom were “transferred” to the Cumberland Band 100A under section 140 of the **Indian Act** in October 1896. The signatories were Kahtapiskowat, Neesoopahtawein, George Sanderson, John Sanderson, Nahnahahpeastah, Charles Sanderson, John Fox, Ahsineeweekahpow, and James Ahsineeweekahpow, all of whom signed with

\(^{387}\) Consent of Band to Transfer, March 12, 1894, in LAC, RG 10, vol. 3936, file 119582 (ICC Exhibit 1, p. 685); Consent of Band to Transfer, October 23, 1896, LAC, RG 10, vol. 3982, file 161097 (ICC Exhibit 1, p. 834); Application for admission to the William Twatt Band, July 27, 1897, LAC, RG 10, vol. 3982, file 161097 (ICC Exhibit 1, p. 912); see also David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, March 26, 1902, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 1169–83); Sturgeon Lake First Nation, “Families of the Chakastapasin Band: Remarks on Homik’s Tracing Study from the Perspective of the Sturgeon Lake First Nation,” revised May 1997 (ICC Exhibit 17c); Teresa Homik, “Chacastapasin Tracing Study,” prepared for Specific Claims West, April 1996 (ICC Exhibit 3c).

\(^{388}\) Surrender for sale of Chakastapasin IR 98, June 23, 1897, no file reference available (ICC Exhibit 1, pp. 897–99).
“X” marks. The surrender document is also signed by Indian Agent R.S. McKenzie and J.H. Price, the farming instructor at Fort à la Corne. There is no interpreter’s signature, and no information to indicate whether J.H. Price was capable of acting as interpreter for those who signed.

An affidavit attesting to the surrender was signed on June 25, 1897, by “Robert Sullivan McKenzie of the settlement of Duck Lake in the district of Saskatchewan in the North West Territories, Indian Agent of the Duck Lake Agency,” and by “Kah-ta-pis-co-wat, Chief–Headman of the said Band of Indians, namely Chacastapasin’s Band No. 98 Reserve.” The text of the affidavit reads as follows:

And the said Robert Sullivan McKenzie for himself saith:

That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Chacastapasin Indian Reserve No. 98, of the full age of twenty-one years then present.

That such assent was given at a meeting or council of the said Band summoned for that purpose and according to their Rules.

That he was present at such meeting or council and heard such assent given.

That he was duly authorized to attend such council or meeting by the Superintendent General of Indian Affairs.

That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.

That there is no Chief of said Band of Indians but said Kah-ta-pis-co-wat is their Headman.

And the said Headman, Kah-ta-pis-co-wat, Headman of said Band of Indians, there being no Chief, says:

That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.


That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their rules, and held in the presence of the said Kah-ta-pis-co-wat.

That no Indian was present or voted at such council or meeting who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.

That he is a Chief Headman of the said Band of Indians and entitled to vote at the said meeting or council.391

The affidavit was sworn on June 25, 1897, in Prince Albert, before J.H. McGuire, Judge of the Superior Court of the North-West Territories.392 As in the surrender document, there is no interpreter’s signature or statement that the contents of the affidavit were interpreted for Kahtapiskowat.

Indian Agent McKenzie forwarded the surrender and affidavit to the Deputy Superintendent General of Indian Affairs on July 1, 1897, merely stating that the documents had been “duly signed and executed before Judge McGuire.”393 His accompanying report noted only:

In connection with the surrender I would inform you that the Indians made a request that they may be supplied with a copy of the documents signed by them. I would therefore request that if this can be done that you will kindly send me a copy to hand to “Kahtapis-co-wat.”394

No other information was provided regarding any meeting or vote, or whether notice was provided to Chakastaypasin members living at either IR 100A or other reserves.

The surrender of IR 98 was quickly accepted by Order in Council 2135 on July 21, 1897. The Order in Council states:

On a report dated 12th July 1897, from the Superintendent General of Indian Affairs, submitting herewith a surrender made by the Indians of Chacastapasins Band of their Reserve No. 98, in the Duck Lake Agency, in the District of Saskatchewan, with a view to the same being sold for their benefit.

391 Affidavit of R.S. McKenzie, Indian Agent, Duck Lake Agency, and Kahtapiskowat, Headman, Chakastaypasin Band, June 25, 1897, no file reference available (ICC Exhibit 1, p. 900). Text is as it appears on the document, with “Chief” crossed out.
393 R.S. McKenzie, Indian Agent, Duck Lake Agency, to DSGIA, July 1, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 902)
The Minister states that the surrender has been duly assented to, executed and attested in the manner required by the 39th Section of the Indian Act, and he recommends that the same be accepted by Your Excellency in Council as required by that Section ... The Committee advise that the said surrender be accepted accordingly.395

Many of the Chakastaypasin elders at the community session testified that neither a meeting to surrender IR 98 nor a surrender vote ever occurred.396 Elder Violet Sanderson stated: “They never released it. They never gave permission to release their land. They didn’t know who sold the land, they didn’t know that the reserve was ever sold. ... It was only recently that they realized that their land was sold.”397 Many elders refer to the sale of the Chakastaypasin lands as a “crooked deal” carried out without their consent.398

As well, there are some stories from the Sturgeon Lake and Muskoday elders about the way the Chakastaypasin lands were lost. Harold Kingfisher never heard of a vote to surrender the lands, but his mother told him of a meeting that took place:

[The only thing she said was there was only a certain amount of people that were allowed, that were picked up for a meeting. That’s all she said, she didn’t mention how many people were picked up but there was only several people that were picked up for a meeting but never told what kind of a meeting it was.]399

Mr Kingfisher explained that only the men were picked up on their houses, where they were living in the houses in Chakastaypasin. ... At Chakastaypasin. And probably, according to mom, they had a ration house. ... And that’s where they had a building there, a log building with some kind of an office, and that’s where they did haul them to.400

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398 For example, see ICC Transcript, May 27–29, 2003 (ICC Exhibit 17b, p. 284, Eric Bear, Muskoday First Nation; p. 302, Melvin Smith, Muskoday First Nation).
The stories passed on to Harold Kingfisher reflect a sense that the land was “stolen.” He was told that

they didn’t consult everybody, they only handpicked people that they could manipulate. ... And how they manipulated people was through giving them rations and et cetera, you know, maybe giving them a horse. That’s how government manipulated First Nations people.

Muskoday elder Melvin Smith, a descendant of The Mink, was told that “the chief wasn’t there at the time it was sold. Just the councillors.” He also stated that when the lands were taken, “there was just a few people living on that reserve at the time and somehow it was sold” after the people “were asked to move.” The timing of these events is uncertain.

Melvin Smith and Eric Bear both recall the existence of some kind of agreement with respect to the Chakastaypasin lands. Eric Bear recalls that Chakastaypasin members were promised that, “if the agreement was made, that the monies would be paid from the other lands to the third generation.” He did not know if anyone ever received the money promised, but explained that “the agreement was made to Hannah Mink family that the third and final payment would go ... to the third generation.” Furthermore, part of the agreement was that

the people that were moving on to this reserve after the land was sold were not to build — they could build houses there, but they could not build houses on foundations, like cement or basements. This is in the event that if they had — the Natives got the land back, that they could have them move their houses away from there.

401 ICC Transcript, May 27–29, 2003 (ICC Exhibit 17b, p. 175, Harold Kingfisher, Sturgeon Lake First Nation).
With respect to the sale of the lands, Melvin Smith explained that when his father spoke of it,

he put it in several different ways. Like it might have been sold and it might not have been sold. I believe it was just leased out or something, the way it was put at that time. If it was sold, it might have been crooked work he said.409

He did not recall hearing of a meeting or a vote, his father “just said that the land was given up, and it was either bought or sold, or leased out.”410 However, Melvin Smith also says that the Band found out later that the interpreter who explained the agreement “wasn’t telling the truth” and misrepresented the terms of the agreement.411 He explained:

He was telling the people one thing. The government was telling him something to say to the people, but when he said something to the people, he was saying something different. He was making promises, I guess, that he wasn’t supposed to.412

Chakastaypasin elder Raymond Sanderson also recalls hearing of improper interpretation, although he did not specifically relate that to the surrender agreement. He says that “on two occasions I could say that I heard people mention that interpreters did not interpret properly.”413

Muskoday elder James Smith heard that the lands were taken because people wanted the timber.414 There are also stories that a Member of Parliament from Prince Albert “used to go see the Chief Chakastaypasin about whether he could sell that land” and would bribe “honoured people within the community.”415 The timeframe of these visits is uncertain, but Harold Kingfisher says they occurred at a time when “they were trying to get rid of the Chakastaypasin band members out of the Chakastaypasin reserve.”416

Sale of Chakastaypasin IR 98 Lands
The Department of Indian Affairs instructed Commissioner Forget in September 1897 to arrange for the survey and subdivision of IR 98 “at as early
a date as may be convenient.”417 However, the subdivision survey was delayed until the following year owing to a lack of funds.418 Meanwhile, MP T.O. Davis again pursued the opening of IR 98 for settlement. On August 30, 1897, following acceptance of the surrender by Order in Council 2135, DSGIA James A. Smart forwarded an inquiry to the department Secretary from Davis, who wished to know “when it is intended to open Stony Knoll and Chapasticolion Reserves for settlement.”419 Davis wrote to the department again in April 1898, stating that the even sections of the Chakastaypasin reserve should be “thrown open for Homestead entry.”420

Survey and Valuation, 1898
Dominion Land Surveyor T.D. Green carried out the subdivision survey of IR 98 in June and July 1898 and submitted his report, valuations, and detailed descriptions of each quarter section to the department on August 4, 1898. He noted that the soil throughout the reserve consisted of “sandy loam,” with good hay meadows and “good bluffs of green poplar” in the southern portion.421 As to the valuations, he said:

Two dollars ($2.00) per acre is the price adopted as a fair saleable one for all the ordinary sections. Good land bordering on the river and good wood lots are valued at $2.50 per acre. The Dominion Lands in this district are all held at $3.00 per acre, so that at the price I have valued the land, it should be easily disposed of.422

Sugar Island itself was subdivided into 40-acre parcels “for the purpose of selling it for wood lots”423 and valued between $2.00 and $2.50 per acre, with the majority valued at the higher figure.424 The majority of parcels on the mainland portion of the reserve were valued at $2.00 or $2.50 per acre, as noted by Green, although six parcels were assigned a lower valuation of $1.00

417 A.N. McNeill, Assistant Secretary, Department of Indian Affairs, to A.E. Forget, Indian Commissioner, September 28, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 924).
418 A.E. Forget, Indian Commissioner, to DSGIA, October 4, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 932).
419 James A. Smart, DSGIA, to J.D. McLean, Department of Indian Affairs, August 30, 1897, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 920).
420 T.O. Davis, MP, to the Minister of the Interior, April 13, 1898, no file reference available (ICC Exhibit 1, p. 941).
421 T.D. Green, DLS, to the Secretary, Department of Indian Affairs, August 4, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 946–47).
422 T.D. Green, DLS, to the Secretary, Department of Indian Affairs, August 4, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 947).
423 T.D. Green, DLS, to the Secretary, Department of Indian Affairs, August 4, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 946).
424 T.D. Green, DLS, to the Secretary, Department of Indian Affairs, August 4, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 948–49).
or $1.50 per acre. In November 1898, Lands Branch clerk W.A. Orr wrote to Green to inquire whether his valuations were premised on the lands “being disposed of unconditionally or subject to actual settlement and improvement” conditions. Green replied that his valuations were set “with the idea of being disposed of unconditionally.”

Orr forwarded Green’s report to the Secretary on November 9, 1898, recommending that the Chakastaypasin reserve lands be placed in the hands of the Indian Agent at Prince Albert to be sold “without any conditions as to settlement or improvements.” He noted that Green’s valuation of $2.00 per acre “seems a fair and reasonable one and I think as much as the Department is warranted in asking for the land.” As well, he recommended that Sugar Island be reserved from the sale, “to be disposed of in the future to actual settlers on the Reserve.” Sirton did not wish to waive settlement conditions, however, and Order in Council 2622, dated November 19, 1898, authorized Indian Agent W.B. Goodfellow to dispose of the reserve lands, “subject to the Regulations of the Department of Indian Affairs.” Once it was determined that Agent Goodfellow was stationed too far from Prince Albert to handle the Chakastaypasin sales, the Order in Council was amended on January 23, 1899, to allow the Dominion Lands Agent at Prince Albert to dispose of the lands and to change the conditions of sale to “one year’s residence (without improvements) instead of the three years’ residence and improvements required by the Land Regulations of the Department of Indian Affairs.” In his instructions to the Dominion Lands Agent charged with conducting the sale, the DSGIA highlighted the change in settlement conditions and noted that Sugar Island was to be reserved from sale “for the purpose of disposing of the wood lots on the Island in the future to actual settlers.”

425 T.D. Green, DLS, to the Secretary, Department of Indian Affairs, August 4, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 950–55).
426 W.A. Orr, Department of Indian Affairs, to T.D. Green, November 8, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 51).
427 Marginal note written on memorandum from W.A. Orr, Department of Indian Affairs, to T.D. Green, November 8, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 51).
428 W.A. Orr, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, November 9, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 52).
429 Order in Council PC 2622, November 19, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 55).
430 W.A. Orr, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, November 9, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 56).
432 James A. Smart, Deputy Minister, to the Dominion Lands Agent, February 7, 1899, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 982).
Proposals for Sale of Entire Reserve, 1899–1901

Four months after these arrangements were finalized, DSGIA James Smart notified the Secretary that an offer to purchase the whole reserve had been received from a group of Hungarian settlers.\(^433\) It may be noted that, although this offer was ostensibly made by a Hungarian named Zoltan Von Racis,\(^434\) the name of T.O. Davis is the one that actually appears throughout the department correspondence on the matter. Smart noted that valuations were already placed on the land, but suggested that if the entire reserve could be sold \textit{en bloc} with settlement conditions, the lands “could be sold at a less rate per acre than where it is sold in small quantities.”\(^435\) After meeting with Davis on June 12 to negotiate terms, Secretary J.D. McLean notified the DSGIA of the offer made by “the Hungarian settlers”: the sale of the entire reserve, excepting Sugar Island, would be made at the rate of $1.50 per acre; every section would be settled with one settler within three years; settlement duties would include three years’ residence and clearing of 5 per cent of the total acreage; and one-fifth of the purchase money would be paid in cash, and the balance in four equal annual instalments at 6 per cent interest.\(^436\) Order in Council 1553, dated August 16, 1899, rescinded previous orders regarding the sale of the Chakastaypasin lands and authorized the sale to the “Hungarian settlers.” The terms were essentially the same as those negotiated by Davis, except that five years were allowed for fulfillment of settlement duties, and the down payment would be due within three months. The order noted: “It is considered that the price offered, viz. $1.50 per acre is a fair and reasonable one.”\(^437\) The down payment was never produced to finalize the sale, and Davis informed the department on May 2, 1900, that the Hungarian offer had been abandoned.\(^438\)

On April 28, 1900, a second offer to purchase the Chakastaypasin reserve \textit{en bloc} was made by “J.W. Mitchell” and “J.C. Neeley” of Council Bluffs, Iowa, claiming to represent “a large number of fairly well-to-do farmers in Iowa and

\(^{433}\) James A. Smart, DSGIA, to J.D. McLean, Secretary, Department of Indian Affairs, June 10, 1899, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 235).

\(^{434}\) Unidentified author to T.O. Davis, MP, December 21, 1900, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 264); James A. Smart, Deputy Minister of the Interior, to Clifford Sifton, January 8, 1901, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 67).

\(^{435}\) James A. Smart, DSGIA, to J.D. McLean, Secretary, Department of Indian Affairs, June 10, 1899, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 235–36).

\(^{436}\) J.D. McLean, Secretary, Department of Indian Affairs, to DSGIA, June 12, 1899, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, pp. 235–36).


\(^{438}\) W.A. Orr, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, May 2, 1900, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 256).
bordering states” looking to organize a colony. Interestingly, the terms of their offer were identical to those set out in the Order in Council authorizing the sale to “Hungarian settlers.” The sale to Mitchell and Neeley was authorized by Order in Council 218 on February 6, 1901. The necessary down payment did not arrive within the three months allowed, but the authorization was not rescinded until October 22, 1901. Tyler and Wright's research on the Chakastaypasin sale notes a significant body of evidence, including typewriter analysis conducted by Roy Huber, to show that DSGIA James A. Smart, Superintendent of Immigration Frank Pedley, and Immigration Inspector William J. White were behind the forged Mitchell and Neeley offer.

During 1901, other inquiries were made regarding the possibility of purchasing Chakastaypasin lands, including at least three offers for the purchase of the entire reserve. One of these offers apparently involved T.O. Davis, as he notified the department on September 29, 1901, that “some parties in Winnipeg” wished to purchase the reserve on the same terms offered “two years ago,” presumably referring to the terms of the Hungarian offer he hadorchestrated. R.C. Macdonald of Winnipeg contacted the department two days later to make an offer for the whole reserve at $1.50 per acre; it is possible that he was one of the “parties in Winnipeg” mentioned by Davis.

### Decision to Sell Chakastaypasin Lands by Tender

On October 2, 1901, when it was clear that the “Mitchell & Neeley” sale would not be completed, DSGIA Smart recommended that the reserve be sold by

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441 Order in Council PC 218, February 6, 1901, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, pp. 283–85).
442 Order in Council, October 22, 1901, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 83).
443 Tyler and Wright Research Consultants, Working draft of Chacastapasin report, c. 1978 (ICC Exhibit 7, pp. 87–116).
446 R.C. Macdonald, Mining Broker & Insurance, to Clifford Sifton, Minister of the Interior, October 1, 1901, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, pp. 307–8).
public tender without settlement conditions, in a similar manner to the “Moose Mountain sale” also being conducted at that time.\textsuperscript{447} The previous Orders in Council relating to the Chakastaypasin sale were rescinded by a new Order in Council dated October 22, 1901, which granted authority “for the disposal of the Reserve upon such terms and in such manner as may be deemed advisable in the interest of the Indians.”\textsuperscript{448}

The draft notice of sale, dated October 11, 1901, specified that separate tenders for each quarter section would be accepted until November 15, 1901. The terms state that each tender required a 5 per cent deposit, and that one-quarter of the total purchase price would be due “upon advice of acceptance of Tender;” with the balance to be paid in four equal annual instalments at 5 per cent interest.\textsuperscript{449} The notice lists all the sections containing any part of the reserve, including Sugar Island, but provides no information about the land or the acreage of parcels, or which quarter sections or fractional quarter sections were not included within the reserve boundaries. There is also no information regarding where any information about the reserve lands might be obtained.\textsuperscript{450} The wording of this notice is very similar to the notice issued for the Moose Mountain sale, which was written under the close supervision of DSGIA James Smart.\textsuperscript{451}

Advertising of the sale was limited. On October 19, 1901, sale posters were sent to those with a previously expressed interest in the Chakastaypasin lands and to all the postmasters in Saskatchewan.\textsuperscript{452} In addition, advertisements were authorized for the \textit{Manitoba Free Press} and \textit{L’Echo de Manitoba} in Winnipeg, and the Prince Albert \textit{Advocate}. The \textit{Manitoba Free Press} ran the advertisement four times between October 22 and 25, 1901, and \textit{L’Echo de Manitoba} ran the notice on October 31, November 7, and November 14, 1901.\textsuperscript{453} However, it appears that the initial sale notice did not appear in the \textit{Advocate} in Prince Albert. After seeing the notice in a Winnipeg paper on

\textsuperscript{447} James A. Smart, DSGIA, to J.D. McLean, October 2, 1901, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 70); James A. Smart to Clifford Sifton, SGIA, October 7, 1901, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 73). The “Moose Mountain sale” mentioned by James Smart refers to the sale of the Ocean Man and Pheasants Rump reserves in Treaty 4.

\textsuperscript{448} Order in Council, October 22, 1901, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 83).

\textsuperscript{449} Draft sale notice signed by J.D. McLean, Secretary, Department of Indian Affairs, October 11, 1901, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 73).

\textsuperscript{450} Draft sale notice signed by J.D. McLean, Secretary, Department of Indian Affairs, October 11, 1901, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, pp. 77–78).

\textsuperscript{451} Tyler and Wright Research Consultants, Working draft of Chacastapasin report, c. 1978 (ICC Exhibit 7, pp. 119–23).

\textsuperscript{452} W.A. Orr, Department of Indian Affairs, October 19, 1901, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, p. 81).

\textsuperscript{453} Tyler and Wright Research Consultants, Working draft of Chacastapasin report, c. 1978 (ICC Exhibit 7, pp. 123–24); Document Summary (ICC Exhibit 3a, Appendix A, p. 58).
October 29, Prince Albert lawyer and prominent Liberal J.H. Lamont immediately wrote to the Secretary to inform him that “[t]his advertisement has not appeared in any Prince Albert newspaper and it seems remarkable that that land will be offered for sale in close proximity to this town without a Notice of the Sale being published in some paper in the vicinity.”\textsuperscript{454} He went on to request an extension until December 15 in order to give some clients in the United States the opportunity to inspect the land before tendering.\textsuperscript{455} The Prince Albert \textit{Advocate} ran an editorial on November 4, 1901, stating:

There is something mighty queer about the manner of calling for tenders for the Chacastapasin Indian reserve land which is now on the market. There seems to be a desire that the people of Saskatchewan should know nothing about the proposed sale of this property. Advertisements have appeared in the Winnipeg papers asking for tenders, but not a line in a paper in Saskatchewan.\textsuperscript{456}

In response to Lamont’s letter, W.A. Orr informed the Secretary on November 6 that the \textit{Advocate} had been authorized to insert the advertisement on October 21 and that he was “not aware that the same was not duly inserted therein.”\textsuperscript{457} James Smart instructed McLean on November 8 to look into whether the advertisements had ever appeared in the Prince Albert paper, and he noted: “I have decided, at any rate, at the request of Mr. J.H. Lamont, to extend the time for a week.”\textsuperscript{458} It is not certain whether any further action was taken to determine whether the advertisements ever actually appeared in the \textit{Advocate}. Tyler and Wright note that the first advertisement eventually ran in a Prince Albert newspaper on November 18, 1901.\textsuperscript{459}

On November 11, 1901, J.D. McLean drafted a revised sale notice extending the deadline for tenders until November 22, 1901, according to Smart’s instructions.\textsuperscript{460} The \textit{Manitoba Free Press} printed the revised notice six times between November 12 and 18, 1901,\textsuperscript{461} and \textit{L’Echo de Manitoba}
published the revised notice once on November 21, one day before the
deadline.462 The Advocate published the notice four times: on November 18
and 25, and December 2 and 9, 1901.463 However, only the first notice
appeared before the deadline for receipt of tenders in Ottawa. Tyler and
Wright note that it would have been impossible for someone who saw the
notice on November 18, 1901, in Prince Albert to submit a tender by the
advertised deadline.464

On November 26, 1901, T.O. Davis wired a brief message to DSGIA James
Smart, saying, “Do not sell Sugar Island[.] Chacastapasin reserve settlers
object.”465 Smart forwarded Davis’s telegram to McLean, asking him to “bring
this up when the tenders are received so that I may bring it to the attention
of the Minister.”466

Following this initial extension, a number of unofficial extensions were
made at the requests of T.O. Davis and J.H. Lamont, but there is no record that
any public notice was made regarding these changes.467 It was not until
Lamont finally notified DSGIA James Smart on December 14, 1901, that his
clients’ tenders had been submitted that instructions were given to open the
tenders.468

Tenders for Land
The tenders were opened in the department on December 16, 1901. W.A. Orr
prepared an analysis of the tenders for the Secretary, in which he brought
attention to Davis’s telegram asking the department not to sell Sugar Island:

462 Tyler and Wright Research Consultants, Working draft of Chacastapasin report, c. 1978 (ICC Exhibit 7, p. 127);
        Document Summary (ICC Exhibit 3a, Appendix A, p. 58).
463 Tyler and Wright Research Consultants, Working draft of Chacastapasin report, c. 1978 (ICC Exhibit 7,
464 Tyler and Wright Research Consultants, Working draft of Chacastapasin report, c. 1978 (ICC Exhibit 7,
465 T.O. Davis, MP, to James A. Smart, November 26, 1901, LAC, RG 10, vol. 6663, file 109A-3-3 (ICC Exhibit 1a,
        p. 112).
466 James A. Smart, DSGIA, to J.D. McLean, November 29, 1901, LAC, RG 10, vol. 6663, file 109A-3-3 (ICC
        Exhibit 1a, p. 113).
467 J. H. Lamont to Department of Indian Affairs, November 21, 1901, quoted in Tyler and Wright Research
        Consultants, Working draft of Chacastapasin report, c. 1978 (ICC Exhibit 7, p. 135); T.O. Davis to Clifford
        Sifton, December 1, 1901, LAC, RG 10, vol. 6663, file 109A-3-3 (ICC Exhibit 1a, p. 114); James A. Smart,
        Department of the Interior, to T.O. Davis, MP, December 2, 1901, LAC, RG 10, vol. 6663, file 109A-3-3 (ICC
        Exhibit 1a, p. 115); James A. Smart, Deputy Minister of the Interior, to J.D. McLean, December 2, 1901, LAC,
        RG 10, vol. 6663, file 109A-3-3 (ICC Exhibit 1a, p. 116); T.O. Davis to James A. Smart, December 5, 1901,
        LAC, RG 10, vol. 6663, file 109A-3-3 (ICC Exhibit 1a, p. 117); James A. Smart, Department of the Interior, to
        T.O. Davis, MP, December 4, 1901, LAC, RG 10, vol. 6663, file 109A-3-3 (ICC Exhibit 1a, p. 118); J.H. Lamont
        to James A. Smart, Deputy Minister of the Interior, December 4, 1901, LAC, RG 10, vol. 6663, file 109A-3-3
        (ICC Exhibit 1a, p. 119).
468 J.H. Lamont to James A. Smart, Deputy Minister of the Interior, December 14, 1901, LAC, RG 10, vol. 6665,
        file 109A-3-3 (ICC Exhibit 1a, p. 1047).
In this connection [I] beg to state that Tenders were called for the whole Reserve, including Sugar Island, but as the advertisement calling for Tenders stated that the highest or any Tender would not necessarily be accepted, there would not appear to be any objection to reserving Sugar Island as desired by Mr. Davis. 469

All the Chakastaypasin lands were purchased by six separate groups or individuals, four of which submitted their tenders after the official November 22 deadline. The successful purchasers were “J.W. Smith,” Charles Adams, R.C. Macdonald, A.J. Adamson, Kenneth McDonald, and a group of individuals associated with T.O. Davis. The lands as a whole were sold for a sum below their assessed value of $30,376.82 for all 114 parcels, an average of approximately $2.04 per acre. The amount actually bid by successful purchasers amounted to $25,710.59, or an average of $1.73 per acre. 470

“J.W. Smith” [Sales 1–69 and 71]

J.W. Smith, a Toronto salesman, signed tenders dated November 20, 1901, for every parcel of land in the surrendered Chakastaypasin reserve, including Sugar Island. 471 He was successful in the purchase of 70 quarter sections (8,799.12 acres, or 59 per cent of the total land sold), for a total price of $12,554.19, or approximately $1.43 per acre. 472 This amount was significantly below the assessed value of $17,818.98. 473 These purchases comprise sales 1–69 and 71 in the Land Sale Book. 474 In many cases, Smith was the only tenderer and was therefore able to purchase some quarter sections for as little as $0.50 per acre.

The first instalment of money for the lands was due immediately, according to the terms of sale, but the payment was not made until the lands were resold three months later. On March 18, 1902, A.C. Bedford-Jones sold Smith’s lands...
to A.J. Stade of Devil’s Lake, North Dakota. Following completion of this agreement, Bedford-Jones wrote to the department on April 2, 1902, forwarding an assignment from J.W. Smith to himself, as well as the money due for the first instalment. The remaining money due on the sale was paid to the department according to the terms of sale, the last payment being made on December 8, 1905. Bedford-Jones assigned the lands to A.J. Stade on January 8, 1906, and the lands were patented to him the same year.

It was later revealed by the Ferguson Commission in 1915 that the J.W. Smith tenders were actually submitted by James A. Smart (then the DSGIA and Deputy Minister of the Interior), Frank Pedley (the Superintendent of Immigration, who became DSGIA in 1902), and William J. White (an Immigration Inspector with the Department of the Interior). The Toronto lawyer A.C. Bedford-Jones, a former law partner of Pedley, acted as a front man for the true purchasers, just as he did in the Moose Mountain sale and others in which these three individuals were involved.

**Charles Adams [Sale 70]**

Charles Adams purchased 36.44 acres of the Chakastaypasin reserve for $63.27, or approximately $1.75 per acre. He submitted a tender on November 7, 1901, for part of the quarter section on the Chakastaypasin reserve occupied by him, but his tender was refused and the purchase awarded to J.W. Smith. However, T.O. Davis intervened on Adams's behalf, stating that Adams had been on the land “for the past eight years having obtained permission from the late Govt” and had “considerable improvements upon the place.” On March 5, 1902, J.D. McLean notified Adams that he would be allowed to purchase the portion of the quarter section he occupied at the same

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476 A.C. Bedford-Jones, Barrister & Solicitor, to the Secretary, Department of Indian Affairs, April 2, 1902, LAC, RG 10, vol. 6664, file 109A-3-17 (ICC Exhibit 1a, p. 563).
478 A.C. Bedford-Jones, Managing Director, Canada National Land & Development Company, to the Secretary, Department of Indian Affairs, January 8, 1906, LAC, RG 10, vol. 6664, file 109A-3-17 (ICC Exhibit 1a, p. 618); J.D. McLean, Secretary, Department of Indian Affairs, to A.J. Stade, February 9, 1906, LAC, RG 10, vol. 6664, file 109A-3-17 (ICC Exhibit 1a, p. 617).
479 Canada, House of Commons, Debates (April 14, 1915), 2549-80 (ICC Exhibit 1, pp. 1337, 1368).
480 Department of Indian Affairs, Land Sale Book, Chakastaypasin IR 98 Land Sales, Sale 70 (ICC Exhibit 1a, p. 648).
481 Charles Adams to J.D. McLean, Department of Indian Affairs, November 7, 1901, LAC, RG 10, vol. 6665, file 109A-3-5 (ICC Exhibit 1a, pp. 654-55); J.D. McLean, Secretary, Department of Indian Affairs, to Charles Adams, December 19, 1901, LAC, RG 10, vol. 6663, file 109A-3-5 (ICC Exhibit 1a, p. 656).
482 T.O. Davis to James A. Smart, December 31, 1901, LAC, RG 10, vol. 6664, file 109A-3-17 (ICC Exhibit 1a, p. 657); J.D. McLean, Secretary, Department of Indian Affairs, to J.W. Smith, January 8, 1902, LAC, RG 10, vol. 6664, file 109A-3-17 (ICC Exhibit 1a, p. 658).
rate as the highest tenderer.\textsuperscript{483} After repeated delays, Adams finally completed payment in February 1912, and he received the patent in 1913.\textsuperscript{484}

**R.C. Macdonald [Sales 72–85]**

R.C. Macdonald of Winnipeg submitted tenders for 44 quarter sections of Chakastaypasin lands on December 6, 1901, two weeks after the official deadline.\textsuperscript{485} He was successful in the purchase of 14 parcels (1,899.53 acres, or 13 per cent of the total lands sold), for a total price of $3,324.19, or $1.75 per acre.\textsuperscript{486} This amount is approximately 15 per cent below the assessed value $3,851.53.\textsuperscript{487} Macdonald assigned his lands to Charles V. Alloway on January 6, 1902, only a few days after being notified of his successful purchases.\textsuperscript{488} The banking company Alloway & Champion completed the payments on January 2, 1906, according to the terms of sale, and the lands were patented to Charles Valentine Alloway in February 1906.\textsuperscript{489}

**A.J. Adamson [Sales 97–107]**

A.J. Adamson\textsuperscript{490} submitted a bulk tender for 11 quarter sections on December 10, 1901.\textsuperscript{491} It appears that he was able to submit a tender so long after the deadline thanks to the intervention of J.H. Lamont, who persuaded Smart...
to hold the other tenders. Adamson was successful in the purchase of all 11 parcels tendered for, and he acquired 1,635.50 acres at the rate of $2.56 per acre. This price was slightly above the assessed value for these lands of $3,613.75. The payments on Adamson’s purchases were made in large part by the Canada Territories Corporation and were completed in September 1906. The patent was issued to the Canada Territories Corporation Limited in May 1908.

Kenneth McDonald [Sales 93–96]
Kenneth McDonald of Ottawa submitted separate tenders for four quarter sections on December 2, 1901, and was successful in each case. He obtained 640 acres of reserve lands for $1,300 (approximately $2.03 per acre), slightly above the appraised value of $1,280. McDonald completed payments in December 1905, according to the terms of sale, and received the patent in January 1906.

“Davis Group” [Sales 86–92 and 108–14]
A group of 16 tenderers from Prince Albert submitted 24 tenders for Chakastaypasin lands on three separate days in November 1901. The group was successful in purchasing 16 quarter sections (1,855.93 acres, or 12.5 per cent of the total lands sold) for $4,282.06, an average of $2.31 per acre. This
amount is about one-fifth more than the assessed value of $3,492.56 for those lands. These parcels are included in 14 sales, comprising sale numbers 86–92 and 108–14 in the Land Sale Book. The lands were patented in 1905, 1906, 1908, and 1914 to Margaret Mackey, J.H. Lamont, Rebecca Davis, W.E. Gladstone, J.W. Good, and T.O. Davis (in that order). The transactions are examined in more detail below.

The Davis group submitted three distinct blocks of tenders. On November 8, nine persons, including T.O. Davis and J.H. Lamont, submitted 10 separate tenders, offering $2.00 per acre for two clusters of land bordering the South Saskatchewan River. The department acknowledged the seven successful offers individually on December 19 and issued receipts for the deposits in the names of each tenderer. On December 30, 1901, each purchaser sent in an almost identically worded assignment, transferring six parcels to T.O. Davis and one parcel to J.W. Good. Davis assigned two of his parcels to J.H. Lamont on

501 T.D. Green, DLS, to the Secretary, Department of Indian Affairs, August 4, 1898, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1a, pp. 39–44); Document Summary (ICC Exhibit 3a, App. A, p. 66).
502 J.D. McLean, Secretary, Department of Indian Affairs, to A. Mackey, September 1, 1905, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 957); Secretary, Department of Indian Affairs, to J.H. Lamont, February 9, 1906, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1225); Secretary, Department of Indian Affairs, to T.O. Davis, Senator, July 10, 1906, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1260); Assistant Secretary, Department of Indian Affairs, to T.O. Davis, Senator, October 30, 1906, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1322); J.D. McLean, Secretary, Department of Indian Affairs, to J.W. Good, MD, January 9, 1908, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 918); W.A. Orr, In Charge, Lands and Timber Branch, Department of Indian Affairs, to T.O. Davis, Senator, April 2, 1914, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1178).
503 J.H. Lewis to J.D. McLean, Secretary, Department of Indian Affairs, November 8, 1901, LAC, RG 10, vol. 6663, file 109A-3-10 (ICC Exhibit 1a, p. 845); Thomas O. Davis to J.D. McLean, Secretary, Department of Indian Affairs, November 8, 1901, LAC, RG 10, vol. 6663, file 109A-3-5 (ICC Exhibit 1a, p. 1014); B. Sutherland to J.D. McLean, Secretary, Department of Indian Affairs, November 8, 1901, LAC, RG 10, vol. 6663, file 109A-3-5 (ICC Exhibit 1a, p. 1026); Frank Heath Clinch to J.D. McLean, Secretary, Department of Indian Affairs, November 8, 1901, LAC, RG 10, vol. 6663, file 109A-3-5 (ICC Exhibit 1a, p. 1027); R. Young to J.D. McLean, Secretary, Department of Indian Affairs, November 8, 1901, LAC, RG 10, vol. 6663, file 109A-3-6 (ICC Exhibit 1a, p. 1100); H.C. Adams to J.D. McLean, Secretary, Department of Indian Affairs, November 8, 1901, LAC, RG 10, vol. 6663, file 109A-3-14 (ICC Exhibit 1a, p. 1110); J.H. Lamont to J.D. McLean, Secretary, Department of Indian Affairs, November 8, 1901, LAC, RG 10, vol. 6663, file 109A-3-13 (ICC Exhibit 1a, p. 1111); J.E.A. Stull to J.D. McLean, Secretary, Department of Indian Affairs, November 8, 1901, LAC, RG 10, vol. 6663, file 109A-3-12 (ICC Exhibit 1a, p. 1190); Heath Clinch to J.D. McLean, Secretary, Department of Indian Affairs, November 8, 1901, LAC, RG 10, vol. 6663, file 109A-3-11 (ICC Exhibit 1a, p. 1191).
504 J.H. Lewis to J.D. McLean, Secretary, Department of Indian Affairs, December 30, 1901, LAC, RG 10, vol. 6663, file 109A-3-10 (ICC Exhibit 1a, p. 861); Robert Young to J.D. McLean, Secretary, Department of Indian Affairs, December 30, 1901, LAC, RG 10, vol. 6663, file 109A-3-6 (ICC Exhibit 1a, p. 1125); J.H. Lamont to J.D. McLean, Secretary, Department of Indian Affairs, December 30, 1901, LAC, RG 10, vol. 6663, file 109A-3-13 (ICC Exhibit 1a, p. 1124); H. Adams to J.D. McLean, Secretary, Department of Indian Affairs, December 30, 1901, LAC, RG 10, vol. 6663, file 109A-3-14 (ICC Exhibit 1a, p. 1125); E.H. Clinch to J.D. McLean, Secretary, Department of Indian Affairs, December 30, 1901, LAC, RG 10, vol. 6663, file 109A-3-11 (ICC Exhibit 1a, p. 1199); J.E.A. Stull to J.D. McLean, Secretary, Department of Indian Affairs, December 30, 1901, LAC, RG 10, vol. 6663, file 109A-3-12 (ICC Exhibit 1a, p. 1200).
May 23, 1902. He did not complete payments on the remaining three parcels in his name until 1913, after repeated notices from the department and cancellation threats. The lands were patented in Davis’s name in 1914.

A second group of very similarly worded tenders dated November 26 offered $2.51 per acre for seven quarter sections. The tenders were submitted by seven separate individuals, two of whom had previously submitted tenders on November 8. On November 27, the last set of tenders was made out for an additional seven quarter sections, offering between $2.50 and $2.53 per acre. These tenders were submitted by five separate individuals, including T.O. Davis and J.W. Good, but each one is similarly worded and written on House of Commons letterhead. Rather than acknowledging the sales to each purchaser as was customary, J.D. McLean wrote to T.O. Davis directly, informing him that eight of the tenders “submitted by you,” out of the 14 submitted on November 26 and 27, had been accepted. A receipt was also made out to T.O. Davis for the deposit sent with each of these successful tenders. On December 30, 1901, and January 21, 1902, four of the purchasers assigned their interest to J.W. Good,

505 T.O. Davis to J.D. McLean, Secretary, Department of Indian Affairs, May 23, 1902, LAC, RG 10, vol. 6663, file 109A-3-11 (ICC Exhibit 1a, p. 1214).
507 Secretary, Department of Indian Affairs, to T.O. Davis, November 28, 1908, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1154); J.D. McLean, Assistant Deputy & Secretary, Department of Indian Affairs, to T.O. Davis, September 23, 1913, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1172).
511 J.D. McLean, Secretary, Department of Indian Affairs, to T.O. Davis, MP, December 20, 1901, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 858).
and one assigned interest to J.W. Stirton.\textsuperscript{513} Payments on the quarter section purchased by Stirton were completed in 1905, and the lands were patented to Margaret Mackey in the same year.\textsuperscript{514} The remaining three purchases from this group were originally made in the names of J.W. Good, Rebecca Davis (the wife of T.O. Davis), and W.E. Gladstone and were never assigned to others.

In the case of W.E. Gladstone’s purchase, Gladstone notified the department on January 17, 1902, that he had never submitted a tender for the Chakastaypasin lands.\textsuperscript{515} Smart instructed the Secretary to write to Davis for an explanation, and on April 1, 1902, McLean wrote a memorandum recounting Davis’s explanation: “I beg to state that Mr. Davis was at the Department some little time ago and explained that he did not sign Gladstone’s name – that it was someone else did so.”\textsuperscript{516} After receiving Gladstone’s repeated assertions that he had never tendered for the land, W.A. Orr recommended on June 6, 1902, that the quarter section be resold.\textsuperscript{517} J.H. Lamont and Davis attempted to have the sale reassigned to Lamont, but they were informed that “the Department is not disposed at present to sell this quarter section.”\textsuperscript{518} Finally, Davis informed McLean on October 24, 1902, that “Mr. Gladstone wishes to get the land now if it is still open.”\textsuperscript{519} The department agreed, but Davis continued to advocate for the

\textsuperscript{513} F.W. Kerr to J.D. McLean, Secretary, Department of Indian Affairs, December 30, 1901, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, pp. 862–63); Ellen Kerr to J.D. McLean, Secretary, Department of Indian Affairs, December 30, 1901, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 932); H. Adams to J.D. McLean, Secretary, Department of Indian Affairs, January 21, 1902, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 867).

\textsuperscript{514} Bank of Montreal receipt to A. MacKay, August 15, 1905, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 953); Bank of Montreal receipt to A. MacKay, no date, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 954); J.D. McLean, Secretary, Department of Indian Affairs, to A. MacKay, September 1, 1905, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 957).

\textsuperscript{515} W.E. Gladstone to Clifford Sifton, January 17, 1902, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1282).

\textsuperscript{516} Marginal note written on memorandum from W.A. Orr, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, January 20, 1902, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1283); J.D. McLean, Secretary, Department of Indian Affairs, to DSGIA, April 1, 1902, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1286).

\textsuperscript{517} W.E. Gladstone to J.D. McLean, Secretary, Department of Indian Affairs, April 21, 1902, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1290); W.A. Orr, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, June 6, 1902, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1296).

\textsuperscript{518} J.H. Lamont to J.D. McLean, Secretary, Department of Indian Affairs, June 30, 1902, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1297); J.D. McLean, Secretary, Department of Indian Affairs, to J.H. Lamont, Barrister, July 8, 1902, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1299).

\textsuperscript{519} Thomas O. Davis, MP, to J.D. McLean, October 24, 1902, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1300).
redisposition of the land to Lamont. He was again unsuccessful, and all the further correspondence and payments on this sale were made through Davis, supposedly acting on Gladstone’s behalf. The payments for this sale were completed in 1906, and the lands were patented to W.E. Gladstone in the same year.

Establishment of Trust Fund and Expenditure of Land Sale Proceeds

Trust account No. 293 for the “Cumberland Reserve, N.W.T.” was established in the fiscal year 1902/1903. It seems clear that the account was established for the “Cumberland Reserve” at Fort à la Corne, since revenue from both the Chakastaypasin IR 98 and the Cumberland IR 100A land sales was deposited in the capital account that year, and management fund and survey fees relating to the sale of IR 100A were disbursed. An Order in Council dated March 7, 1903, authorized the costs for the subdivision survey of township 46 to be charged to the capital account of the “Cumberland Indians.” Following the alleged amalgamation of the James Smith Band and Cumberland Band 100A, David Laird recommended that their trust accounts be combined as well. He was notified on July 2, 1903, that the separate accounts had been combined into account 293, the number originally belonging to the Cumberland Band 100A. It was known as the “Cumberland (James Smith) Band” account until 1918, when the name was changed to James Smith Band account 293.

Most of the 10 per cent share of the proceeds from sale, which the surrender document promised would be used for “implements, waggons, harness and other useful articles,” became available in 1904 and was spent

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520 J.D. McLean, Secretary, Department of Indian Affairs, to T.O. Davis, MP, November 4, 1902, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1303); J.D. McLean, Department of Indian Affairs, to W.A. Orr, Department of Indian Affairs, March 25, 1903, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1304); J.D. McLean, Secretary, Department of Indian Affairs, to the Lands Branch, May 1, 1903, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1306); T.O. Davis to Frank Pedley, Deputy Minister of Indian Affairs, September 28, 1905, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1309).
521 [Duncan C. Scott], Accountant, Department of Indian Affairs, September 25, 1906, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1318); Assistant Secretary, Department of Indian Affairs, to T.O. Davis, Senator, October 30, 1906, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 1322).
522 Auditor General’s Report, 1902/1903, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903, part J, 168 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 17, p. 353). A cursory search of the trust accounts from this period did not reveal a trust account for the Cumberland Band residing at IR 20.
524 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, May 30, 1903, no file reference available (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 1, p. 860).
525 Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, July 2, 1903, LAC, RG 10, vol. 3736, file 27580 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 1, p. 886).
526 See the Auditor General’s Reports, 1903–18, Canada, Annual Report of the Department of Indian Affairs (ICC Exhibit 23a). See Trust Account 293.
on agricultural implements, oxen, a threshing machine, and miscellaneous other items.527

It is also important to note that Kahtapiskowat received a pension from January 1904 to January 1906, which totalled $183.528 These payments are reflected in the statement provided to David Laird in response to the James Smith Band’s request for an accounting of the proceeds and expenditures from the sale of the surrendered portion of IR 100A. Big Head died sometime between 1906 and 1907.529 The last known pension payment made to Kahtapiskowat was made on January 10, 1906.530 He was the only person to receive this type of payment from the trust account.

**Ferguson Commission, 1913–15**

The T.R. Ferguson Commission, established in 1913 to investigate issues relating to Dominion and Indian lands, tabled a report in the House of Commons on April 14, 1915.531 Before the official tabling of the report, numerous newspapers reported that “well known government officials” would likely face charges related to their involvement in the administration of Indian lands in the West.532 DSGIA Frank Pedley tendered his resignation on October 11, 1913, soon after the first newspaper report was published, and his resignation was accepted by Order in Council “without prejudice to any action which the Crown may be advised to take against him.”533

The transcript of the debates in the House of Commons refers to the involvement of James A. Smart, Frank Pedley, and William J. White in the sale of three Indian reserves and relates how the three “formed a company of some kind

532 Tyler and Wright Research Consultants, “The Alienation of Indian Reserve Lands during the Administration of Sir Wilfrid Laurier, 1896–1911. Addendum: The Royal Commission of Thomas Roberts Ferguson,” May 1977 (ICC Exhibit 5, pp. 1–2, G1, L1–L12). Ferguson’s final reports cannot be located. The only evidence available regarding these reports comes from the excerpt of the debates in the House of Commons when the reports were tabled, as well as a few pieces of correspondence and newspaper articles from that time.
533 Order in Council PC 2585, October 11, 1913, LAC, RG 10, vol. 3059, file 253792 (ICC Exhibit 1, p. 1325).
to acquire Indian lands,” represented by A.C. Bedford-Jones. The three had access to the department’s data on the value of the lands and the tenders received, and they used the information partially to fill out their own tenders for the same lands. These tenders were then sent to Bedford-Jones in Toronto, who completed them and submitted them to the department. The group reportedly made a total profit of $84,000 through the sales of the three reserves. Moose Mountain is the only reserve mentioned by name in the debates, but other newspaper accounts of the day make reference to the sale of Chakastaypasin lands as well. Unfortunately, researchers have been unable to locate any copies of Ferguson’s reports.

Sale of Sugar Island
As noted above, Sugar Island was excluded from the sale of the Chakastaypasin reserve in 1901 at the request of T.O. Davis. In June 1903, 13 settlers from the area near the reserve petitioned to have the island reserved “for the benefit of the settlers,” because building materials were “very scarce [sic] in this locality.” DSGIA Frank Pedley replied that Sugar Island had been reserved from the recent sale of the Chakastaypasin reserve, but that, “in case of any proposed disposition thereof, your request will receive due consideration.” Early in January 1904, Davis wrote to Pedley on behalf of a settler who wished to put in a sawmill, saying, “I think this would be a good thing for the settlers as a lot of it is going to waste.” The local Indian Agent at that time, J. Macarthur, made an investigation of Sugar Island and recommended on March 7, 1904, that the island be sold in 20-acre timber lots to settlers, “and no one settler to be allowed to purchase more than two lots.” His report notes that “the large Island on the map just below Sugar

534 Canada, House of Commons, Debates (April 14, 1915), 2549, 2580 (Ottawa: King’s Printer, 1915) (ICC Exhibit I, pp. 1337, 1368).
535 Canada, House of Commons, Debates (April 14, 1915), 2580 (ICC Exhibit I, p. 1368).
536 Canada, House of Commons, Debates (April 14, 1915), 2580 (ICC Exhibit I, p. 1368).
537 Canada, House of Commons, Debates (April 14, 1915), 2560, 2580 (ICC Exhibit I, pp. 1348, 1368).
539 W.C. Ramsay and others to Clifford Sifton, Minister of the Interior, June 27, 1903, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 1196).
Assistant Indian Commissioner J.A.J. McKenna rejected the Agent's recommendation, stating:

I cannot agree that we, from the standpoint of the Indians' interests, should restrict a purchaser to two lots. My view is that the property should be disposed of en bloc, or in lots, by auction after due notice, and should be sold to the highest bidder irrespective of the number of lots he bids for, if sold in lots.

Pedley informed Davis on April 11, 1904, that “it is considered that it would be most advantageous in the interest of the Indians, to sell the lots by public competition.” Similar applications to cut or purchase timber were received in the following years up until at least 1911, but they were rejected by the department with the reply that “this Island is not at present in the market.”

The matter of selling the lots was briefly raised again in 1933 but apparently not pursued. On July 21, 1947, the James Smith Band passed a Band Council Resolution (BCR) stating that it was “interested in the disposal of the balance of the land in the Chacastapaswin Indian Reserve 98 ... being the area known as Sugar Island.” The resolution stated that “this is a particularly appropriate time to attempt to make a sale of this ... there are a very considerable number of people looking for land and if this island was cleaned up, we believe it could be made into reasonably good farming land.”

In June 1948, a resident of nearby Fenton offered $200 to the department for the entire island, but the offer was rejected because it was felt that the land was...
worth more. The Superintendent of Reserves and Trusts advised the Indian Agent that the matter of sale should “be left in abeyance until such time as either your office or the Department receives an offer to purchase which is considered close to the approximate value of the land which you have estimated at $2.00 to $3.00 an acre.” A subsequent offer of $3,000 for the island in 1949 was also rejected, as the agent felt that “eventually we will receive a higher offer.”

J.P.B. Ostrander, the Regional Supervisor of Indian Agencies, agreed, remarking that if it were not for the fact that the land is surrounded by water it would be worth at least $25.00 an acre. ... the money which it might be necessary to spend on a ferry could be saved by the fact that the land requires no fencing. The area is large enough for quite a large farm, and while I have not seen it, I am informed that it is excellent soil, resulting from the gathering of river silt for hundreds of years.

His letter concludes with the comment: “If we have to hold the land for several years before selling it I cannot see that it would make a great deal of difference to the band, or to anyone else.”

D.J. Allan, the Superintendent of Reserves and Trusts, concurred with Ostrander’s recommendation.

On January 15, 1952, a five-year renewable lease was granted to Hugh Struthers of Prince Albert, with terms requiring certain improvements and payment in crop share. The lease was cancelled only a year later, after Struthers failed to fulfill the conditions of the lease. There is no further information regarding what improvements, if any, were actually completed under the terms of the lease, although the 1956 sale agreement noted that there were no buildings on the land.
Floyd B. Glass of Prince Albert purchased Sugar Island on July 26, 1956, for $2,501. The “Memorandum for Sale of Indian Land” states that, according to an appraisal done by the “V.L.A.” in 1955, the lands were worth $1,500 in total.559 The sale memorandum contains a notation stating: “Tenders called and one received. Island not too desirable covered with dense growth – greatest value seems to be as a game sanctuary but provincial authorities offer only $2000.”560 This assessment is in stark contrast to previous discussions within the department regarding the value and potential usage of the Sugar Island lands, and the final sale price was essentially the same as that proposed by T.D. Green in 1898, 58 years earlier.

Some Chakastaypasin elders recall the sale of Sugar Island and say that many Chakastaypasin people were angry that the James Smith band council had agreed to sell the land, arguing that they had no right to do so.561 Later, Edward Burns said that he had never signed the document agreeing to sell the land.562 His signature appears on a James Smith BCR dated July 21, 1947, requesting the department to sell Sugar Island, and on another BCR dated December 7, 1951, authorizing the long-term lease of Sugar Island “for agricultural purposes.”563

563 Band Council Resolution, July 21, 1947, DIAND file 674/30-4-100 (ICC Exhibit 24c, p. 5); Band Council Resolution, December 7, 1951, [DIAND file 674/30-4-100] (ICC Exhibit 24c, p. 18).
PART III

ISSUES

The Indian Claims Commission is inquiring into the following issues:

Validity of Surrender Issues

1. Was a surrender of Chakastaypasin IR 98 required prior to the sale of those lands?
   The consideration of this issue may include the following related issues:
   (a) the alleged abandonment of IR 98;
   (b) the transfer of First Nation members to other bands; and
   (c) the consent of First Nation members to any such transfers.

2. If the answer to Issue 1 is yes, then what were the requirements of surrender according to
   (a) Treaty No. 6;
   (b) the Indian Act; and
   (c) the fiduciary obligations of Canada?

3. If the answer to Issue 1 is no, and Canada was not legally required to take a surrender of Chakastaypasin IR 98, did the fact that Canada took a surrender nevertheless create a fiduciary obligation(s) on the part of Canada?
   (a) and if so, what were these obligations?

4. Did Canada breach any obligation(s) which may arise under Issue 2 or 3?

5. Is the effect of any breach(es) such that it invalidates the surrender of IR 98 or otherwise gives rise to a claim for damages?
Land Disposition Issues

6 What were Canada’s obligations in disposing of IR 98 lands, including Sugar Island, according to
   (a) Treaty No. 6;
   (b) the Indian Act and its Regulations; and
   (c) the fiduciary obligations of Canada?

7 Did Canada, having accepted as a validated claim that it breached its beyond lawful obligation to legally sell 71 quarters of IR 98, breach any further obligation which may arise under Issue 6 concerning the sale of IR 98, including Sugar Island? In considering this issue, the parties agree to address the following:
   (a) the application of the Indian Land Regulations;
   (b) allegations regarding the manipulation of the land tendering process;
   (c) allegations of fraud as regards the remaining 44 quarter sections that Canada asserts were legally sold and for which Canada has not accepted a validated claim; and
   (d) the actions of Canada in the administration of the sales of the land.

Sugar Island Issues\(^{564}\)

8 What obligations did Canada have regarding Sugar Island prior to the alleged surrender of 1897?

9 Did Canada breach these obligations?

10 What obligations did Canada have regarding Sugar Island after the alleged surrender of 1897?

11 Did Canada breach these obligations?

12 If the answer to 9 or 11 is yes, does Canada have an outstanding lawful obligation?

\(^{564}\) On March 31, 2003, Canada partially accepted the James Smith Cree Nation’s claim relating to Sugar Island. With this partial acceptance, the only issues that remain to be determined are issues 8 and 9; Canada has addressed issues 10, 11, and 12 in its letter of March 31, 2003 (ICC Exhibit 4f, p. 2).
PART IV

ANALYSIS

We have organized our analysis to follow the three themes under which the issues are set out in Part III: validity of surrender, land disposition, and Sugar Island.

ISSUES 1–5 VALIDITY OF SURRENDER

1. Was a surrender of Chakastaypasin IR 98 required prior to the sale of those lands?
   The consideration of this issue may include the following related issues:
   (a) the alleged abandonment of IR 98;
   (b) the transfer of First Nation members to other bands; and
   (c) the consent of First Nation members to any such transfers.

2. If the answer to Issue 1 is yes, then what were the requirements of surrender according to
   (a) Treaty No. 6;
   (b) the Indian Act; and
   (c) the fiduciary obligations of Canada?

3. If the answer to Issue 1 is no, and Canada was not legally required to take a surrender of Chakastaypasin IR 98, did the fact that Canada took a surrender nevertheless create a fiduciary obligation(s) on the part of Canada?
   (a) and if so, what were these obligations?

4. Did Canada breach any obligation(s) which may arise under Issue 2 or 3?
5 Is the effect of any breach(es) such that it invalidates the surrender of IR 98 or otherwise gives rise to a claim for damages?

We will begin our analysis with a consideration of Issue 1.

Was a Surrender of Chakastaypasin IR 98 Required before the Sale?
The James Smith Cree Nation (JSCN) argues that a surrender was and is always required under treaty and under the Indian Act before a reserve can be sold by Canada. More specifically, it says, IR 98 was established under Treaty 6, and it could cease to exist only if the Indians for whom it was created, the Chakastaypasin Band, chose to surrender the reserve within the terms of that treaty. Thus, unless this Band agreed to surrender the reserve, it continued to be its reserve under Treaty 6.

Further, JSCN argues that there is no provision in the 1886 Indian Act for disposing of a band’s interest in its reserve other than by surrender. Thus, if Canada wished to proceed to obtain IR 98 by means other than a surrender, it was bound to amend the Indian Act. It did not. JSCN argues that Canada could not create a right to dispose of a reserve without surrender by transferring all the members of the Chakastaypasin Band to other bands. Finally, JSCN argues that Canada was bound by the surrender provisions of the Indian Act to find the members of the Band and to ask them if they wanted to surrender IR 98, whether or not these members had been transferred to other bands.

Canada takes the position that a surrender was not required with respect to IR 98. It argues that, by royal prerogative, the Crown has the authority to create Indian reserves. A corollary right to the Crown’s prerogative power to establish an Indian reserve is the Crown’s prerogative power to dispose of an Indian reserve. This power, Canada argues in its written submission to this inquiry, is limited only by legislation – in this case, by the relevant provisions of the Indian Act. However, during legal argument, Canada acknowledged that the treaty will also operate as a limit on the Crown’s prerogative. This admission came during an exchange between Commissioner Holman and counsel for Canada in oral submissions:

Commissioner Holman: ... You make the argument that the Crown used its prerogative right to create the reserves and it has a corollary right to take away the

reserve – if I’m reading that right – and that the only limitation on the Crown’s prerogative is statute. But when the Crown commits itself, as it does in a treaty, and it’s spelled out in a treaty what is required for the disposition or to take away a reserve, is that not also a limitation on the Crown’s prerogative?

Mr. Winogron: Absolutely.567

It is Canada’s submission that the Chakastaypasin Band ceased to exist as a band within the meaning of section 3 of the 1876 Indian Act by at least 1888, when all the band members had joined other bands. Before the introduction of section 140 to the Indian Act in 1895, the section that formalized the procedure for transfer of Indians between bands, Canada sometimes facilitated informal transfers by means of the annuity paylists. All the Chakastaypasin members were transferred to other bands via the paylists, in recognition of the fact that they were living with other bands. The legal effect of these transfers was that the Chakastaypasin Band ceased to exist.568 At the same time, IR 98 was abandoned.569 Although Canada admits that neither the case law nor Treaty 6 addresses the question of what happens to an Indian reserve when a band ceases to exist, it argues that other areas of the law – trust and property law concepts – may be helpful to discern analogous principles that we can apply to this case.570

Canada submits that the principles of trust law are generally analogous to the facts of this case. The relationship between aboriginal peoples and the Crown has been described by the courts as “trust-like,” but not a trust. For a valid trust to exist, there must be three parties – a settler, a trustee (who may be the same as the settler), and a beneficiary – and the certainties in creating a trust must be met: certainty of intention, certainty of subject matter, and certainty of objects.571 Canada takes the position that the objects of the trust must be ascertainable. By analogy, the object of the trust is the Chakastaypasin Band. If the object of the trust ceases to exist, under trust law principles, the subject matter of the trust results back to the settler. In this case, the subject of the trust is IR 98. Thus, Canada submits that when the Chakastaypasin Band

ceased to exist, its interest in IR 98 can be considered to have reverted to the Crown.

Furthermore, Canada submits that property law principles are also analogous to the facts in this case, although it admits that these principles do not apply to the nature of the interest of an Indian band in a reserve. Canada argues that if A (the legal title-holder) grants exclusive use and occupation (and still retains legal title of the estate) to B for life, when B dies, the part of the estate granted to B reverts back to A. Applying these principles to this case, when IR 98 was granted to the Chakastaypasin Band, the Crown held legal title to the reserve. However, the use and occupation of IR 98 belonged to the Band. When the Band ceased to exist, it could not exercise its interest in IR 98, and the reserve reverted back to the Crown.572

Canada concludes by stating that “the status of land as reserve lands, by virtue of the definition [in the Indian Act], is dependent upon the continued existence of the band for whom the band [sic] is set apart. It [sic] the band ceases to exist the status of the land as reserve land cannot continue.”573

Based on Canada’s position in this inquiry, the crux of determining whether a surrender of IR 98 was required before the sale of these lands is first decided by answering whether the Chakastaypasin Band ceased to exist and, if so, when. Canada relies on the transfer of all band members to other bands as evidence of the Band’s ceasing to exist. We will therefore begin our analysis with this question, which will necessarily involve a review of the evidence regarding the transfer of members to other bands.

**Did the Chakastaypasin Band Cease to Exist?**
We believe it is helpful to consider the evidence surrounding the transfer of Chakastaypasin members in two periods: pre-1895, and 1895 (when section 140 of the Indian Act was introduced).

**Before 1895**
It is not disputed in this inquiry that the Chakastaypasin Band, represented by Chief Chakastaypasin and four of his headmen (including Kahtapiskowat, also known as Big Head), entered Treaty 6 with the Crown on August 23, 1876, at Fort Carlton. It is also undisputed that IR 98, including Sugar Island, was selected, surveyed, and set aside for this Band.

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The population of the Chakastaypasin Band when it entered treaty has been recorded as totalling 82, and it grew to 107 by 1880. Thereafter the population declined to 69 people in 1884, and we see from the paylists that many of the Chakastaypasin families were paid on the James Smith paylists between 1878 and 1883.\textsuperscript{574}

There is little evidence to explain the reasons for the early migration out of IR 98. However, during the community session on May 27, 2003, Mr Harold Kingfisher of the Sturgeon Lake First Nation recounted that his great-grandparents, Ooteepayinisew and Nesoquam, left IR 98 for the James Smith Band when Chakastaypasin band members were denied rations before the North-West Rebellion in 1885.\textsuperscript{575}

During this same period, the Inspector of Indian Agencies, T.P. Wadsworth, reported in 1883 that, although the Band was “still very backward in farming, they have made considerable progress ... about twenty-five acres under crop. Big Head ... [has] built houses and broken land ... The chief ... has ten acres in wheat, barley and potatoes.”\textsuperscript{576} We see from the evidence the effort of band members to pursue agriculture despite Wadsworth’s report the following year that “the Department have never considered them of sufficient importance to go to the expense of sending them a Farming Instructor.”\textsuperscript{577}

In 1884, we also see evidence of the department’s lack of support for agriculture when Indian Agent Macrae reports that “very few” of the Chakastaypasin members lived on their reserve, but that “such as do are maintaining a steady rate of progress”\textsuperscript{578} ... Nothing prevents all of our Indians from being settled on their reserves, except our incapacity to furnish enough material for agriculture. They are all desirous of settling, but have not the wherewithal to enable them to commence farming.”\textsuperscript{579}

In the evidence, we do not see further migration from IR 98 until the rebellion in March 1885. At that time, as the elders recounted to this Commission, band members left the reserve to avoid being drawn into the conflict and were motivated both by loyalty to treaty and by fear stemming

\begin{itemize}
  \item \textsuperscript{574} Treaty annuity paylist, Chakastaypasin Band, 1876, no file reference available (ICC Exhibit 12a, pp. 206–14); James Smith band paylists, 1878–83 (ICC Exhibit 12a, pp. 292–97).
  \item \textsuperscript{575} ICC Transcript, May 27–29, 2003 (ICC Exhibit 17b, p. 158, Harold Kingfisher, Sturgeon Lake First Nation).
  \item \textsuperscript{576} T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, October 9, 1883, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883}, 120–21 (ICC Exhibit 1, pp. 102–3).
  \item \textsuperscript{577} T.P. Wadsworth, Inspector of Indian Agencies, to the Deputy Minister, April 22, 1884, LAC, RG 10, vol. 3786, file 27580 (ICC Exhibit 1, p. 119).
  \item \textsuperscript{578} J. Ansdell Macrae, Indian Agent, Carlton District, to SGIA, August 11, 1884, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884}, 80 (ICC Exhibit 1, p. 139).
  \item \textsuperscript{579} J. Ansdell Macrae, Indian Agent, Carlton District, to SGIA, August 11, 1884, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884}, 80 (ICC Exhibit 1, p. 136).
\end{itemize}
from threats made by scouts who came to their reserve. The words of elder Oliver Constant are particularly poignant: “They didn’t want to shoot the queen. They honoured the treaty, because they made the treaty.”

At the time of the rebellion, most, if not all, Chakastaypasin band members had fled IR 98. However, by 1887, some members, including Big Head, had returned to IR 98 and received their annuities there. Chief Chakastaypasin and his family continued to be denied annuity payments from 1885 to 1889 because the government viewed them as “rebels.”

The department’s designation of “rebel” and “loyal” Indians in the aftermath of the North-West Rebellion merits particular attention in this inquiry, as such designations had a direct impact on the Chakastaypasin Band. The Department of Indian Affairs initially branded the entire Chakastaypasin Band as “rebels,” and, in June 1885, Indian Commissioner Dewdney informed the SGIA that the Chakastaypasin Band had “violated the terms of the Treaty made with them” and that it would be advisable to break up the band and amalgamate the members with other bands.

At about the same time, Hayter Reed, the Assistant Indian Commissioner, outlined a number of general recommendations for dealing with the “Future Management of Indians” following the rebellion. Aside from his general recommendations, Reed made a specific recommendation for dealing with the Chakastaypasin Band:

Chakastapaysin’s [Band] should be broken up, and its reserve surrendered ... Neither of these [One Arrow and Chakastaypasin bands] are large enough to render it desirable to maintain instructors permanently with them, and as they are constituted of bad and lazy Indians, nothing can be done without constant supervision of them. The action suggested therefore would have been wise in any case; their rebellion justifies the pursuit.

On October 28, 1885, Indian Commissioner Dewdney’s advice was approved by the Superintendent General of Indian Affairs, who said:

581 ICC Transcript, June 27–28, 2001 (ICC Exhibit 16a, p. 49, Oliver Constant).
583 Edgar Dewdney, Indian Commissioner, to SGIA, June 19, 1885, LAC, RG 10, vol. 3714, file 21088-2, and vol. 3584, file 1130 (ICC Exhibit 1, pp. 188, 193).
584 Hayter Reed, Assistant Indian Commissioner, to the Indian Commissioner, July 29, 1885, Glenbow Archives, Edgar Dewdney Papers, document M320, box 4, file 66, pp. 1417–18 (ICC Exhibit 18a, pp. 4–5).
[The SGIA] considers that Chakastapaysin’s Band should be broken up; the Reserve of this Band when the members of the same are distributed among other Bands to be handed over to the Government and the necessary addition to be made to the Reserves to which they may be moved.585

By January 1886, the department appeared willing to treat those it considered “rebel” and “loyal” differently. We see in the evidence that Chief Chakastaypasin was regarded as a “rebel” and denied his treaty annuities, unlike Kahtapiskowat, who was rewarded for his loyalty. In January 1886, the department formalized its different treatments through the creation of a “rebel paylist” and a “loyal paylist.” In May 1886, Commissioner Dewdney then notified the Acting Agent at Prince Albert that “Big Head or Kah-tip-is-kee-wat from Chakastapaysin’s Band” was to be “rewarded for loyalty” during the rebellion.586 We see from the evidence that Big Head’s “loyalty” was rewarded on numerous occasions: he received a gift of two heifers in 1886,587 he and his family were paid annuities with James Smith in 1885,588 when no other band members received annuities on the Chakastaypasin band paylist that year; he was not deposed of his designation of headman, although Hayter Reed had recommended the abolishment of the “tribal system” by deposing the chiefs and councillors of “rebel tribes”;589 and, when paid his annuities, he also received payment of a “pension” during the years 1904 to 1906, for a total of $183 – a payment not provided to any other band member.

Based on the evidence, what we see during this period is the department taking active steps to encourage the movement of Chakastaypasin band members from IR 98, or, at the very least, to discourage further settlement on the reserve. Before the rebellion, we see evidence of the department's characterization that “they are a rather superior band of Indians and as far as I could observe need only a good example set them ... to very much improve their present condition.”590 Only a year before the rebellion, Indian Agent Macrae reported that the few members on IR 98 “are maintaining a steady rate of progress ... nothing prevents all of our Indians from being settled on their reserves, except our incapacity to furnish enough material for

585 L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, part 1B (ICC Exhibit 1, p. 206).
586 E. Dewdney, Indian Commissioner, to the Acting Indian Agent, May 25, 1886, LAC, RG 10, vol. 1591 (ICC Exhibit 1, p. 234).
587 E. Dewdney, Indian Commissioner, to the Acting Indian Agent, May 25, 1886, LAC, RG 10, vol. 1591 (ICC Exhibit 1, p. 234).
589 Hayter Reed, Assistant Indian Commissioner, to the Indian Commissioner, July 29, 1885, Glenbow Archives, Edgar Dewdney Papers, document M320, box 4, file 66, pp. 1414–19 (ICC Exhibit 18a, pp. 1–6).
590 Natural Resources Canada, Field book 434 CLSR, Elihu Stewart, DLS, “Field Notes of Chacastapasin Reserve,” 1878 (ICC Exhibit 6b, item 6, p. 60).
agriculture. They are all desirous of settling, but have not the wherewithal to enable them to commence farming.”591 Within a year of these remarks, we see in the evidence a complete shift in the department’s characterization of this Band. By July 1885, Assistant Indian Commissioner Hayter Reed remarked: “[A]s they are constituted of bad and lazy Indians, nothing can be done without constant supervision for them. The action suggested [breaking up the Band and surrendering its reserve] therefore would have been wise in any case; their rebellion justifies the pursuit.”592

Throughout the years 1886 to 1888, the evidence indicates that at least Big Head and 11 “loyal” families continued to use and occupy IR 98. Other band members were reported to be living near Fort à la Corne in the vicinity of the James Smith Band.593 In 1888, Indian Agent McKenzie referred to “two sections” of the Chakastaypasin Band — one section living at IR 98 and another living near Fort à la Corne. The existence of two sections is, in our view, very important, when viewed from the perspective of whether the entire Band consented to the surrender of its reserve; we will revisit the existence of these two sections and return to the matter of surrender later in this report. Nevertheless, in Agent McKenzie’s September 1888 annual report, he wrote that “Big Head and his party” had requested permission to join the Cumberland Band, and were now “transferred” to that band and “engaged in farming.”594 The following year, on October 23, 1889, McKenzie reported to the Indian Commissioner that “band No. 98 is now thoroughly broken up” and its members settled with the One Arrow, James Smith, and Cumberland Bands.595

The Crown today argues that when members of Chakastaypasin’s Band chose to leave IR 98 and join other bands, they were choosing to stop participating in the relationship between the Crown and Chakastaypasin’s Band and to begin participating in the relationship between the Crown and the other bands. Further, “these people must be considered to be ‘autonomous actors’; the Department of Indian Affairs could not make them remain on IR 98. If they wanted to join other bands, to participate in another

591 J. Ansdell Macrae, Indian Agent, Carlton District, to SGIA, August 11, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884, 80 (ICC Exhibit 1, p. 136).
592 Hayter Reed, Assistant Indian Commissioner, to the Indian Commissioner, July 29, 1885, Glenbow Archives, Edgar Dewdney Papers, document M320, box 4, file 66, pp. 1417–18 (ICC Exhibit 18a, pp. 4–5).
relationship with the Crown, it was appropriate to permit them the transfers they sought.”

The evidence is unequivocal that, in the aftermath of the North-West Rebellion, the Indian Department of the day wanted the Chakastaypasin Band “broken up.” Yet, if such a policy was to be carried out by the transfer of members to other bands, the department had no statutory process and procedure in place to effect such transfers before 1895. Before that year, what we see in the evidence is the development of a transfer practice in March 1889 to require, first, the “written consent of a majority of the voting members of both the originating and receiving bands” and, second, the assurance that these votes came after a full explanation that the transferee would be entitled to a share in all lands and other privileges of the receiving band.

We see in the evidence that six Chakastaypasin families were paid their annuities with James Smith in November 1885, including Big Head. In 1886, Big Head and 11 “loyal” families received their annuities on the Chakastaypasin band paylist. In 1887, all of the “loyal” families were again paid, including Big Head, except for one family that was paid with the James Smith Band. In 1888, the Chakastaypasin Band had two paylists: the first, dated October 13, 1888, noted Big Head as headman and was paid at “Agency.” This paylist noted that six families, including Big Head, had “transferred to the Cumberland Band” and two families had “transferred to James Smith Band.” The corresponding 1888 paylist for the “Cumberland Band paid at Peter Chapman’s Reserve” shows six Chakastaypasin families grouped at the end of the paylist according to their Chakastaypasin treaty numbers and marked with an “A,” including Big Head, who received the extra headman’s annuity. All the Chakastaypasin band members on this paylist have the notation “now transfd” or “transfd from Chakastapaysin” beside their names. By 1889, the Chakastaypasin band paylist was discontinued.

We are struck by the department’s use of the language “now transfd” appearing for the first time in the 1888 paylists, when the departmental position had previously been “that it is contrary to the law” to “transfer” anyone to another band, except in cases where a woman marries into it.

597 [L. Vankoughnet, DSGIA], to the Indian Commissioner, March 18, 1889, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1, pp. 507–8).
599 [L. Vankoughnet, DSGIA], to Hayter Reed, Indian Commissioner, November 23, 1888, LAC, RG 10, vol. 3807, file 52583-2 (ICC Exhibit 1, p. 481).
was this categorical refusal to allow transfers that may have precipitated the development of the department’s practice in 1889 to require the written consent of a majority of the voting members of both the originating and the receiving bands, in the years before the formal amendment to the Indian Act in 1895 with the introduction of section 140.

We also see in the evidence that the Cumberland band paylist of October 31, 1891, indicated that the former Chakastaypasin members were given new Cumberland Band ticket numbers.600 One month previously, on September 4, 1891, Chakastaypasin and Cumberland band members signed a “Consent to Transfer” that stated:

We the undersigned Councillors and members of the Band of Indians owning the Reserve situated in treaty No. 6 and known as the Cumberland Reserve No. 100A 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 Rule of the Band, and held in the presence of the Indian Agent for the locality on the 4th day of September 1891, granted leave to “Nanequaneum” No. 35 of Beardy’s Band No. 97 to be transferred from said band to this our Band of Indians owning the Reserve as situated at Fort a la Corne in Treaty No. 6 and known as Cumberland Reserve to which transfer, we the undersigned hereby give our consent.601

This Consent is signed by five Cumberland people and two Chakastaypasin members, George Sanderson and Big Head. The department approved the transfer of Nanequaneum to “the Band of Indians owning the Reserve situate in treaty No. 6 and known as the Cumberland Reserve No. 100A” on October 20, 1891, and he appeared the next year as ticket no. 105 on the 1892 paylist for “Big Head’s Band 100A.”602 We believe from the evidence that the creation of this “Big Head’s Band 100A” paylist results from the department’s effort to make a distinction between the Cumberland band members, who were Treaty 5 Indians, and Chakastaypasin members, who were Treaty 6 Indians, both living at IR 100A.603

At the time the above Consent to Transfer was executed, there is no evidence explaining how Big Head and George Sanderson were transferred.

601 Consent of Band to Transfer, September 4, 1891, LAC, RG 10, vol. 3862, file 83104 (ICC Exhibit 1, p. 632).
602 Treaty annuity paylist, Big Head Band, 1892, no file reference available (ICC Exhibit 12a, p. 223).
603 [L. Vankoughnet, DSGIA], to Hayter Reed, Indian Commissioner, April 22, 1892, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, James Smith Cree Nation, IR 100A Inquiry, pp. 359–60); Hayter Reed, Indian Commissioner, to the Indian Agent, Duck Lake Agency, May 7, 1892, no file reference available (ICC Exhibit 1, p. 673).
into the Cumberland Band at IR 100A beyond Agent McKenzie’s notation on the 1888 paylist that they were now “transferred.” They had moved to Fort à la Corne, but, as we shall see, there was no attempt at formal transfer until 1896. So, on the facts, we see that these people had moved to Fort à la Corne, but the department would not seek to formalize their transfer for another 12 years.

In 2001, the Federal Court of Canada in *Snake v. The Queen* considered the movement of Young Chipeewayan members from their Stoney Knoll IR 107 (also a Treaty 6 band) to other bands, as evidenced only by the paylists of these other bands, and the effect such movement had on their membership. In that case, Mr Justice Gibson stated:

... counsel for the defendant urged that, as members of the Band dispersed, they became members of other bands. I have greater difficulty with this submission. While, as previously noted, the names of members of the Band began to appear on the paylists of other bands, I am not satisfied that that constitutes evidence that they became members of those bands. Rather, I would prefer to interpret this reality as evidence of nothing more than an *administrative convenience* accomplished by, and for the benefit of, those charged with distributing annuities.

I am assured that there was no statutory provision relating to the transfer of membership from one band to another before 1895, except as previously noted, on marriage. Transfers, if they took place, were achieved informally, largely based upon physical relocation of an individual or a family. Physical relocation was entirely consistent with the history of the Plains Indians. That being said, *physical relocation of an individual or family onto the reserve of a band of which those relocating were not traditional members was not, on the evidence before me, consistent with assumption of membership in the band to which the reserve had been dedicated or with granting or acknowledgement of membership in that band by its members.*

In this inquiry, Canada has argued that the Chakastaypasin Band ceased to exist as a band at least by 1888, when all its members had joined other bands. Further, Canada argues that the movements of Chakastaypasin members from IR 98 were informal transfers facilitated by means of the annuity paylists, in recognition of the fact that these people were living with other bands. With great respect, we must disagree. On the basis of *Snake*, the physical relocation of members does not in and of itself prove the transfer of membership. With membership comes rights and privileges shared by the whole band. Surely, something more than the administrative documents used by the department to distribute treaty annuity payments is required as proof of transfer. Clearly, by 1889 the Department of Indian Affairs set out what would

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be required: “written consent of a majority of the voting members of both the originating and receiving bands.” For the individuals and families transferring to IR 100A, on the basis of our findings in both the Cumberland House Cree Nation IR 100A Inquiry and the James Smith Cree Nation IR 100A Inquiry, what is required is evidence of the consent of the whole of the Cumberland Band, including those resident at IR 20, to accept the transfer of Chakastaypasin members. There is no evidence of the consent of the whole Cumberland Band. Consequently, we find there were no valid transfers before 1895 from Chakastaypasin into IR 100A. This finding is confirmed by the fact that the government took steps in 1896 —unsuccessfully, in our view — to bring about the “formal” transfer of these people.

**In 1895**

We note that following the introduction of section 140 to the Indian Act in 1895, the DSGIA questioned, some seven years after McKenzie’s 1888 report, “whether the members of Chakastaypasin Band were formally transferred to the other bands with which they became amalgamated.”

In 1895, the Indian Act was amended with the introduction of section 140, which formalized the procedures for transfer of membership between bands. Section 140 reads:

> When by a majority vote of a band, or the council of a band, an Indian of one band is admitted into the membership in another band, and his admission thereto 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 was 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 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.\(^{605}\)

With the introduction of section 140, DSGIA Hayter Reed wrote to Indian Commissioner A.E. Forget and asked

> whether the members of Chakastaypasin Band were formally transferred to other Bands with which they become amalgamated, and if not to request that the formal application for such transfer and consent of the Bands concerned to receive applicants may be obtained without delay — and admitted to the Department.\(^ {606}\)

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\(^{605}\) *Indian Act*, RSC 1886, c. 43, s. 140 (added by SC 1895, c. 35, s. 8) (ICC Exhibit 25a, p. 59).

\(^{606}\) DSGIA to A.E. Forget, Indian Commissioner, November 9, 1895, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 722).
On the same day, Reed wrote to the Deputy Minister of the Interior, A.M. Burgess, and stated:

Relative to the advisability of throwing open for settlement the Reserves set apart for the Bands of Chiefs Young Chippewayan and Chakastapaysin respectively; and acquainting me with the Minister’s views as to the desirability of these Reserves being surrendered, and in reply to suggest for consideration the question as to whether under the circumstances any necessity exists for taking a surrender at all. With regard to the Indians of Young Chippewayan’s Reserve, the question presents itself as to whether the fact of their having been rebels in 1885, and having left the Country after the rebellion would not afford sufficient and reasonable grounds for dispossessing them of such rights as they originally had to the Reserve. As to such of them as have since returned they are in the same position as the Indians of Chacastapasin Band in so much as they have all become amalgamated with or merged to other Bands with the members of which they enjoy equal privileges.607

We see next in the evidence that Indian Commissioner Forget instructed the Indian Agent at Duck Lake, on February 3, 1896, to immediately “obtain the consent of the councils of the several Bands into which these Indians have gone, to their formal admission thereinto,” because it appeared that “no formal transfer of these Indians to the Bands with which they subsequently amalgamated has apparently ever been obtained.”608 Commissioner Forget enclosed a tabular statement with his letter to the Indian Agent, “showing the dispersion of the Band as it was in 1888, tracing each member from that date to 1895.” This statement shows that, by 1895, nine of the 10 families that had appeared on the 1887 paylist for the Chakastaypasin Band were living with the Big Head, James Smith, and One Arrow Bands.

The necessity of “formally” transferring the Chakastaypasin band members to other bands in 1896 was clearly evidenced by DSGIA Hayter Reed in his letter of February 8, 1896, to Indian Commissioner Forget. He wrote:

The Department does not propose to take any surrender of the Chakastaypasin Reserve ... and it is largely on that account that it desires to have the transfer to other Bands, by which the original owners have forfeited all rights in Reserve set apart for them, formally completed.609

607 Hayter Reed, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, November 9, 1895, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 726).
609 Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, February 8, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, p. 743).
On May 18, 1896, Indian Agent McKenzie forwarded 22 “consents of the members of the Cumberland Band No. 100A to accept into their Band the remnant of Chakastaypasin’s Band No. 98.” McKenzie also forwarded one Consent to Transfer form admitting one former Chakastaypasin member into the James Smith Band. The Consents to Transfer were signed by seven members of the Cumberland Band at IR 100A: Samuel Brittain, Joseph Head, James Head, Moses Cameron, Frederick Okeekeep, James Okeekeep, and Andrew Brittain.

It is important to note that in this same May 18, 1896, letter, Agent McKenzie reported that “the reason the Cumberland Band did not give their consent sooner was because they wished to know if by so doing they would be allowed to appoint a Chief and Councillors. However, after I explained to them that I did not expect this privilege would be extended to them but that I would submit their desire to the Department, I got them to sign the papers without any difficulty.” In evidence, the marginalia to this letter reads: “The Agent will be asked to inform the band that their request cannot be granted, F.W.P. for Commr.”

Equally important to note is that McKenzie also reported in this same letter that the Chakastaypasin members had not yet consented to join the Cumberland Band. This comment contradicts his September 10, 1888, annual report, where he stated that “Big Head and his party” had requested permission to join the Cumberland Band, and were now “transferred” to that band. On May 18, 1896, he explained:

Chakastaypasin’s or Big Head’s Band state that by joining the Cumberland Band they do not wish to give up their claim to their Reserve and ask to be informed what the Department proposes doing with the Reserve, and what they will receive if they give up their claim to the Reserve. I explained that I was not in a position to give them any information but that I would receive instructions from the Department before they would be asked to sign any document.

In an attempt to answer Agent McKenzie’s request for information from the department on how to proceed, E.H. Paget, writing for the Indian Commissioner, forwarded McKenzie’s letter to the DSGIA and stated: “[I]t will be seen that these Indians either do not comprehend the full effect of their

transferring themselves to another Band or have only accepted same conditionally. As this is the first instance of the kind which has arisen, I should be glad to be advised as to the course the Department desires to pursue in the matter.”

On June 2, 1896, DSGIA Hayter Reed replied to the Indian Commissioner’s request for instructions. Reed directed that “the Agent should be instructed to tell them that since by admission to other Bands they share all privileges with the Bands concerned, including the right to the Reserves, they cannot, in the opinion of the Department, expect any compensation for relinquishing their own Reserve, and have in fact already done so by leaving it and taking up permanent abode upon others. They should be reminded that it is somewhat late for them to set up such a claim after they have been virtually members of other Bands for years, which they joined entirely of their own accord, the Department refraining from making any objection.”

From the evidence it appears that, as of 1896, there was a fundamental difference of understanding between Chakastaypasin band members and the department on the effect of transfer to another band. Indeed, on June 5, 1896, the Indian Commissioner instructed Agent McKenzie to explain the situation to the Chakastaypasin members:

[You may inform them that by their admission to other Bands they receive, with the band which they enter, all the privileges including the right to lands, which they enjoyed as members of a separate band, and for this reason they cannot expect compensation where no loss is sustained. They would be in the enjoyment of no greater privileges or benefits were they on a Reserve of their own.

In any case they have practically relinquished all claim to their old reserve by abandoning it and taking up their abode on others and after years of practical membership in such other bands, which was not opposed by the Department, it is now somewhat late to set up any claim to lands that as a matter of fact they hardly occupied.

They might also be informed that in order to definitely assure themselves of the privileges now offered them in connection with other bands, they had better, in their own interests, make no unnecessary delay in accepting the offer while it remains open.”

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614 F. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1, pp. 813–14).
There is no evidence to indicate that Agent McKenzie acted on these instructions to inform the Chakastaypasin members on the consequences of transfer, but we do see in the evidence that he called a meeting “of the members who were not absent.” On June 12, 1896, he made an unsuccessful attempt to get their signatures on an application for transfer, but “they flatly refuse[d] unless they are allowed something for the Chacastapasin’s Reserve.” In any case, he explained, only a few members were present. When he reported on his lack of success, Agent McKenzie suggested that he would try again when the Band gathered for its treaty annuities. On receipt of this report, Commissioner Forget reluctantly agreed with the Agent’s approach, but he instructed that, “should the Agent find it less difficult to get the Indians to make individual applications,” he should pursue that course rather than try to get all the signatures on a single application. Further, since it was “useless” to approach the Chakastaypasin members as a whole, “except in making the trial you suggest at the treaty payments,” the Agent should “take the members individually and endeavour to win them over one by one, obtaining their signatures as occasion offers.”

On October 15, 1896, at the time of the treaty payments, 27 Chakastaypasin families applied for admission to the Cumberland Band at Fort à la Corne, and one family applied for admission to the James Smith Band. The application for admission to the “Cumberland Band No. 100A” reads:

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 IR 100A, in the same Agency, do hereby make application to be admitted into membership in the said Cumberland Band No. 100A.

The application is witnessed by Agent McKenzie and Sandy Thomas, the Agency interpreter, and signed by 27 members. Included among the signatories are all nine men who later signed the surrender of the Chakastaypasin IR 98 on June 23, 1897.
Because this application for admission was taken at the time of the treaty payments, there is a contemporaneous “Cumberland No. 100 A Band, Paid at Reserve Fort a la Corne” paylist dated October 14 and 15, 1896. It reflects the transfer of 17 families from the Big Head band paylist, and it includes Big Head and his family among the names listed.

In our view, even if the Chakastaypasin individuals and families seeking to transfer could do so under section 140, a valid transfer required the consent of the receiving band. In this case, the 27 Chakastaypasin individuals and families, including Big Head, required the consent of the whole of the Cumberland Band — both those resident at IR 20, as the receiving band, and those at IR 100A. For the reasons stated in the Cumberland House Cree Nation: IR 100A Inquiry and the James Smith Cree Nation: IR 100A Inquiry, IR 100A was reserved for the whole of the Cumberland Band, including those resident at IR 20. There is no compelling evidence that a separate band was created or had evolved from the original Treaty 5 signatory Cumberland Band. For this reason, the seven signatories to the October 1896 Consent to Transfer to IR 100A may represent the consent of some members of the Cumberland Band, but there is no evidence of consent of the whole of the Cumberland Band, including those at IR 20. As such, the October 25, 1896, “transfer” is not in compliance with the section 140 requirement of consent “of the receiving band,” and, consequently, it must be found invalid.

Canada has also argued that the Chakastaypasin band members’ migration from IR 98 is inextricably linked to whether IR 98 was thereby abandoned. We will next consider the question of IR 98’s abandonment.

Was IR 98 Abandoned?
It is Canada’s position that IR 98 was abandoned in the 1880s and that the abandonment was real and intended to be permanent. Canada submits that “had the former members of Chakastapaysin had any intention of remaining a separate band or retaining any interest in IR 98, they would not have moved to 100A, consented to transfer to that band, inquired about compensation with respect to IR 98 and signed a surrender with respect to the same.”

Further, Canada submits that by the time of the IR 98 surrender in 1897, members of the Chakastaypasin Band had already been living at IR 100A for about nine years. They had formalized their membership with the Cumberland Band in 1896, according to Canada, when they signed the application for admission into IR 100A.

The James Smith Cree Nation submits that, following the North-West Rebellion, Canada used the uprising to implement policies designed to break up the Chakastaypasin Band once it was labelled a “rebel” band. This policy was implemented by the department’s designation of the Band as “rebel,” by the department’s stated decision to “break up the band,” by the Crown’s deliberate prevention of members from returning to the reserve after the rebellion, and by pressure from department officials for members to leave IR 98.

The “Two Sections” of the Band and the Consent to Surrender

In his January 1888 report, Agent McKenzie referred to “two sections” of the Chakastaypasin Band: one section was living at Fort à la Corne both before and after the North-West Rebellion, and the other section remained on IR 98. It is important to reflect on how department officials were dealing with each section. We know from the evidence that Agent McKenzie reported in January 1888 on his meeting with the members of the Chakastaypasin Band living at Fort à la Corne who, at that time, requested “that the Department would take back the Reserve on the South Branch, and give them a Reserve near James Smith’s at La Corne.” He concluded his January 1888 report by advising the Indian Commissioner that this request should be granted, “as it will be much more convenient to look after them when they are all together, than in the shape they are at present.”

In response, Assistant Indian Commissioner Hayter Reed instructed Agent McKenzie to “induce” those Chakastaypasin members who make a living “by cultivating the soil to join some of the Bands who have a Farming Instructor, and those who mainly depend upon hunting and fishing for a livelihood to join some of the Bands at Fort La Corne.” In February 1888, DSGIA Vankoughnet informed Hayter Reed that the Indian Commissioner thought it “desirable” for the department to implement Agent McKenzie’s January 1888 report. In that report, McKenzie had recommended that the department grant the request that IR 98 be relinquished and that a reserve near James Smith at Fort à la Corne be established for the Chakastaypasin Band.

623 Hayter Reed, Assistant Indian Commissioner, to the Indian Agent, Duck Lake Agency, February 13, 1888, LAC, RG 10, vol. 1592 (ICC Exhibit 1, p. 361).
624 [L. Vankoughnet, DSGIA], to Hayter Reed, Assistant Indian Commissioner, February 23, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 366).
During the course of legal argument, Canada referred to Agent McKenzie’s January 1888 report as evidence of the Band’s intention to surrender. We caution, however, that, with regard to the Band’s intention to surrender, McKenzie was reporting only on his meeting with those Chakastaypasin band members living at Fort à la Corne — only one section of the Band. Members of the other section were still living on IR 98. Thus, we cannot attribute a request coming from only one section of the Band to be the expression of the entire Band in January 1888.

When Agent McKenzie visited the Chakastaypasin reserve in March 1888, his report confirms that some members, including Big Head, continued to use and occupy IR 98 and that “they were prepared to relinquish the reserve at any time and join Peter Chapman’s Band but that they expected the Dept. to give them something for doing[,] no matter how small. I told them the Dept. would not in my opinion give them anything but that I would give them provisions to move with. They insisted that I should write to you [the Indian Commissioner] and that they would await your reply.”

There is no evidence that the Indian Commissioner replied to this correspondence or, if there was a reply, that the Chakastaypasin band members living at IR 98 were supplied with it. What is particularly striking about this correspondence is that, at the time of his meeting in March 1888, Indian Agent McKenzie neglected to inform the members of their rights as the lawful owners of IR 98 — owners who, at that time, were using and occupying IR 98. It was wrong to have left the Band with the limited view that their interest in their reserve amounted to nothing.

Following the movement of Chakastaypasin members away from IR 98, debate continued within the department about the necessity for a taking a surrender. The matter seemed finally resolved when the Deputy Minister of Justice delivered his positive opinion on the matter of a surrender. On June 11, 1897, Indian Agent McKenzie was instructed, “in accordance with the provisions of the Indian Act, [to] summon a meeting of the Indians formerly owning the Chakaspatasin Reserve and obtain from them their signatures to the enclosed documents.”

On June 23, 1897, Agent McKenzie met with some members of Chakastaypasin at IR 100A. Based on the documents, nine members of the Chakastaypasin Band signed a surrender of Chakastaypasin IR 98. At the time of the surrender, the department was aware

of Chakastaypasin members having been dispersed among several bands. In 1896, Indian Commissioner Forget specifically identified Chakastaypasin members living with the Big Head, James Smith, and One Arrow Bands. Chakastaypasin members or their descendants were also living in other locations, including the Sturgeon Lake, Gordon, and John Smith reserves.627

According to Canada, the nine signatories to the surrender document were all members who had allegedly “transferred” to the Cumberland Band under section 140 of the Indian Act in October 1896. Viewed from this perspective, Canada’s argument today is inconsistent. If, as Canada argues, these nine signatories had validly transferred and were therefore no longer members of the Chakastaypasin Band, but members of IR 100A, they no longer had the legal capacity to dispose of IR 98 by surrender. Yet Canada did, in fact, seek a surrender from Chakastaypasin members at IR 100A the year following their “transfer.” As we have said, we find the October 15, 1896, transfers of Chakastaypasin members into IR 100A to be invalid.

There is no evidence that Agent McKenzie attempted to meet with or to seek the consent of those Chakastaypasin members living on reserves other than Cumberland IR 100A, even though the department was aware of their settlement with these other bands. Moreover, the surrender document itself promised a “pro rata” credit to the “several of the Bands with whom we have become amalgamated.” The question of the status of these other members is not an issue before us in this inquiry, and we make no findings with respect to the validity of transfers to locations other than IR 100A. Based on the evidence in this inquiry, we are not satisfied, on the face of these documents, to rely on the expression of nine signatories as providing consent for the whole of the Chakastaypasin Band when there is no evidence of the department having made an effort to seek the consent of members residing at several other locations – locations that the department was aware of before the vote.

Canada takes the position that, regardless, the Band had ceased to exist and that no surrender was required. With respect, we must disagree. In Snake, the Federal Court of Canada considered the question of whether a surrender of Stoney Knoll IR 107 was required from the Young Chipeewayan Band, whose members had dispersed among other bands – and, as a result Canada argued, had ceased to exist as a band. In that case, no effort was made to locate the members of the Band or to seek their consent, and control of the reserve was, allegedly, passed to the Crown by Order in Council. Mr Justice Gibson disposed

627 Teresa Homik, “Chacastapasin Tracing Study,” prepared for Specific Claims Branch West, April 1996 (ICC Exhibit 3c).
of the case on the basis that none of the plaintiffs had established that they were descendants in an unbroken line of members of the Young Chipeewayan Band. However, he went on to deal with the question of whether the “Order in Council P.C. 1155 of 1897, which purported to transfer the administration of the lands comprising Stony Knoll Reserve,” was valid. The Crown in *Snake* took the same position that Canada does in this inquiry – namely, that neither the treaty nor the *Indian Act* is relevant to the matter of surrender because the Band had ceased to exist. In *Snake*, Mr Justice Gibson was not satisfied on the evidence of the paylists, offered as proof of transfer to other bands, that the Young Chipeewayan Band had ceased to exist. In light of this conclusion, he stated:

> I am satisfied that the onus was on the defendant in this regard since it is the defendant that alleges the action of the Governor in Council was justified ... and in light of the fact that the evidence before me discloses that no efforts were made at consultation with members of the Band regarding the release or surrender and, in the result, no assent of any kind to the release or surrender was obtained from the Band.628

Thus, on the reasoning of Mr Justice Gibson in *Snake*, even if the members had dispersed to other bands – and there is no compelling proof of their transfer – Canada is under a duty to seek the members’ consent to surrender, and it cannot rely on its prerogative power to take control of the reserve lands. On the facts of this inquiry, Canada was under a duty to seek the consent of all eligible voters of the whole Chakastaypasin Band to the surrender of IR 98, pursuant to section 39 of the *Indian Act*, and not only the consent of those members assembled at one of six possible locations.

**Compliance with Section 39 of the *Indian Act***

Based on the evidence, there is some dispute as to the number of eligible voters. The First Nation submits there were at least 35, but Canada argues there were 15 adult males eligible to vote on the matter of surrender.629

Because nine members apparently signed or affixed their marks to the surrender document, there is some evidence to suggest that certain members of the Band were asked to approve and assented to the surrender of IR 98. The complete absence of any further evidence means that we cannot determine whether the surrender meeting was called according to the rules of

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628 *Snake v. The Queen*, 2001, FCT 858 at 34.
629 Written Submissions on Behalf of the Chakastaypasin Cree Nation, November 7, 2003, p. 168, para. (i).
the Band. Assuming there was such a meeting, there are no details of any notice; of when and to whom notice was given; of the number of persons present at the meeting; of whether an actual vote was taken and, if so, of the number of votes for and against the surrender. In addition to the absence of evidence concerning the circumstances surrounding how the nine members came to approve a surrender, there is no evidence that the department sought the consent of those members living on reserves other than IR 100A. We are also struck by the total absence of any oral history evidence surrounding these events.

Nonetheless, whatever the intention of the nine signatories was, we believe the expression of this consent was vitiated by the conduct of the Crown. In Wewayakum, Mr Justice Binnie for the Supreme Court of Canada stated: “Once a reserve is created, the content of the fiduciary duty [of the Crown] expands to include the protection and preservation of the Band’s interest from exploitation.”

As previously stated, we reject Canada’s argument that the Chakastaypasin Band ceased to exist by 1888. Thus, the Band continued to hold an interest in its reserve – an interest that could be disposed of only by surrender.

Canada’s Pre-Surrender Fiduciary Obligations
The Indian Claims Commission has considered the question of the Crown’s fiduciary duties to First Nations in the context of reserve land surrenders in many cases: Kakhewistahaw First Nation: 1907 Reserve Land Surrender Inquiry; Moosomin First Nation: 1909 Reserve Land Surrender Inquiry; Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry, and Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry.

We will not review all the jurisprudence leading up to the hallmark decision of Apsassin and the Crown’s pre-surrender fiduciary duties. Instead, we will begin our analysis with Apsassin. At issue in Apsassin was the validity of two land surrenders in 1940 and 1945. In 1940, the Beaver Indian Band surrendered the mineral rights in its reserve to the Crown, in trust, “to lease” for its benefit. In 1945, the Department of Indian Affairs sold the reserve to the director of the Veterans’ Land Act (DVLA) in 1948 for

$70,000; through “inadvertence,” however, it also transferred the mineral rights. Following the sale, the lands were found to contain oil and gas deposits. Once these facts were discovered, the Band commenced an action for damages resulting from the improper transfer of the mineral rights. It sought a declaration that the 1945 land surrender was invalid on the ground that the Crown committed several acts and omissions that constituted negligence and breach of fiduciary obligation owed to the Band. The case proceeded all the way to the Supreme Court of Canada, where a unanimous court concluded that the Crown, in “inadvertently” selling the mineral rights in the reserve lands to the DVLA, and then failing to use its statutory power to cancel the sale once the error had been discovered, had breached its post-surrender fiduciary obligation to dispose of the land in the best interests of the Band. With respect to the Crown’s pre-surrender fiduciary duties, Mr Justice Gonthier and Madam Justice McLachlin differed in their analysis of these duties yet concluded that the Crown had discharged its duties on the facts of the case.

Madam Justice McLachlin conducted her pre-surrender fiduciary analysis from two perspectives: first, as an inquiry into whether the Indian Act imposed a fiduciary obligation on the Crown with respect to the surrender; and, second, as an inquiry into whether the facts and circumstances of the case gave rise to any fiduciary duties.

On the matter of Madam Justice McLachlin’s first perspective – whether the Indian Act imposed a fiduciary duty – she stated:

My view is that the Indian Act's provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band’s consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation ... It follows that under the Indian Act, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.632

632 Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at 370 (referred to as Apsassin), McLachlin J.
Thus, the *Indian Act* does not impose a fiduciary duty on the Crown to withhold its consent to the surrender unless the band’s decision is foolish or improvident, or amounts to an exploitative bargain.

Madam Justice McLachlin’s second perspective considered whether the facts of the case resulted in a fiduciary relationship “being superimposed on the regime for alienation of Indian lands contemplated by the Indian Act.” On the facts in *Apsassin*, Madam Justice McLachlin found that “the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender,” but there was no evidence to suggest that the Band “abnegated or entrusted its power of decision over the surrender of the reserve to the Crown.”

Mr Justice Gonthier, in his pre-surrender fiduciary analysis in *Apsassin*, concerned himself with giving “effect to the true purpose of the dealings” between the Band and the Crown. He wrote that he would have been “reluctant to give effect to this surrender variation if [he] thought that the Band’s understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band’s understanding and intention.”

At the heart of Mr Justice Gonthier’s reasoning is the notion that “the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.” Thus, in Mr Justice Gonthier’s view, a band’s decision to surrender its land should be respected unless the band’s understanding of the terms was inadequate or there were tainted dealings involving the Crown which make it unsafe to rely on the band’s decision as an expression of its true understanding and intention.

**Inadequate Understanding and Tainted Dealings**

On the facts of this case, the weight of the evidence leads us to conclude that any “intention to surrender” shown by some members of the Chakastaypasin Band was single-handedly created and pursued by the Crown, and, at best, the action of “giving effect to the Band’s intention” was contrived.

On our view of the evidence, the notion of surrendering IR 98 was motivated by the decision among the highest officials within the Indian Department to “break up the band” following the North-West Rebellion. As

633  *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 362, Gonthier J.

634  *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 358, Gonthier J.
early as June 1885, Indian Commissioner Dewdney directed that “the Chakastapaysin Band had violated the terms of the Treaty made with them” and that it would be advisable to break up the Band and amalgamate them with others. By July 1885, Assistant Indian Commissioner Hayter Reed recommended that “Chakastapaysin’s [Band] should be broken up, and its reserve surrendered ... the action suggested would be wise in any case; their rebellion justifies the pursuit.” Following the rebellion, the department initially branded the entire Chakastapaysin Band as “rebels,” and it acted to abolish the “tribal system” by deposing the Chiefs and councillors of “rebel tribes” and dealing directly with individuals. Chief Chakastapaysin was thereby denied recognition of his leadership and treaty annuities from 1885 to the discontinuation of the Chakastapaysin band annuity paylist in 1889. In contrast, Kahtapiskowat, or Big Head, was regarded by the department as “loyal” and a “good Indian,” and he continued to be recognized in his position as headman until his death.

By October 1889, the Indian Agent reported that “band No. 98 is now thoroughly broken up” and its members settled with other bands. By the year of Chief Chakastapaysin’s death in 1891, the department was continuing with its pursuit of the surrender of IR 98, but it deferred taking action until the lands increased in value. Sometime before the fall of 1895, the Minister of the Interior, T.M. Daly, instructed his Deputy Minister, A.M. Burgess, to “open correspondence with Mr. Reed [the DSGIA] as to these reserves [Chakastapaysin and Young Chipewyan] being surrendered.” Indian Commissioner Hayter Reed replied that, “relative to the advisability of throwing open for settlement the Reserves set apart for the Bands of Chiefs Young Chipewyan and Chakastapasin,” and “in so much as they have all become amalgamated with or merged to other Bands,” the matter of opening

636 Hayter Reed, Assistant Indian Commissioner, to the Indian Commissioner, July 29, 1885, Glenbow Archives, Edgar Dewdney Papers, document M320, box 4, file 66, pp. 1417–18 (ICC Exhibit 18a, pp. 4–5).
637 Hayter Reed, Assistant Indian Commissioner, to the Indian Commissioner, July 29, 1885, Glenbow Archives, Edgar Dewdney Papers, document M320, box 4, file 66, pp. 1414–19 (ICC Exhibit 18a, pp. 1–6).
640 J. McTaggart, Dominion Lands Agent, to T. Mayne Daly, Minister of the Interior, October 12, 1895, LAC, RG 15, Series D-II-1, vol. 724, file 390906 (ICC Exhibit 1, p. 717).
up IR 98 to settlement could be accomplished by order in council — a “method preferable to an endeavour to obtain surrender.”

By February 1896, Hayter Reed confirmed that the department intended to use the provisions of section 140 of the Indian Act to obtain control of the Chakastaypasin reserve: “[T]he Department does not propose to take any surrender of the Chakastapaysin Reserve ... and it is largely on that account that it desires to have the transfer to other Bands, by which the original owners have forfeited all rights in the Reserve set apart for them, formally completed.”

From this time forward, our view of the record is clear: Indian Agent McKenzie was pressured “not to allow any evitable delay” in completing the formal transfers. Yet the department understood that section 140 was intended to address the situation of an individual Indian transferring to another band, and not the scheme it was seeking to undertake: the transfer of the whole band. Thus, on June 5, 1896, Indian Commissioner Forget instructed Indian Agent McKenzie, “in the absence of the customary consent of band to released members applying for transfer, which cannot in this case be procured as the whole band[,] or the remnant thereof, is being transferred,” to obtain an application from each Chakastaypasin head of family for admission into its respective host bands. Equally compelling is the department’s acknowledgment that, if left too long, “the more chance there is of the present tendency to opposition developing into a pronounced refusal and this it is desired to avoid.”

In all the dealings with the Chakastaypasin Band and its IR 98 lands, the department actively sought the “relinquishment” of “all the privileges[,] including the right to lands,” which the members of the Chakastaypasin Band had previously enjoyed by their “transfer” to other bands. The question of whether any surrender was truly desired by the Band, or in its best interests, was never asked or considered by department officials. In our view, the department’s only interest in IR 98 was to “break up the band” and take a

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642 Hayter Reed, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, November 9, 1895, LAC, RG 10, vol. 6665, file 109A-3-1, part 1 (ICC Exhibit 1, p. 727).
643 Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, February 8, 1896, LAC, RG 10, vol. 6665, file 109A-3-1, part 1 (ICC Exhibit 1, p. 743).
644 Hayter Reed, DSGIA, to A.E. Forget, Indian Commissioner, April 23, 1896, LAC, RG 10, vol. 6665, file 109A-3-1, part 1 (ICC Exhibit 1, p. 756).
645 E. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1, p. 813).
646 E. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1, p. 813).
647 E. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, June 5, 1896, no file reference available (ICC Exhibit 1, p. 814).
surrender. Further, its only inquiries into the matter related to the means and conditions by which members could be “transferred” to other bands, thereby making it easier to obtain such a surrender. In our view, the department gave no consideration to the best interests of the Band.

Conclusion
We turn now to Issues 4 and 5, to draw our conclusion on the validity of the surrender issues:

4 Did Canada breach any obligation(s) which may arise under Issue 2 or 3?

5 Is the effect of any breach(es) such that it invalidates the surrender of IR 98 or otherwise gives rise to a claim for damages?

As regards the validity of surrender, we find that a surrender of IR 98 was required before the sale of these lands. On the matter of Chakastaypasin transfers into IR 100A, we find that the alleged pre–1895 and 1896 transfers of Chakastaypasin members to IR 100A must be found invalid for their failure to meet not only the minimum department requirements pre–1895, but also the statutory requirement, by section 140 of the Indian Act, of the consent of the receiving band – in this case the whole of the Cumberland Band, including those resident at IR 20.

The Crown was required by the terms of Treaty 6 and the Indian Act to have sought the consent of all eligible voters of the Chakastaypasin Band, and not only those members residing at IR 100A, to effect a valid surrender. Contrary to Canada’s argument today, Canada was under a treaty and statutory duty to have sought the Band’s informed consent to the question of extinguishing its interest in IR 98. Canada cannot rely on its prerogative to have disposed of the Band’s interest in its reserve land, particularly when its interest in IR 98 was created by Treaty 6.

In our view, the terms of this treaty limit the exercise of the Crown’s royal prerogative, especially where that prerogative is being exercised to deprive a band of its reserve land. As regards the surrender of land, Treaty 6 clearly states that “reserves of land or any interest therein may be sold or otherwise
disposed of by Her Majesty’s Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.”\textsuperscript{648}

Thus, the treaty expressly requires the consent of the band before Canada can lawfully dispose of its interest. In our view, the express language of the treaty must prevail over the exercise of the Crown’s prerogative, particularly where the exercise of prerogative operates to deprive the band of its interest in its treaty reserve land without its knowledge or consent. We further accept and acknowledge that, in an exchange between Commissioner Holman and counsel for Canada during oral submissions in this inquiry, Canada admitted that Treaty 6 is a limit on the exercise of royal prerogative:

\begin{quote}
Commissioner Holman: ... You make the argument that the Crown used its prerogative right to create the reserves and it has a corollary right to take away the reserve — if I’m reading that right — and that the only limitation on the Crown’s prerogative is statute. But when the Crown commits itself, as it does in a treaty, and it’s spelled out in a treaty what is required for the disposition or to take away a reserve, is that not also a limitation on the Crown’s prerogative?

Mr. Winogron: Absolutely.”\textsuperscript{649}
\end{quote}

For these reasons, we find that the surrender of IR 98 was invalid.

\textbf{Participation of Host Bands}

The panel acknowledges that, on November 1, 2002, it invited seven other Host Bands to participate in this inquiry. As participants, some of these other Host Bands submitted evidence and made written and oral arguments on the issues defined by the James Smith Cree Nation and Canada. We believe it is important to state here, unequivocally, that this Commission was not asked to address the specific terms of the surrender agreement as it relates to these other Host Bands. In particular, we were not asked to determine whether Canada fulfilled its obligation, as per the terms of surrender, “that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed pro rata to our credit and that of the several Bands with whom we have become amalgamated.” Similarly, we were not asked to determine the validity of the Chakastaypasin members’

\textsuperscript{648} 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) (ICC Exhibit 6a).

“amalgamations” to these other bands. We therefore make no findings on these issues.

**ISSUES 6 AND 7: LAND DISPOSITION**

We will begin our consideration of the disposal of IR 98 lands with Issue 6 and discuss it under the next four subheadings.

**Issue 6**

6 What were the obligations of Canada in disposing of IR 98 lands, including Sugar Island, according to

(a) Treaty 6;
(b) the *Indian Act* and its Regulations; and
(c) the fiduciary obligations of Canada?

Although the parties have, by agreement, framed this issue as considering Canada’s obligations in disposing of all IR 98 lands, they disagree on Canada’s decision to limit its acceptance of its outstanding “beyond lawful obligation” to only 71 of the 114 quarter sections of land disposed of. In its partial acceptance letters of February 6, 1996, and January 19, 1998, Canada acknowledged its outstanding beyond lawful obligation regarding the 71 quarter sections that involved James Allan Smart, Frank Pedley, and William J. White, and it offered to negotiate these claims, subject to the identification of all “beneficiary bands.” In Canada’s view, it is the remaining 44 quarter sections that are the only issue for consideration in this inquiry regarding the disposal of IR 98 lands. In Canada’s written and oral submissions, it argues that the James Smith Cree Nation has tried, unsuccessfully, to argue that the purchase of 14 quarter sections by T.O. Davis should also be impugned for the same reasons as the Smart, Pedley, and White sales – transactions that were fraudulent. In Canada’s view, there is no evidence that clearly demonstrates there was any fraudulent action on the part of any of the bidders on the remaining 44 sections, including those purchased by Davis. Canada relies on the findings in the Homik Report to support its position. With respect to the remaining 44 sections not purchased by Pedley, Smart, and White, Ms Homik states:

The remaining acreage was acquired by ordinary speculators and at least one local resident ... the claim does not offer any documentary evidence of governmental fraud with respect to the latter sales ... some of these other speculators paid prices
in excess of the appraised value of the land they acquired. The irregularities in the
bidding process ... are cited in the claim as examples of the manipulation of the
sales process by three main conspirators ... notwithstanding, there is no direct
documentary proof of the motivation underlying the Department's failure to adhere
to the published terms of sale and the disposition of the Chakastaypasin Reserve to
the purchasers other than Smith.650

Canada submits that clear evidence of fraud is required under the policy
and, while the First Nation has “rightfully pointed out all of the improper
transactions that occurred in the course of disposing of IR 98 ... the Crown
has already conceded these actions were improper ... it has offered to
negotiate these as a result of these actions.”651

The James Smith Cree Nation argues that, in 1898, when IR 98 was
surveyed for subdivision by T.D. Green, he valued IR 98 land at $2.00 to $2.50
per acre. In that year, land in the same area was being sold for at least $3.00
per acre, and there is no evidence that Surveyor Green had any experience or
expertise in valuing land. In addition, JSCN argues that, with the passage of
time between the alleged surrender of the land in 1897 and the first land sales
in 1901, Canada had an obligation to revalue the land to ensure fair market
value. Its failure to carry out this land valuation for all IR 98 lands is a breach
of duty.

The First Nation further argues that “Canada bungles the sale process of
IR 98” numerous times. First, as regards the two proposals for the sale “en
bloc” of IR 98, one from the group of Hungarian settlers in 1899 and the
second by Americans J.W. Mitchell and J.C. Neeley of Iowa in 1900, Canada
was prepared to sell the entire reserve, except Sugar Island, at a rate of $1.50
per acre. When the necessary down payments did not arrive within the three
months allowed, each transaction was cancelled. Today, the James Smith Cree
Nation argues that Canada, charged with the duty to conduct itself as a prudent
fiduciary, was obliged to have rejected these two proposals outright as being
grossly unfair. It did not and, instead, was prepared to carry out the terms of
these sales but for the inability of the purchasers to meet the down-payment
requirements. For the First Nation, Canada was under a duty to cancel the
sales and not rely on the abandonment of each deal by the prospective
purchasers. For Canada, nothing today turns on these transactions, as each
ultimately failed. Instead, what is required is a review of the sales that actually
occurred.

650 Teresa Homik, “‘The Chacastapasasn Claim’ report prepared at the request of Specific Claims (West),”
January 27, 1995 (ICC Exhibit 3b).
When IR 98 lands were still unsold by October 1901, DSGIA Smart recommended that the reserve be sold by public tender without settlement conditions. The October 22, 1901, Order in Council granted authority “for the disposal of the Reserve upon such terms and in such manner as may be deemed advisable in the interest of the Indians.” While the correspondence exchanged immediately following the posting of the notice of sale would suggest a rather hurried attempt by government officials to close the tender process, we are unwilling to speculate on what might have occurred had the notice been posted both within a larger area and for a longer period of time. The evidence indicates what can only be described as a limited advertisement of the sale: the *Manitoba Free Press* (Winnipeg) ran advertisements four times between October 22 and 25, 1901, and six times between November 12 and 18, 1901; while *L’Echo de Manitoba* (Winnipeg) ran the notice four times, and the *Advocate* in Prince Albert ran it only once before the November 22, 1901, deadline for receipt of tenders in Ottawa. In their 1978 report, Tyler and Wright noted: “[I]t would have been impossible for someone who saw the notice on November 18, 1901 in Prince Albert to submit a tender by the advertised deadline of November 22, 1901.”

All the IR 98 lands were purchased by six separate groups or individuals, four of which submitted their tenders after the official November 22, 1901, deadline. The successful purchasers were “J.W. Smith,” who purchased 70 quarter sections of land, or sales 1–69 and 71 (8,884.24 acres, or 59 per cent of the total land sold), for a total of $12,554.19, or approximately $1.44 per acre. In 1915, the Ferguson Commission revealed that the J.W. Smith tenders were actually submitted by James A. Smart (then the DSGIA and Deputy Minister of the Interior), Frank Pedley (the Superintendent of Immigration who became DSGIA in 1902), and William J. White (a Department of the Interior Immigration Inspector). Canada has admitted a beyond lawful obligation in the sale of these quarter sections and has offered to negotiate on them.

Charles Adams purchased part of a quarter section he already occupied, 36.44 acres (sale 70), for $63.27 (or approximately $1.75 per acre). His original tender, containing a lower offer, was at first refused and the purchase awarded to J.W. Smith. However, when T.O. Davis, the MP from Prince Albert, intervened on Adams’s behalf, J.D. McLean (then Secretary of the Department

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of Indian Affairs) notified Adams that he would be allowed to purchase the portion of the quarter section at the same rate as the highest tenderer.654

R.C. Macdonald of Winnipeg submitted tenders for 44 quarter sections and was successful in the purchase of 14 parcels (1,899.53 acres, or 13 per cent of the total land sold) for a total of $3,324.19, or $1.75 per acre. Macdonald ultimately assigned his lands to the banking company Alloway & Champion, which completed the required payments in 1906.

A.J. Adamson submitted a bulk tender for 11 quarter sections (weeks after the November 22, 1901, deadline) and was successful in the purchase of all of them (1,635.50 acres) at a rate of $2.56 per acre.

Kenneth McDonald of Ottawa submitted separate tenders for four quarter sections (again past the November 22, 1901, deadline) and was successful in each case. He purchased 640 acres for $1,300.00, or approximately $2.03 per acre.

The remaining sections (sales 86–92, 108–14) were bid on by a group of 16 tenderers who submitted 24 tenders. This group included T.O. Davis, the local MP. They were successful in purchasing 14 parcels (or 16 quarter sections) (1,855.93 acres, or 12.5 per cent of the total) for $4,282.06, or approximately $2.31 per acre.

We will now turn to the consideration of the above transactions within the context of the agreed-upon issues framed by the parties.

**Canada’s Treaty Obligations in Disposing of IR 98**

With respect to selling or disposing of reserve lands, Treaty 6 states:

> Provided however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty’s Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.655

Canada takes the position that “this issue [Canada’s treaty obligations on surrender] does not require consideration since the surrender was unnecessary in these circumstances.” It argues, further, that its position on

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654 W.A. Orr, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, January 29, 1902, LAC, RG 10, vol. 6664, file 109A-3-17 (ICC Exhibit 1a, p. 662).

655 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) (ICC Exhibit 6a).
this issue is presented “in the alternative only, without conceding that a surrender was required.”  

In the alternative, then, Canada argues that  

Treaty 6 provides that a reserve may be sold or disposed of, for the benefit of the ‘said Indians entitled thereto,’ with their consent. This provision does not create obligations on the part of the Crown that are different than any obligations which may have been imposed by the Indian Act at the time of the 1897 surrender. There are no obligations in the treaties which are separate or different than what was contained in the Indian Act. As such, the Indian Act governs the obligations of the Crown in the disposition of Indian lands.  

Further, in Canada’s view, “the only allegation the First Nation makes with respect to Treaty 6 is that Canada assumed responsibility for the sale of reserve lands, and that the best method of sale for IR 98 would be to follow the Indian Act regulations.”  

Canada ultimately rejects the applicability of these regulations to the sale of IR 98 lands in its consideration of its statutory obligations under the Indian Act.  

The James Smith Cree Nation argues that, as a signatory to Treaty 6, Canada assumed responsibility for the sale of reserve land, once surrendered, and agreed that such sales would be conducted for the “use and benefit of the said Indian entitled thereto.” Thus, “Canada’s unequivocal duty was to obtain the most favourable terms for the sales of the surrendered lands.” Further, Canada was required to sell IR 98 for no less than fair market value. In its view, the best method of sale “would have been to follow the Indian Act regulations on land sales. When Canada accepted prices below fair market value and did not follow the Indian Act regulations on land sales, it breached its treaty obligations as it was not conducting the sales for the ‘use and benefit’ of the Band,” nor was Canada seeking to obtain “the most favourable terms for the sales of the surrendered lands.”  

In our view, a treaty right gives rise to a separate lawful obligation of the Crown. A treaty right does not owe its existence to the Indian Act. While the surrender and sale provisions of the Indian Act give expression to the procedural rights of an Indian band to be consulted with by the Crown, this statutory expression of consent may be subject to change over time. In contrast, a treaty right is today a constitutional right, protected by section 35
of the Constitution Act, 1982, and cannot be infringed upon except by the clearest intent. Thus, we cannot accept Canada’s argument that fulfilling its statutory obligation defined by the Indian Act will, as a consequence, address its obligations arising under treaty. Canada cannot limit its analysis to the Indian Act and ignore the treaty, simply because they are different obligations.

Under treaty, Canada had an obligation to seek and obtain the Chakastaypasin Band’s consent to the surrender of its lands. Once given, Canada has a general treaty right obligation to sell the land for its “use and benefit.” We interpret “use and benefit” to mean an obligation, as fiduciary, to act as a prudent fiduciary when disposing of the land by sale and to maximize the Band’s benefit.

Canada’s Statutory Obligations under the Indian Act
Canada accepts that the Indian Act Regulations are set out in Order in Council 1787, dated September 15, 1888, and provided the following:

- Any one purchaser could not purchase more than one quarter section;
- One-fifth of the purchase price was to be paid at date of sale, with the balance in four equal annual consecutive instalments with interest at 6%;
- The purchaser had to settle on the land bought. More specifically, within 6 months from the date of sale, the purchaser had to occupy and improve the land and continue to do so for three years, during which time certain improvements had to be made;
- No timber was to be cleared before a Crown patent was issued, except under licence; and
- Any violations of these conditions would result in the land and any moneys paid to date to be forfeited by order of the SGIA.660

These regulations, in Canada’s view, were a lawful exercise of power given to the Governor in Council by section 41 of the Indian Act. Section 41 of the 1886 Indian Act provides:

41. All Indian lands, which are reserves or portions of reserves, surrendered or to be surrendered to Her Majesty, shall be deemed to be held for the same purpose as before the passing of this Act and shall be managed, leased and

sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Act.

It is Canada’s position that section 41 of the *Indian Act* authorized the Governor in Council to create the *Indian Land Regulations* and gave it the authority to “direct” otherwise in a specific situation. In this case, Canada argues, the Governor in Council had the authority to direct that IR 98 be sold on terms different from those specified in the 1888 *Land Regulations*.661 Such a direction was specified in the Order in Council dated October 22, 1901, which stated: “IR 98 was to be disposed of upon such terms and in such manner as may be deemed advisable in the interests of the Indians.”662 The effect of this 1901 Order in Council, Canada argues, was to override the 1888 *Land Regulations*.

In its written submission, the First Nation does not address the matter of the 1901 Order in Council overriding the *Indian Land Regulations* and the Orders in Council dated October 26, 1887, and September 15, 1888, and instead argues that “selling the land pursuant to the Regulations was the best method for achieving the best terms for Chakastaypasin ... When Canada failed to sell under the Regulations, it breached it obligation and invalidated the sales.”663

In our view, the legal maxim *generalia specialibus non derogant* must apply here. In *Lalonde v. Sun Life Assurance Co. of Canada*, the Supreme Court of Canada considered the interpretation to be given the *Insurance Act*, a general statute, which on its face appeared to derogate from the *Husbands and Parents Life Insurance Act*, a special statute, in determining the validity of a husband’s revocation of wife as a beneficiary. The Court applied the maxim to give precedence to the special Act. Mr Justice Gonthier for the Court said:

> The principle is, therefore, that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception to the subject-matter of the rule from the general Act ...

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In this inquiry, we view the 1888 *Indian Land Regulations* to be of general application. The October 22, 1901, Order in Council, however, is a

specific expression of the Governor in Council’s intention as regards the disposition of IR 98 on behalf of the Chakastaypasin Band. Thus, the 1901 Order in Council accepting the surrender and directing that “IR 98 was to be disposed of upon such terms and in such manner as may be deemed advisable in the interests of the Indians” – an order that was a more particular expression of the administration of the sale of IR 98 lands than the more general 1888 Indian Land Regulations – must override the regulations.

The Crown’s Fiduciary Obligations in Disposing of IR 98

Canada accepts that, upon surrender, the Crown’s fiduciary obligation “is to deal with the surrendered land for the benefit of the Indians” – an obligation defined by the Supreme Court of Canada in both Guerin and Blueberry River Indian Band v. Canada (“Apsassin”). Canada submits that, upon surrender, “the Crown has a fiduciary obligation to fulfill the terms of the surrender, and if that was not possible, to advise the band and consult with them about alternative ways to proceed.”665 Further, Canada defines the standard of care which the Crown must meet in fulfilling its fiduciary obligations by adopting the standard defined by Madam Justice McLachlin in Apsassin: “The duty on the Crown as fiduciary was ‘that of a man of ordinary prudence in managing his own affairs.’”666 In this case, Canada submits that “this standard of care can be expressed as a duty to take reasonable care to obtain fair market value for the lands in a timely fashion.”667

In its written submission, the First Nation accepts the definition of the Crown’s standard of care defined by Madam Justice McLachlin and argues that “Canada assumed a greater fiduciary responsibility with regard to the surrender of Chakastaypasin land when it inserted language in the surrender document that Canada could sell and distribute the sale proceeds unconditionally. No terms or prices are set. Canada has assumed an unconditional responsibility to justly sell the surrendered land.”668

Under statute, Canada has an obligation, pursuant to section 41 of the Indian Act, to exercise its discretion granted by this section as a prudent fiduciary. As we stated in the previous section of this report, the 1901 Order in Council, authorized by section 41 of the Indian Act, was a more specific expression of the administration of the sale of IR 98 than the 1888 Indian

**Land Regulations.** As a fiduciary, Canada has an obligation to sell reserve lands, once surrendered, for a reasonable price on the facts of each case.

In addition, Canada has an obligation, in administering the sale of reserve land, to ensure its compliance with section 110 of the *Indian Act*. As such, this compliance will require diligent oversight of the conduct of those Crown employees acting as “agent for the sale of Indian lands.” Where such agents act to contravene section 110, such sales shall be void.

**Conclusion**

In our view, when disposing of IR 98 lands, Canada had a treaty obligation to sell the land for the “use and benefit” of the Chakastaypasin Band – an obligation we interpret to mean to act as a prudent fiduciary to maximize the Band’s benefit. Further, Canada had a statutory obligation, pursuant to section 41 of the *Indian Act*, to exercise its discretion granted by this section as a prudent fiduciary – an obligation that, likewise, created a fiduciary obligation to sell reserve lands, once surrendered, for a reasonable price. In addition, Canada had a statutory duty to ensure the compliance of its agents to section 110 of the *Indian Act*, and, where the conduct of these agents contravened section 110, such sales would be void. Finally, both the treaty and the statutory obligations should have triggered a fiduciary obligation upon the Crown to manage the sale of reserve lands as a prudent fiduciary.

We will now go on to Issue 7 in our consideration of the disposal of IR 98 lands, and we will discuss it under four subheadings:

**Issue 7**

7 Did Canada, having accepted as a validated claim that it breached its beyond lawful obligation to legally sell 71 quarters of IR 98, breach any further obligation which may arise under Issue 6 concerning the sale of IR 98, including Sugar Island? In considering this issue the parties agree to address the following:

(a) the application of the *Indian Land Regulations*;
(b) allegations regarding the manipulation of the land tendering process;
(c) allegations of fraud as regards the remaining 44 quarter sections that Canada asserts were legally sold and for which Canada has not accepted a validated claim; and
(d) the actions of Canada in the administration of the sales of the land.
Fair Market Value
The First Nation argues in its written submissions that the sale of IR 98 lands did not begin until four and a half years after the alleged surrender. At the time of the land sales, the First Nation argues, the land values had increased, and not decreased, as evidenced by the valuation assigned to IR 100A lands in 1902 at $5.00 per acre. In the First Nation’s submission, IR 100A land “is no better than Chakastaypasin’s land.” In the First Nation’s view, Canada had an obligation, four and a half years after the surrender, “to determine if the prices being offered by tender were fair.”

Canada’s confirming research report explains that Surveyor T.D. Green was given the job of assessing the value of IR 98 land. The research report says that, in 1898, “he [T.D. Green] stated that Dominion Lands in the area were priced at $3.00 per acre. Generally he priced the quarter sections at $2.00 per acre and those fronting on the river at $2.50 per acre. The land on Sugar Island was similarly priced. The reduced figure was expected to hasten the disposal of the land.” The First Nation argues that, “when it was finally decided to tender the land for sale in 1901, Canada had an obligation to appraise the land again to determine fair value at the time.”

The First Nation submits that “the tenders which were received were all below the appraised value of 1897.”

In response to this argument, a review of the historical records, as well as the research reports prepared by T. Homik and Public History Inc., indicate that in 29 of the 44 quarter sections that remain at issue, speculators paid prices within the appraised value of the land they acquired.

The First Nation further argues that the two en bloc offers involving, first, the Hungarian group and, second, the Americans Mitchell and Neeley should have been rejected outright by the Crown, acting as a prudent fiduciary, for each offer “was far below market value.”

In considering the First Nation’s arguments regarding the en bloc offers, we are mindful of the fact that neither of these transactions came to fruition. It is, in our view, too speculative to attribute any wrongdoing to Canada’s conduct regarding these transactions, and, instead, we believe our focus must remain on the sales that were actually made of IR 98 lands. In this regard,
based on the evidence, we find Canada in breach of its treaty, statutory, and fiduciary duties for accepting tenders on the sections of land sold to Charles Adams, R.A. Macdonald, and “J.W. Smith” — all sales that fell below the appraised value of $2.00 to $2.50 assigned by Surveyor Green in 1897.

**Tendering**
The First Nation has argued a number of procedural irregularities with Canada’s handling of the tendering process. These irregularities include limiting the advertising of the sale; setting terms of sale different from the minimum requirements of the 1888 *Indian Land Regulations*; and delivering tenders to DSGIA Frank Pedley, and not Secretary McLean. Further, the First Nation argues that, without these irregularities, the tendering process would have resulted in a greater benefit to the First Nation. Based upon the evidentiary record in this inquiry, we have reviewed all tenders (accepted and rejected) for the IR 98 land sales. The evidence reveals that the highest offers were accepted for all sales, and we have addressed in the previous section our view of Canada’s obligation in accepting bids that fell below fair market value. As regards the tendering process itself, it would be, in our view, too speculative to conclude that, had Canada altered any one of the above-described “irregularities,” such changes would have resulted in a better outcome for the First Nation.

**Fraud**
It is Canada’s position that, “with the exception of that portion of the sales for which we have acknowledged a ‘beyond lawful obligation’ on the basis of fraud by Crown employees, it is our view that the sale of the lands was conducted in the best interest of the beneficiaries.” 675 Canada submits that, “although there were some minor procedural irregularities in the land-tendering process, it nevertheless resulted in the purchase of 44 quarter sections by the highest bidders. This result was in the beneficiaries’ best interests ... procedural irregularities, in and of themselves, do not amount to a breach of fiduciary obligation.” 676 More specifically, “the allegations of fraud against Mr. Davis, a Member of Parliament, do not give rise to any obligation on Canada. As a Member of Parliament, T.O. Davis was holder of an office. He was not a Crown employee or agent.” 677 In any event, Canada submits that

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“there is little, if any, evidence of any arrangement of T.O. Davis to engage in fraud.” 678

The First Nation argues that, “while Canada has agreed that it breached its duties to Chakastaypasin members when officials purchased 71 quarters of the reserve, it has not acknowledged that it was equally wrong to sell the rest of the reserve for unfair prices.” 679 Further, “Canada cannot excuse itself from responsibility by saying there may have been no law or policy against a Member of Parliament participating in a reserve purchase; there are laws against participation of any individual in fraudulent, deceitful, and corrupt ways, particularly when this involves conspiracy with very senior public officials.” 680

The First Nation has alleged that T.O. Davis fraudulently acquired land on IR 98 by using a consortium of individuals to purchase the land and, subsequently, assign their interest to him. As set out in the historical portion of this report, we have carefully reviewed the historical record as it relates to the tenders submitted by the “Davis group.” During the course of this inquiry, the Specific Claims Branch contracted Public History Inc. to conduct additional research to “search for any evidence of a ‘grand scheme orchestrated by T.O. Davis’ to acquire surrendered land on Chakastaypasin IR 98”; determine what T.O. Davis had done with the land he acquired on IR 98; and try to determine whether the department had guidelines regarding the sale and purchase of Indian lands. 681 This report found that there is insufficient evidence to conclude that Davis’s actions were fraudulent. The report was provided to the First Nation for review and comment, and, in response, it produced a research report prepared by Four Arrows. However, the Four Arrows report limited its focus on the role of T.O. Davis in the IR 100A surrender and sale, and it is therefore of little assistance in this case.

The fact that the Davis group purchased 16 of the quarter sections tendered for does not in and of itself establish any wrongdoing. As a matter of law, a Member of Parliament is not an employee or agent of the federal government. Further, the First Nation has not submitted any case law or authority to counter this view. The fact that T.O. Davis was a sitting MP and part of a group to submit tenders on IR 98 lands is not proof of fraud. Unlike the facts that implicate Smart, Pedley, and White, a situation investigated by the 1915 Ferguson Commission, the facts in this case do not support a finding of

679 Written Submissions on Behalf of the Chakastaypasin Cree Nation, November 7, 2003, p. 251, para. 688.
fraud on the part of T.O. Davis. That he was involved and likely knew the other actors involved does not make him guilty by association, as the First Nation would have us conclude. The evidence reveals that the Davis group submitted 10 tenders on November 8, 1901, before the close of sale, and the department accepted seven of them as successful bids. A second group of tenders was submitted on November 26, 1901, after the closing date, for seven quarter sections. A final set of tenders was made out for an additional seven quarters on November 27, 1901, again after the closing date. Of the 14 tenders submitted on November 26 and 27, J.D. McLean wrote to T.O. Davis, informing him that eight of the tenders “submitted by you” had been accepted. The evidence further indicates that each accepted tender either met or exceeded the value of the land (estimated at $2.00 to $2.50 per acre by Surveyor T.D. Green in 1898). Public History Inc. determined that “the available records provide no clear indication as to whether this group acted as a consortium. It is clear, however, from a review of the land sales records that not all of these individuals assigned their interests to T.O. Davis. Of the 11 individuals identified as part of the ‘Davis group,’ only 5 actually assigned their interests to T.O. Davis,” and it is “not clear why [they] assigned their interests to T.O. Davis less than one month after submitting their tenders. However, a schedule of tenders for lands on Chacastapaysin IR 98 prepared circa 1902 indicates that Davis submitted his own tender for two quarter sections, neither of which was accepted by the Department as Davis failed to submit the highest price. In our view, Mr. Davis’s transactions were conducted overtly at all times, using his own name in the tenders submitted[,] and it appears that Davis simply wanted to purchase land on Chacastapaysin IR 98, whether by purchasing directly from the Department of Indian Affairs or from third parties.”

Conclusion
On the totality of evidence put before us, we find Canada in breach of its treaty, statutory, and fiduciary duties in its disposition of IR 98 lands and conclude that Canada owes an outstanding lawful obligation for the breach of these duties. As regards Canada’s beyond lawful obligation, we cannot conclude that a fraud was perpetrated outside the transactions that Canada has admitted with respect to “J.W. Smith.”

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682 J.D. McLean, Secretary, Department of Indian Affairs, to T.O. Davis, MP, December 20, 1901, LAC, RG 10, vol. 6664, file 109A-3-16 (ICC Exhibit 1a, p. 858).
ISSUES 8–12: SUGAR ISLAND

During the course of this inquiry, on March 31, 2003, Canada accepted the argument that it has breached its lawful obligations to the First Nation following the surrender of Sugar Island, thereby rendering the consideration of Issues 10 to 12 moot. With Canada’s acceptance, the only issues that remain for inquiry are Issues 8 and 9, which concern Canada’s pre-surrender obligations, if any.

8 What obligations did Canada have regarding Sugar Island prior to the alleged surrender of 1897? and

9 Did Canada breach these obligations?

We shall now turn to our analysis of Canada’s pre-surrender obligations regarding Sugar Island.

Issue 8 Pre-Surrender Obligations

Treaty Obligations

Counsel for Canada and counsel for the James Smith Cree Nation direct the panel to consider two separate passages of Treaty 6 in considering whether Canada had a positive duty to keep IR 98, and specifically Sugar Island, secure for the Chakastaypasin Band.

Counsel for Canada highlighted the following section of Treaty 6:

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 ...

Arguing that this section “may have some bearing on the issue,” Canada submits that “the JSCN has not offered any evidence with respect to the negotiations of the treaty or the historical context which could shed any light on how the phrase ‘to be administered and dealt with’ should be interpreted nor have they made any submissions that the treaty includes some oral terms, implicit or explicit, regarding protection of reserves.” Further, “Treaty 6

684 Robert D. Nault, Minister of Indian Affairs and Northern Development, to Chief Sol Sanderson, Chief Walter Constant, and Chief Delbert Brittain, James Smith Cree Nation, March 31, 2003 (ICC Exhibit 4e, p. 1).
does not address the issue of the protection of reserve lands. The Crown’s obligations with respect to reserves pursuant to Treaty 6 was limited to establishing them, dealing with settlers within their boundaries, and selling or disposing of surrendered reserve lands. The Crown had no obligation under Treaty 6 to protect reserve lands prior to surrender.”

Counsel for the First Nation quoted the section of Treaty 6 that addresses sale or disposition:

*Provided[,] however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.*

The First Nation argued that, “when Canada allowed squatters, trespassers, thieves and looters to descend upon Sugar Island through Canada’s indifference, Canada was not disposing of the reserve for the use and benefit of the Chakastaypasin Band.”

In our view, the language of Treaty 6, “to be administered and dealt with for them by Her Majesty's Government,” is a trigger on the Crown and creates a fiduciary obligation to act as a prudent fiduciary in administering the IR 98 lands on behalf of the Chakastaypasin Band. In *Wewayakum*, Mr Justice Binnie for the Supreme Court of Canada stated, “once a reserve is created, the content of the fiduciary duty [of the Crown] expands to include the protection and preservation of the Band’s interest from exploitation.” Thus, the authority that the Crown reserves to itself in Treaty 6 to “administer” reserve lands creates a fiduciary obligation from which it derives a duty to act as a prudent fiduciary. Further, the Crown also reserves to itself in Treaty 6 the right to “deal with” reserve lands. This right is another discretionary authority that gives rights to the Crown to “deal with” settlers on reserve lands as it deems fit. It is necessary, in acting as a fiduciary, to give expression to this right. Thus, to permit settlers to trespass on reserve lands set aside under treaty is a breach of treaty and a breach of the fiduciary obligation that derives from treaty.

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Statutory Obligations
Canada submits that, during the pre-surrender period, 1878–97, there were three main aspects to the relevant Indian Act regarding timber on reserve: a prohibition against trespass on reserves by “cutting, carrying away or removing therefrom any of the trees, saplings, shrubs, underwood, timber of hay thereon”; the granting of licences to cut timber on reserves and penalties for failure to obtain such licence; and trespass to maple trees on reserves.689

Canada argues that while these aspects are present in the Act, all sections are “silent with respect to the imposition of an obligation or duty to perform any positive action with respect to the protection or preservation of reserve lands or the timber thereon ... Absent a statutorily imposed duty, the Crown had discretion regarding enforcement. The Crown did not have any statutory duty to enforce these provisions and had no obligation to exercise its discretion to enforce.”690

The First Nation, in contrast, argues that these sections were “the statutory embodiment of the treaty commitment to keep the reserve for the use and benefit of the Indians entitled to that reserve.” Further, because “only Canada could enforce the provisions of the Act, the Bands were dependent on Canada taking action against any who breach the Indian Act.” Thus, “when Canada allowed the continuing trespasses and theft of timber of Sugar Island, it was sanctioning breaches of the legislation it had enacted to protect the reserves.”691

In our view, because the Act prohibits trespass, directs a penalty for failure to obtain the proper licence to cut timber, and creates a discretion within the Crown to grant such licences, the fact that the Crown did not exercise its discretion to protect IR 98 lands and resources is a breach of its statutory obligation. We therefore agree with the First Nation’s characterization that, “when Canada allowed the continuing trespasses and theft of timber of Sugar Island, it was sanctioning breaches of the legislation it had enacted to protect the reserve.” In failing to act, and thereby permitting the removal of timber resources from IR 98, the Crown also failed to act as a prudent fiduciary.

Fiduciary Obligations
Canada submits that “there is no case law which establishes that there is a general fiduciary duty on the part of the Crown to protect Indian lands.”692

Rather, in order for a fiduciary duty to arise, Canada argues, there must first occur some triggering event: either the fiduciary has the unilateral power or discretion to affect the beneficiary who is thereby made vulnerable to the exercise of the fiduciary’s discretion or power, or, by statute, agreement, or conduct of the Crown, the First Nation has a reasonable expectation that the Crown will act in a fiduciary capacity.  

With respect to the power/vulnerability approach, Canada argues that “the Crown had the power to try and enforce the provisions of the Indian Act which prohibited unauthorized cutting of timber on Sugar Island; however this power was not unilateral or exclusive.” In Canada’s view, the Indians could have taken practical steps to protect the timber themselves by occupying the reserve or monitoring the area, or they could have sought to cut it themselves and reap the profits. They could also have made complaints of trespass themselves, or with the further assistance of appropriate Crown personnel, i.e. farm instructor, Indian Agent. There is no evidence that any of these steps were taken nor is there evidence of any further complaint by the Band.

Finally, Canada argues that the “JSCN has not identified in its submission any statute, agreement, course of conduct or unilateral undertaking on the part of the Crown that would give rise to a reasonable expectation on the part of the First Nation that the Crown would act in a fiduciary capacity with respect to protecting and/or preserving the timber on Sugar Island.”

In contrast, the First Nation argues that “Chakastaypasin members could not protect their reserve. They were told they had no interest in their reserve. They were dependent on Canada.” The First Nation points in evidence to farming instructor Harry Loucks’s account of Chief Chakastaypasin’s complaint in the spring of 1882 “that the settlers in the Halcro Settlement were stealing their timber from the island.” The farming instructor “was requested to investigate and report to the Agent as to this complaint.” He reported:

After a careful and thorough search into the whole matter, the writer found that practically every settler in the Halcro Settlement had taken some timber from the island, and reported accordingly to the Agent. As a result of this investigation, every settler in the District mentioned was summoned to appear before

697 Written Submissions on Behalf of the Chakastaypasin Cree Nation, November 7, 2003, p. 288, para. 801.
Judge Richardson sitting in Prince Albert in June 1882. The writer, as farm instructor, and the Indians of the Reserve, were the complainants. When the case came up, Judge Richardson dismissed the criminal action, and not as a civil case.

The Government authorities took no further interest in the matter and as a result, there was great dissatisfaction among the band on this Reserve. ...

Here again came in the difficulty of making the Indians understand the technicalities and fine points of the white man’s law. They had been assured when they made their treaty with the great white Queen through her representatives that the land within their Reserve and all that grew upon it would be theirs “while the grass grew and water run,” yet on this first opportunity that the white men had to defend the rights of the Indian against his fellow white, be failed lamentably to fulfil his obligations. 698

That the Crown understood the need to protect the valuable timber resource found at Sugar Island for the use and benefit of the Chakastaypasin Band is highlighted by Acting Commissioner Hayter Reed’s letter to Superintendent General John A. Macdonald in 1884, where he writes: “[T]hese islands are well covered with timber, which being scarce in their vicinity, are being encroached upon by white settlers ... I would respectfully urge that they be set aside for the benefit of the Indians, not only to meet their own wants, but as a means under a discriminating disposal of the timber under the Indian Act, to their future benefit.” 699

The First Nation further points in evidence to the department’s awareness of the scarcity of timber in the area and its decision, once “the Indians have sufficient timber,” to open up other nearby islands so that “the public generally should have the benefit of any surplus over and above what the Indians actually require.” 700 By 1894, the department was made aware of the wholesale slaughter of logs which are cut year by year without permit,” and, in response, Indian Agent McKenzie was instructed “to post some notices on the island and in the vicinity.” 701 Finally, as late as April 1897, the department, while prepared to consider the action of cutting timber on Sugar Island as “trespass,” did not take action and, instead, trusted that the “chief offender” of trespass, Mr Gordon, “will aid the Department in the matter of preserving the timber by exercising more care in purchasing from trespassers.” 702

699 Written Submissions on Behalf of the Chakastaypasin Cree Nation, November 7, 2003, p. 266, para. 745, quoting ICC Exhibit 10, p. 56.
700 Written Submissions on Behalf of the Chakastaypasin Cree Nation, November 7, 2003, p. 266, para. 746.
701 Written Submissions on Behalf of the Chakastaypasin Cree Nation, November 7, 2003, p. 267, para. 749.
702 Written Submissions on Behalf of the Chakastaypasin Cree Nation, November 7, 2003, p. 273, para. 760.
Based on the totality of evidence, the First Nation argues that “a prudent fiduciary would not allow an asset to be used and abused while under the control of the fiduciary.” Further, it states, Canada recognized its responsibility and authority over the reserve, but took no action to protect the reserve.\textsuperscript{703}

In our view, the Crown confuses the characterization of its unilateral or exclusive power. The fact that the First Nation has some other recourse available to it does not negate the Crown’s fiduciary duty. It is the existence of a discretionary power within the Crown, and the exercise of this discretion unilaterally, that gives rise to the fiduciary duty. Thus, the question becomes: Did the Crown exercise its discretion to protect the First Nation’s reserve lands? On the evidence, clearly the answer is no. For nearly 20 years, Canada permitted the continuing trespass to IR 98 lands and resources that put it in breach of its fiduciary duty.

In conclusion, we find that there were treaty, statutory, and fiduciary duties owed and breached by Canada which, today, give rise to outstanding lawful obligations.

\textsuperscript{703} Written Submissions on Behalf of the Chakastaypasin Cree Nation, November 7, 2003, p. 288, paras. 803—4.
PART V

CONCLUSIONS AND RECOMMENDATION

Based on the totality of the evidence, we find, first, that a surrender of IR 98 was required before Canada could lawfully dispose of these reserve lands. In our view, there were no valid transfers of Chakastaypasin members into IR 100A at any relevant point in time. Before the introduction of section 140 of the *Indian Act* in 1895, something more than the administrative documents used by the Department of Indian Affairs to distribute treaty annuity payments is required as proof of transfer. After the introduction of section 140, a valid transfer required the consent of the receiving band. In this case, the 27 Chakastaypasin individuals and families, including Big Head, required the consent of the whole of the Cumberland Band, including those resident at IR 20, as the receiving band at IR 100A. This consent of the Cumberland Band was neither sought nor obtained by Canada.

Secondly, we find the surrender that Canada sought to be invalid. We are not satisfied, on the face of the June 23, 1897, surrender, to rely on the expression of nine signatories at IR 100A as providing consent for the whole of the Chakastaypasin Band. In our view, on the basis of *Snake v. The Queen*, even if members had dispersed to other bands and there is no compelling proof of their transfer, Canada is under a duty to seek the members’ consent to surrender, and it cannot rely on its prerogative power to take control of the reserve lands. In this case, there is no evidence of the department’s effort to seek the consent of Chakastaypasin members residing in several locations other than IR 100A, even though it was aware of these locations before the alleged June 23, 1897, vote. Finally, the evidence leads us to conclude that any “intention to surrender” shown by some members of the Band was single-handedly created and pursued by the Crown following the North-West Rebellion in 1885, and the action of giving effect to the Band’s intention was, in our view, contrived at best.

Thus, with regard to the validity of surrender issues in this inquiry, we find Canada in breach of its treaty, statutory, and fiduciary obligations for its failure
to have sought and obtained the consent of the whole of the Chakastaypasin Band to the surrender of IR 98.

With regard to the disposition of IR 98, Canada has a treaty obligation to sell the land for the “use and benefit” of the Chakastaypasin Band – an obligation we interpret to mean to act as a prudent fiduciary to maximize the Band’s benefit. Further, Canada has a statutory obligation, pursuant to section 41 of the Indian Act, to exercise its discretion granted by this section as a prudent fiduciary – an obligation that, likewise, creates a fiduciary obligation to sell reserve lands, once surrendered, for a reasonable price. In addition, Canada has a statutory duty to ensure the compliance of its agents to section 110 of the Indian Act; and, where the conduct of these agents contravenes section 110, such sales shall be void. Finally, both the treaty and the statutory obligations will trigger a fiduciary obligation on the Crown to manage the sale of reserve lands as a prudent fiduciary. On the totality of evidence put before us, we find Canada in breach of its treaty, statutory, and fiduciary duties in its disposition of IR 98 lands, and we conclude that Canada owes an outstanding lawful obligation for the breach of these duties. With regard to Canada’s beyond lawful obligation, we cannot conclude that a fraud was perpetrated outside of the fraudulent transactions that Canada has admitted with respect to “J.W. Smith.”

Finally, with regard to Sugar Island, we find that the language of Treaty 6 concerning a reserve once created, “to be administered and dealt with for them by Her Majesty’s Government,” is a trigger on the Crown and that it creates a fiduciary duty to act as a prudent fiduciary in administering IR 98 lands on behalf of the Chakastaypasin Band before any surrender of these lands. Based on the evidence, to permit settlers to trespass on and take timber from reserve lands, set aside under Treaty 6, is a breach of treaty and a breach of the fiduciary obligation that derives from treaty. Further, the Crown’s failure to exercise its discretion to protect IR 98 lands and resources pursuant to the Indian Act is a breach of its statutory and fiduciary obligations. Thus, Canada owes an outstanding lawful obligation for the breach of these treaty, statutory, and fiduciary duties.
We therefore recommend to the parties:

That the James Smith Cree Nation’s Chakastaypasin Indian Reserve 98 claim be accepted for negotiation under Canada’s Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Renée Dupuis
Chief Commissioner

Alan C. Holman
Commissioner

Dated this 17th day of March, 2005.
APPENDIX A

INDIAN CLAIMS COMMISSION

JAMES SMITH CREE NATION: CHAKASTAYPASIN IR 98 SURRENDER
INTERIM RULING

The James Smith Cree Nation brought forward its claim into the Chakastaypasin IR 98 Surrender to the Commission on May 10, 1999. It was rejected on April 11, 1997 and then partially accepted on January 19, 1998. Canada accepted to negotiate on a “beyond lawful obligation” basis on the grounds that senior federal officials were involved in fraudulent activities in connection with the sale of 71 quarter sections of the reserve. This partial acceptance came with three conditions, two of which are relevant to the issue of the other Host Bands:

“.........
2. Agreement amongst the beneficiary First Nations as to their respective share, based on their review of the apportionment of the proceeds of sale of the reserve as of the date of the 1897 surrender.
3. That the Department of Justice (DOJ) be satisfied that all potential beneficiary First Nations have been identified.”

The January 19, 1998 letter also states that, “in the event that a final settlement is reached, Canada must obtain a formal release from each First Nation with an interest in this claim. This is to ensure that this portion of the claim cannot be reopened.”

Canada’s letter of December 1998, which rejects the claim on the validity of the surrender, states that “the evidence does not establish an outstanding lawful obligation on Canada’s part to the First Nations sharing an interest in the Chakastaypasin (sic) claim with respect to the validity of the 1897 surrender”, and reiterates the offer to negotiate with all interested First Nations with respect to the 71 quarter sections.

The issue of participation of the other Host Bands in the James Smith Cree Nation inquiry first arose before this Commission in the Fall of 1999. In November 1999 the Commission was provided with a copy of a Protocol
Agreement including seven of the eight Host Bands, which had been in place since June 9, 1998. This Agreement expressed that the other Host Bands supported Chakastaypasin in its reinstatement efforts, and that the James Smith Cree Nation would take the lead role in the claim, negotiation and pending settlement of the Chakastaypasin IR 98 claim.

On April 19, 2001 Canada’s counsel, Ms. Uzma Ihsanullah, on behalf of Canada, unilaterally wrote to each of the other Host Bands informing them of the activity on the James Smith Cree Nation - Chakastaypasin IR 98 claim. This letter expressed Canada’s view that the other Host Bands should be added as parties to the James Smith Cree Nation - Chakastaypasin IR 98 Inquiry, although reserving Canada’s right to make any arguments.

In response to Canada’s April 19, 2001 letter, the Commission wrote to the other Host Bands on November 9, 2001 and June 5, 2002, to invite them to participate in the James Smith Cree Nation - Chakastaypasin IR 98 Inquiry to the extent of providing oral evidence in a community session(s) and Reply submissions to Canada’s and James Smith Cree Nation’s written legal submissions.

During the 7th Planning Conference of the James Smith Cree Nation, the parties (Canada and James Smith Cree Nation) indicated their without prejudice agreement to the limited participation of the other Host Bands outlined in the Commission’s November 2001 and June 2002 correspondence. During a June 10, 2002 conference call, counsel for James Smith Cree Nation - Bill Selnas expressed concern over the scope and manner of the participation outlined in the Commission’s June 5, 2002 letter. Following this call, the Commission received a series of correspondence from James Smith Cree Nation - Chakastaypasin IR 98 which attempted to severely limit the other Host Bands’ participation.

In response to this correspondence, the Commission wrote to the parties and the other Host Bands to indicate that the Commission would hear submissions on the manner of the other Host Bands’ participation on August 22, 2002, with written submissions being due by August 1, 2002. During the Host Band Planning Conference on June 24, 2002, it became clear that the parties would also seek to argue the issue of the matter of the other
Host Bands’ participation, and that James Smith Cree Nation would raise a challenge to the Commission’s mandate.

The Commission convened a hearing of the parties and the other Host Bands on August 22, 2002. After careful consideration of the issues, the Commission panel has rendered its decision. Each issue is addressed in turn, below:

1) Does the Commission have the mandate to allow an Indian Band to participate in the Inquiry of another Band when the Band seeking participation does not have a rejected specific claim relating to the subject matter of the Inquiry?

Yes. The Commission panel have heard and considered the objections and arguments of the James Smith Cree Nation, Canada and the other Host Bands to this issue and have concluded that yes, the Indian Claims Commission pursuant to its Order in Council and the *Inquiries Act*, has the power to exercise its discretion to hear any evidence and argument it deems requisite to the full investigation of the matters into which it is mandated to examine. In this regard, the Commission panel in this case is not limited to hearing the evidence and/or argument of only Bands that have submitted a claim or only those Bands who have a rejected claim.

2) If yes, does the Commission have the mandate to allow participation in the Inquiry to an Indian Band claiming an interest in a rejected specific claim of another Band, which claim is subject of an Inquiry by the Commission, without the consents of Canada and the Band whose claim has been rejected?

Yes. In the exercise of its discretion pursuant to its Order in Council and the *Inquiries Act*, the Commission panel may seek out and hear whatever witnesses it deems would be beneficial to its understanding of the issues. As previously stated, the Commission’s authority is not limited to hearing from only those Bands with a rejected claim. In exercising this discretion, the Commission panel does not require the consent of either party to the inquiry.

Pursuant to its Order in Council, the Commission panel may adopt whatever method it deems expedient for the conduct of the inquiry. The flexibility of adopting its own procedures for inquiry means that the
Commission has the power not only to adopt its own procedures, but it also has the power to control its own process. In so saying, it has the power to determine who it will hear in the absence of the parties’ consent.

3 If yes to 1 and 2, does the Commission have the mandate to allow a Band seeking participation to have party status at the Inquiry?

In the case of the Commission’s Inquiry into the James Smith Cree Nation - Chakastaypasin IR 98 surrender, the parties are the James Smith Cree Nation and Canada. The Commission, as previously stated has the discretion to allow other groups to appear before it to introduce evidence and make argument. From the outset, Canada has insisted on the participation of the other Host Bands to the James Smith Cree Nation - Chakastaypasin IR 98 Inquiry. The Commission panel cannot now, continue to proceed with this Inquiry as if it had not been made aware of the other Host Bands. The Commission has the power to adopt whatever methods it deems expedient for the conduct of an inquiry. In this case, the Commission panel has deemed it expedient to hear from the other Host Bands. In so saying, and with further refinement below as to the extent of that participation, the other Host Bands will be invited to participate but not as parties to this inquiry. There are only two parties to this inquiry: the James Smith Cree Nation and Canada.

4 The Commission welcomed argument on the manner of the participation of the other Host Bands into the IR 98 Inquiry.

The Commission panel have heard and considered the arguments of the James Smith Cree Nation, Canada and the other Host Bands regarding the manner of the other Host Bands participation, should it be allowed. The Commission panel has decided that it will hear any and all evidence the other Host Bands wish to put forward in the James Smith Cree Nation Inquiry into IR 98 and the panel will welcome whatever arguments the other Host Bands wish to advance respecting this evidence. The Commission panel will not however, permit the other Host Bands to expand or in any way alter the Inquiry as raised by the James Smith Cree Nation.

The Commission panel welcomes whatever documentary and/or community evidence the other Host Bands may have ready to submit and that will be beneficial to the panel’s investigation in this case. The Commission panel is prepared to receive this evidence as soon as possible. Should the
other Host Bands wish to put forward the evidence of Elders in their respective communities, the panel directs that the other Host Bands coordinate the logistics of how to present this evidence with Commission Counsel. Further, the panel is aware that Elders’ evidence must still be gathered at James Smith Cree Nation regarding the Chakastaypasin IR 98 claim. This session will therefore proceed first. The Commission panel will respect the wish of the James Smith Cree Nation to close this session to outside observers, should this request be made. A transcript of this session will be provided to all parties and the other Host Bands. The other Host Bands will not be participants at the gathering of the James Smith Cree Nation Community Session. Specifically, the other Host Bands will not be permitted to ask questions of the James Smith Cree Nation Elders through Commission Counsel.

Once provided with a transcript of the James Smith Cree Nation Community Session into Chakastaypasin IR 98, the other Host Bands will have six (6) weeks from receipt of the transcript to convene their respective community sessions should that be necessary. At these sessions, the James Smith Cree Nation and Canada will have the right to participate as parties to the inquiry. In this way, both James Smith Cree Nation and Canada will have the right to ask questions of the Elders’ of the other Host Bands however, this right is limited, as is always the case, to posing questions through Commission Counsel. There will be no right to cross examine.

Should either the James Smith Cree Nation or the other Host Bands wish to introduce expert evidence that is not Elders’ evidence, then as is always the case, such evidence must be introduced in a written report first, upon receipt of which, the Commission panel will determine whether or not it will be necessary to hear orally from the expert witness. All parties and the other Host Bands will have the right to cross examine the expert witness.

In fairness to the James Smith Cree Nation, it will have the full and final opportunity to provide further evidence in response to either the documentary or witness evidence that may be presented by the other Host Bands.

At the conclusion of the evidence gathering (documentary, oral history or other expert evidence) the historical record will be closed and the inquiry will
proceed to legal argument. The Commission directs that this stage of inquiry proceed as follows:

- The James Smith Cree Nation will first submit its written legal submissions;
- Canada will then submit its responding legal submissions;
- The other Host Bands will submit their reply submissions (if any) to the submissions of James Smith Cree Nation and Canada;
- Canada will submit a reply submission (if any) to the James Smith Cree Nation and the other Host Bands; and
- James Smith Cree Nation will submit a final reply (if any) to all.

The exchange of legal submissions will be followed by an oral session wherein the Commission panel will hear directly from the parties and the other Host Bands on their respective written legal submissions. Due to the amount of time necessary to allow all parties and the other Host Bands to be heard, the Commission panel will plan to convene the oral session over two days.

In conclusion, the Commission panel wishes to make clear that the decision to include the other Host Bands as participants in this Inquiry does not in any way alter the fundamental purpose and scope of this Inquiry. Namely, to inquire into the rejection of the James Smith Cree Nation - Chakastaypasin IR 98 surrender claim as it was raised by the James Smith Cree Nation.

FOR THE INDIAN CLAIMS COMMISSION

Renee Dupuis  Alan Holman  Roger Augustine

November 1, 2002
APPENDIX B

CHRONOLOGY

JAMES SMITH CREE NATION: CHAKASTAYPASIN IR 98 INQUIRY

1 Planning conferences

Saskatoon, September 20–21, 1999
Ottawa, November 9–10, 1999
Ottawa, October 24–25, 2000
Saskatoon, December 5–6, 2000
Ottawa, January 10–11, 2001
Melfort, June 5–6, 2001
Saskatoon, August 29, 2001
Prince Albert, November 21, 2001
Ottawa, May 16–17, 2002
Saskatoon, June 24, 2002

2 Community sessions

James Smith Cree Nation, June 27–28, 2001
The Commission heard from Jim Brittain, Charlotte Brittain, Robert Constant,
George Whitehead, Walter Sanderson, and Violet Sanderson.

Melfort, Saskatchewan, January 28–29, 2003
The Commission heard from Chief Sol Sanderson, Terry Sanderson, Raymond
Sanderson, Martha Opoo nechaw-Stonestand, Albert Sanderson, Patrick
Stonestand, Alex Sanderson, Violet Sanderson, and Jake Sanderson.

Muskoday First Nation, May 27–29, 2003 (Host Bands)
The Commission heard from Kinistin First Nation: Chief Felix Thomas,
Louise Smokeyday, Besigan Nippi, Peter Nippi, Quao Smokeyday, and Gassion
Thomas; Yellow Quill First Nation: Chief Robert Whitehead, Verna Cachene,
and Larry Cachene; Sturgeon Lake First Nation: Chief Earl Ermine and
Harold Kingfisher; Fishing Lake First Nation: Chief Michael Desjarlais, Jerry
Kayseas, Milton Paquachan, and Lawrence Desjarlais; One Arrow First
Nation: Chief Dwayne Paul, Marcel Paul, and Joseph Ernest Paintednose; and
from Muskoday First Nation: Chief Austin Bear, Melvin Smith, Eric Bear, James Smith, Clarence Olson, and Keith Guay.

3 Interim ruling November 1, 2002

4 Written legal submissions
Other Host Bands’ participation – Challenge

- Submission on Behalf of the Government of Canada, August 1, 2002
- Submission on Behalf of the James Smith Cree Nation, August 1, 2002
- Submission on Behalf of the One Arrow First Nation, August 1, 2002
- Submission on Behalf of the Yellow Quill First Nation, undated
- Submission on Behalf of the Sturgeon Lake First Nation, July 2, 2002
- Submission on Behalf of the Muskoday First Nation, July 25, 2002
- Submission on Behalf of the Kinistin First Nation, August 1, 2002
- Fishing Lake First Nation, no submission provided
- Gordon First Nation, no submission provided
- Panel Hearing: “Host Bands” Participation, held at Sheraton Cavalier, Saskatoon, August 22, 2002
- Ruling: James Smith Cree Nation: Chakastaypasin Inquiry – Interim Ruling (Ottawa, November 2002)

Written submissions

- Written Submissions on Behalf of the James Smith Cree Nation, November 7, 2003
5 Oral legal submissions
Interim hearing  Saskatoon, Saskatchewan, August 22, 2002
Other Host Bands participation hearing. The Commission heard arguments from William Selnes for James Smith Cree Nation; Uzma Ihsanullah for Canada; David Knoll for Sturgeon Lake First Nation; Bruce Slusar for Kinistin First Nation; Doug Kovatch for One Arrow First Nation; and Donna Driedger for Yellow Quill First Nation.

Oral session    Saskatoon, Saskatchewan, May 4–6, 2004

6 Content of formal record
The formal record of the James Smith Cree Nation Chakastaypasin IR 98 Inquiry consists of the following materials:
INDIAN CLAIMS COMMISSION

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

PANEL

Chief Commissioner Renée Dupuis
Commissioner Alan C. Holman

COUNSEL

For the James Smith Cree Nation
William A. Selnes

For the Government of Canada
Robert Winogron / Uzma Ihsanullah

To the Indian Claims Commission
Kathleen N. Lickers

MARCH 2005
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SUMMARY

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


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
Treaties Referred To
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).

COUNSEL, PARTIES, INTERVENORS
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.


**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.


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

McLean, Jacob, signed Treaty 6 in 1876 as headman of the James Smith Band.
Morris, Alexander, Treaty Commissioner for Treaty 6 and Lieutenant Governor of the North-West Territories in 1876.

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

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

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

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

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

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

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

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

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

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

Walker, James, Acting Indian Agent and Inspector of the North-West Mounted Police in 1877.
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. 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 paylist from 1892 until 1896, at which time they were formally “transferred” to the Cumberland Band 100A. They were often referred to as “Big Head’s Band.”

**Chakastaypasin Band** – The people who signed Treaty 6 with Chief Chakastaypasin in 1876 and were the owners of IR 98 on the south branch of the Saskatchewan River, approximately 50 kilometres west of IR 100A. The Band was scattered following the 1885 North-West Rebellion, its members dispersed to other reserves, and the Chakastaypasin was paylist 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.

**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).  

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.  

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.

**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

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

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

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

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

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).
excluded from the Commission’s inquiry. After hearing from the parties on the mandate of the Commission to inquire into these “new” aspects of the claim, the panel ruled on May 2, 2000, that it would proceed with an inquiry into all issues raised by the First Nation and, in the course of so doing, would provide adequate time for Canada to prepare and respond to these issues during the course of this inquiry. This ruling is reproduced as Appendix A to this report.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on “whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister.” 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. 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.

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

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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).


same time, Canada has been given until April 2005 to respond to the additional issues of land quality and lands occupied prior to treaty.\footnote{Kathleen N. Lickers, Legal Advisor to the Indian Claims Commission, to William Selnes and Robert Winogron, November 27, 2003, reproduced as Appendix B to this report.} Further, the necessity to hear from the parties in an oral session on these additional issues may depend on the panel’s decision regarding amalgamation.

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

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

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.

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.

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, clothed themselves with their skins, and were ‘truly heathen and truly barbarian.’”  

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.

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.

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 ...

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10 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).
One of the petitioners, however, was Bernard Constant, identified on that document as a “Halfbreed” with a wife and six children, two head of cattle, two pigs, and ploughed land and buildings in progress.\textsuperscript{14} 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).\textsuperscript{15}

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.\textsuperscript{16}

**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,\textsuperscript{17} and the other is a memoir of the Chiefs’ hired interpreter, Peter Erasmus, told some 45 years after the event.\textsuperscript{18}

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

\textsuperscript{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, n.2 (ICC Exhibit 11, pp. 2–3).

\textsuperscript{15} Lorraine Patrick, DLS, Field notes, April 2–18, 1883, Canada Lands Surveys Records (CLSR), Field book 3869, p. 32 (ICC Exhibit 8i, p. 21).

\textsuperscript{16} ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, pp. 44–45, Mervin Burns).


\textsuperscript{18} Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976) (excerpts in ICC Exhibit 13d).
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.\textsuperscript{19} 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.\textsuperscript{20} 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.”\textsuperscript{21}

The Fort à la Corne Indians were also at an advantage because at least one\textsuperscript{22} 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.\textsuperscript{23} Elder Mervin Burns told the ICC Commissioners that his ancestors “understood the treaty. These people, their spokesmen there had fairly good English.”\textsuperscript{24}

\textsuperscript{19} Peter Erasmus, \textit{Buffalo Days and Nights} (Calgary: Glenbow Institute, 1976), foreword by Hugh Dempsey, vii, and introduction by Irene M. Spry, xvii and xviii (ICC Exhibit 13d, pp. 2, 13, 18).
\textsuperscript{20} Peter Erasmus, \textit{Buffalo Days and Nights} (Calgary: Glenbow Institute, 1976), 241–42 (ICC Exhibit 13d, pp. 43–44).
\textsuperscript{22} 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).
\textsuperscript{23} 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).
\textsuperscript{24} ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 43, Mervin Burns).
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, 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 with the Indians thereof as to the locality which may be found to be most suitable for them.

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.” 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.

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25 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).

26 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).

27 Peter Erasmus, Buffalo Days and Nights (Calgary: Glenbow Institute, 1976), 243 (ICC Exhibit 13d, p. 45).
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...²⁸

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 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.”²⁹

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.”³⁰ 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.³¹

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:

²⁹ Peter Erasmus, Buffalo Days and Nights (Calgary: Glenbow Institute, 1976), 244 (ICC Exhibit 13d, p. 46).
³⁰ Peter Erasmus, Buffalo Days and Nights (Calgary: Glenbow Institute, 1976), 246 (ICC Exhibit 13d, p. 48).
³¹ Peter Erasmus, Buffalo Days and Nights (Calgary: Glenbow Institute, 1976), 250 (ICC Exhibit 13d, p. 52).
[Chiefs] If our choice of reserve does not please us before it is surveyed we want to be allowed to select another.

...  

[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.\(^{32}\)

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.\(^{33}\) 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.\(^{34}\)

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 its land at Fort à la Corne, “as far up the river as Nepowewen Creek.”\(^{35}\) In the same year, David Laird, the Indian Superintendent and

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\(^{34}\) 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).

\(^{35}\) 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).
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.36

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.37 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.38

Another surveyor, Elihu Stewart, was charged with laying out reserves for John Smith (brother to James Smith)39 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.40 The

36 David Laird, Indian Superintendent, to Superintendent General of Indian Affairs (SGIA), November 18, 1877, Annual Report for the Department of Indian Affairs for the Year Ended June 30, 1877, 45–46 (ICC Exhibit 1, pp. 12–13).
37 Milner Hart, DLS, to Surveyor General, November 29, 1878, in CLSR, Field book 724, p. 29 (ICC Exhibit 8a, p. 30).
38 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).
40 E. Stewart, DLS, Indian Reserve Survey Diary, 1878–79, in CLSR, Field book 729 (ICC Exhibit 8c, p. 28).
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.\(^{41}\)

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."\(^{42}\)

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

The “Plan of Partial Survey of Indian Reserve at Ft. a la Corne, Chief James Smith,” which Hart signed in December 1878, shows a block of land with the Saskatchewan River on the north, the surveyed “East Limit 3½ miles,” a “trial line 2½ miles” on the south, and another “trial line 2 miles 2.31 chains” on the west. The block is immediately to the west of the HBC reserve, although separated from it by a narrow strip of land.\(^{43}\) The block is shown on a “Map of Part of the North West Territory shewing the Operations of the Special

\(^{41}\) 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).

\(^{42}\) 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).

\(^{43}\) Milner Hart, “Plan of partial survey of Indian Reserve at Ft. a la Corne, Chief James Smith,” CLSR, Plan A1029 (ICC Exhibit 8b).
Survey of Standard Meridians and Parallels for Dominion Lands,” dated December 31, 1878, and published in the Surveyor General’s annual report.44

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.”45 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 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.46

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.47

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47 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).
According to Hart’s field notes, William Smith (James Smith, No. 9) had a house and three cultivated fields totalling approximately 12 acres about one and a half miles south of the river, along the east boundary. Other Indians may have had buildings and gardens in areas away from the boundary line, for Hart reported that:

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

**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:

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.

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. 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.

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

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

51 Lorraine Patrick, DLS, Field notes, township 48, range 20, W2M, April 2–18, 1883, in CLSR, Field book 3869 (ICC Exhibit 8i).
52 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).
likewise surveyed the balance of the Reserve on the north side,\textsuperscript{53} 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.\textsuperscript{54}

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.”\textsuperscript{55} 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.\textsuperscript{56}

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.”\textsuperscript{57} (This last reference must be to discussions surveyor Hart had in 1878 with either Lindsay Russell, who was

\textsuperscript{53} 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.


\textsuperscript{55} 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).

\textsuperscript{56} 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. 240–50).

\textsuperscript{57} 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).
Surveyor General at that time, or A.L. Russell, who was then in charge of the special survey in the area.) In August, Ponton reported on the various settlers’ claims within the reserve boundaries. One, Btd Scyiese, was in the northwest corner of section 6, township 48, range 20, W2M, and adjoined the west boundary, so it was simply omitted from the reserve. Three others, Edward Cook, Charles Fiddler, and Alexander Fiddler, 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.

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. 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.” 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. Ponton considered that the reserve he laid out, with its combination of good soil and abundance of fish and game, was well suited to the Band:

The Reserve is well situated to support the band, fish being plentiful in the river and moose meat abundant. The band being accustomed to hunt this kind of game seem to devote a considerable time to it and with good results. The soil is for the

58 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).
59 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 paylist, Cumberland Band, Treaty 5, August 25, 1882, no file reference available (ICC Exhibit 1, pp. 152–53).
61 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).
63 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, lxvi (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).
greater part from sand to sandy loam, but many spots of better land lie back from the river.\textsuperscript{64}

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.”\textsuperscript{65}

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?\textsuperscript{66}

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 Sciyese claim is all described as being “1st class.”\textsuperscript{67} In his field notes, Ponton described the soil above the Sciyese claim as being sandy or sandy loam, except for one area opposite section 13, township 48, range 20, W2M, which he states is unfit for cultivation.\textsuperscript{68} On the survey plan, the soil on the southern boundary is said to be “too wet for cultivation,” but in the field

\begin{footnotes}
\item[64] 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).
\item[65] ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 38, Chief Walter Constant).
\item[66] ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, pp. 20, 24, Chief Walter Constant).
\item[67] 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).
\item[68] 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).
\end{footnotes}
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.\textsuperscript{69}

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 spruce is distributed along the southern side of the river, and poplar of
sufficient size for building purposes can be cut at many points on the reserve.\textsuperscript{70}

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

According to Treaty 6, the James Smith Band was entitled to a reserve equiva-
lent to one square mile (640 acres) for each family of five, or 128 acres per
person. Therefore, the area confirmed by Order in Council PC 1151, 27.8
square miles, satisfies the treaty land entitlement for 139 people \((27.8 \times
640 \div 128 = 139)\). One hundred and forty-two individuals were paid
annuities with the James Smith Band on October 6, 1884,\textsuperscript{71} and two others
were absent from that payment but returned in 1886 and were paid arrears
for 1884.\textsuperscript{72} 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

\textsuperscript{69} 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

\textsuperscript{70} Order in Council PC 1151, May 17, 1889, pp. 52–53 (ICC Exhibit 1, pp. 652–53).

\textsuperscript{71} Treaty annuity paylist, James Smith Band, September 30, 1885, in LAC, RG 10, vol. 9417, in LAC, RG 10, vol. 9416, and October 6, 1884,

\textsuperscript{72} 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,
pp. 20–21 (ICC Exhibit 3b).
mile of land \((144 - 139 = 5 \times 128 = 640)\). The James Smith Cree Nation’s treaty land entitlement story does not end here, however.

**BAND AMALGAMATION**

**Survey of IR 100A, 1887**

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

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. In 1882, however, surveyor W.A. Austin was instructed to survey 11,040 acres for the 345 members of the Cumberland Band \((345 \times 32 = 11,040)\) in the location stipulated in Treaty 5, and, when the Band protested, it was told that “the Government would not grant to the Indians of one Treaty a Reserve in another Treaty, but were desirous of giving them the best land in their own Treaty.” According to the survey plan filed in 1883, only 6.29 square miles of land \((4025.6 \text{ acres})\) was set aside in the vicinity of Cumberland Lake, land which the Superintendent General of Indian Affairs described the following year as a “miserable tract of sterile land.” 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.

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73 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).


75 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).

76 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).

77 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).
Map 2  Cumberland IR 100A and James Smith IR 100

Based on Sketch found in Bennett McCordle, "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)
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).\textsuperscript{78} 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).”\textsuperscript{79}

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

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

\textsuperscript{78} 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).
\textsuperscript{79} Order in Council PC 1151, May 17, 1889, pp. 54–55 (ICC Exhibit 1, pp. 655–57).
\textsuperscript{80} 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).
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.\(^{81}\)

Whether Chakastaypasin and his followers left IR 98 before or after this notice was given is unknown. What is known, however, is that the Department of Indian Affairs initially regarded the entire Chakastaypasin Band as rebels and repeatedly recommended that the Band be broken up, that its reserve be surrendered, and that its membership be forcibly transferred to surrounding bands.\(^{82}\) 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.\(^{83}\)

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.”\(^{84}\)

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

82 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).

83 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).

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.”85 By early May, Kahtapiskowat and most of his followers left IR 98 for Fort à La Corne.86 In April 1889, Chief Chakastaypasin reportedly also decided to “come in onto the reserve [IR 100A],” as he “cannot support himself any longer.”87 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 paylist for Chakastaypasin Band was discontinued in 1889. The Chakastaypasin members living at IR 100A were then paid on the Cumberland Band paylist until 1891. From 1892 to 1896, they were paid separately on the paylist 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.”88 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 ... formally transferred” to James Smith.89 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.90

89 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).
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.  

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.

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.

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. (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.95

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.

**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.96

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

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

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96 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).
97 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).
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.98

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

\[
\text{THIS AGREEMENT made in duplicate and entered into this Twenty fourth day of July in}
\]
\[
\text{the year of our Lord one thousand nine hundred and two, between the owners of}
\]
\[
\text{James Smith’s Indian Reserve No. 100, in the Provisional District of Saskatchewan,}
\]
\[
\text{in the North West Territories and Dominion of Canada, as represented by their}
\]
\[
\text{Chief and Headmen, hereinafter called the Parties of the First Part; and the owners}
\]
\[
\text{of Cumberland Reserve No. 100A, also in the said Provisional District, as}
\]
\[
\text{represented by their Headman, hereinafter called the parties of the Second Part.}
\]
\[
\text{Witnesseth that the Parties of the First part, for themselves and their}
\]
\[
\text{descendants, agree to admit the Parties of the Second Part, and their descendants,}
\]
\[
\text{into their Band, and allow them as members thereof, to have, hold and possess}
\]
\[
\text{forever, an undivided interest in all land, moneys and other privileges now}
\]
\[
\text{possessed and enjoyed, or which may at any time hereafter be possessed or}
\]
\[
\text{enjoyed by the said Band.}
\]
\[
\text{In return for the above interest, rights and other privileges granted to them by}
\]
\[
\text{the Parties of the First Part, the Parties of the Second Part agree for themselves and}
\]
\[
\text{their descendants to give to the parties of the First Part, a joint and undivided}
\]
\[
\text{interest in all land, moneys and other privileges now possessed and enjoyed or}
\]
\[
\text{which may at any time hereafter be possessed or enjoyed by the said Parties of the}
\]
\[
\text{Second Part.}
\]
\[
\text{In Witness whereof we, James Smith, Chief, and Bernard Constant, Che-koo-sis}
\]
\[
& Jacob McLean, Headmen of Reserve 100 and Kh-ta-piskowat, Headman of
\]
\[
Reserve 100A & Geo Sanderson his son, have hereunto set our hands and affixed our
\]
\[
seals on the day and year first above written.99
\]

None of the government officials involved submitted detailed reports of the
events surrounding the surrender or the amalgamation, but a transcript of a
1972 elder’s interview with a James Smith band member provides some
eyewitness observations. Angus Burns (James Smith, No. 29),100 the son of
Robert Burns, was 20 years old101 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

98 Surrender, Cumberland Band of Indians , to the Crown, dated July 24, 1902, in DIAND Land Registry,
Instrument no. XJ0691 (ICC Exhibit 1, pp. 941–43).
99 Amalgamation Agreement, July 24, 1902, LAC, RG 10, vol. 2562, file 82, pt. 9 (ICC Exhibit 1, pp. 945—46).
100 Angus Burns was given number 175 in 1901; in 1903, when the paylist was reorganized, he was assigned
no. 29.
101 See James Smith treaty annuity paylist, May 4, 1950, p. 105 (ICC Exhibit 3b, Supporting worksheets and
JAMES SMITH CREE NATION – TREATY LAND ENTITLEMENT INQUIRY REPORT ON ISSUE 9

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 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.
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

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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.\textsuperscript{102}

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 paylist for the Cumberland Band 100A notes that 115 people, including 29 adult men were paid annuities “at James Smith’s reserve.”\textsuperscript{103} The James Smith band paylist indicates 107 people were paid annuities that day, including 28 adult men.\textsuperscript{104} Agent Jones’s annual report for that year notes 25 men in the James Smith Band and 27 in the Cumberland Band 100A.\textsuperscript{105}

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.

\textsuperscript{102} 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).

\textsuperscript{103} Treaty annuity paylist, 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).

\textsuperscript{104} Treaty annuity paylist, No. 100 James Smith Band Paid at Reserve, July 25, 1902, no file reference available (ICC Exhibit 3b, supporting documentation, vol. 4, tab T).

\textsuperscript{105} W.E. Jones, Indian Agent, to SGIA, August 15, 1902, in Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902 (ICC Exhibit, 1, p. 949).
PART III

ISSUES

James Smith Cree Nation – Treaty Land Entitlement

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)?

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.
D Alleged Amalgamation

8 Did the Peter Chapman Band have a surplus of treaty lands at the time of the alleged amalgamation?

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

10 If the answers to questions 8 and 9 are positive, what effect if any did Peter Chapman’s surplus treaty land have on the entitlement of James Smith?

E Sufficiency of Treaty Lands

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

ANALYSIS

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

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

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

Canada takes the position that the evidence is clear that there was in fact, and in law, an amalgamation of the original James Smith Band and the “Peter Chapman Band.” Canada relies upon its royal prerogative as empowering it to amalgamate these two Bands, and Canada argues that the two Bands

107 John C. Munro, Minister of Indian Affairs, to Chief Angus McLean, James Smith Cree Nation Band, May 22, 1984 (ICC Exhibit 4a, p. 1).
consented to that authority, as evidenced by their signature on the “Amalgamation Agreement” of July 24, 1902.

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

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

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

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

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

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

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

108 David Laird, Indian Commissioner, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, June 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 933–36).
109 W.A. Orr, In-charge Lands & Timber Branch, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, June 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 937–38).
would be better that I should discuss the question with them before you begin
the payments.”

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

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

If the treaty is silent on the matter of amalgamation then, what, if anything,
was required by the Indian Act? The parties agree that the Indian Act makes
no provision for the amalgamation of bands. For Canada, this leads to the
conclusion that, absent a statutory limitation on its royal prerogative, it
exercised its prerogative power to bring about the amalgamation. For James
Smith, in the absence of statutory authority, the Crown had no authority to
amalgamate and cannot rely upon its prerogative power to create or
amalgamate bands.

Without guidance from either the treaty or the Indian Act, we must ask
whether principles of fiduciary law provide any assistance in determining the

110 David Laird, Indian Commissioner, Department of Indian Affairs, to W.E. Jones, Indian Agent, Department of
Indian Affairs, July 15, 1902, LAC, RG 10, vol. 3562, file 82, pt. 9 (ICC Exhibit 1, p. 940).
lawfulness of Canada’s actions in this case. We will not review the general principles concerning fiduciary law here. We believe we have thoroughly reviewed these principles in many other inquiries.\textsuperscript{114} We will, therefore, rely upon our synopsis of the case law in these other reports and categorically state here that the courts have clearly stated that the relationship between aboriginal people and the Crown is a fiduciary one; however, not every aspect of this relationship will give rise to a fiduciary duty. What will be required is a determination of whether a specific fiduciary duty arises on the circumstances of this case, after a meticulous examination of the facts.

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

Canada’s position is that there is an abundance of “clear, unchallenged, unequivocal evidence of informed consent to the amalgamation and aside from the [amalgamation] agreement itself ... [the evidence is] primarily in the post-amalgamation facts.”\textsuperscript{116} In Canada’s view, it is this post-amalgamation conduct “which is completely consistent with informed consent.” Further, Canada argues that JSCN’s “attempt to equate an amalgamation with a surrender is not a proper question. Amalgamation[s] aren’t surrenders. There were detailed provisions for surrenders; there are no provisions for amalgamations ... A surrender – an amalgamation is not a surrender, [it’s] fundamentally different. On amalgamation the bands don’t surrender their land to third parties or at all, there’s no need for a surrender

\textsuperscript{114} See (1998) 8 ICCP for the Commission’s reports of the Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry; Moosomin First Nation: 1909 Reserve Land Surrender Inquiry; Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry; and Sumas Indian Band:1919 Indian Reserve 7 Surrender Inquiry.

\textsuperscript{115} Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1996] 2 CNLR 25 (SCC).

and that’s not what it’s about. On this amalgamation each band obtained an undivided interest in all land, monies and other privileges of the other band.”

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

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

The authority of “the owners of the James Smith’s Reserve No. 100” to have entered into this agreement has not been disputed by the parties. From JSCN’s perspective, the issue is whether, in the absence of other evidence, Canada can rely upon this document as prima facie evidence of JSCN’s consent. We believe the document is impugned by a more fundamental question: Who were “the owners of Cumberland Reserve No. 100A” upon whom Canada has sought to rely as having the authority to amalgamate with the James Smith Band? Based upon the totality of the evidence, reviewed and reported in direct answer to the matters before this panel in the James Smith Cree Nation: IR 100A Inquiry and the Cumberland House Cree Nation: IR 100A Inquiry, we believe the “owners of Cumberland Reserve No. 100A” were the whole of the Cumberland Band, including those resident at IR 20, and not just those members resident at IR 100A. The Cumberland Band included members at IR 100A and at IR 20; yet, based on the evidence, Canada relied upon only those resident at IR 100A (including non-members of the Chakastaypasin Band, who allegedly had transferred into the Cumberland Band) to agree to the amalgamation with the James Smith Band. There is no evidence to indicate that those members living at IR 20, who were also “owners” of IR 100A, voted to amalgamate.

The “amalgamation agreement” further states:

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

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

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\(^{119}\) Amalgamation Agreement, July 24, 1902, LAC, RG 10, vol. 2562, file 82, pt. 9 (ICC Exhibit 1, pp. 945–46).
PART V

CONCLUSION

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

FOR THE INDIAN CLAIMS COMMISSION

Renée Dupuis  
Chief Commissioner

Alan C. Holman  
Commissioner

Dated this 17th day of March, 2005.
APPENDIX A

INDIAN CLAIMS COMMISSION

INTERIM RULING

JAMES SMITH CREE NATION INQUIRIES
TREATY LAND ENTITLEMENT AND
CUMBERLAND 100A RESERVE CLAIMS
RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

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

COUNSEL

For the James Smith Cree Nation
Sylvie Molgat

For the Government of Canada
Jeffrey A. Hutchinson

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

May 2, 2000
BACKGROUND

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

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

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

The Treaty Land Entitlement

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

By a Band Council Resolution dated May 10, 1999, the JSCN requested that the Indian Claims Commission conduct an inquiry into the rejected TLE claim. In advance of the Commission’s first planning conference, the First Nation prepared a summary document, entitled “James Smith Cree Treaty Land Entitlement: Legal Submissions.” In this submission, Canada argues, the First Nation raised claims pertaining to land quality and land occupied prior to treaty, claims which Canada argues were not raised in the original submission. As such these claims are “new claims” not previously rejected by the Minister and therefore are not properly before the Commission. Canada maintains that “there is a distinction between a Band simply presenting new legal argument
or relying on different evidence to prove the claim originally submitted and ... a Band submitting entirely new grounds for a claim.” The TLE claims based upon land occupied prior to treaty and land quality are, Canada submits, entirely new grounds for a TLE claim.

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

**Peter Chapman IR 100A**

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

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

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

The First Nation argues that, in its original submission, it made arguments that the Crown “breached its statutory, treaty, trust and fiduciary duties in the taking of a surrender and for Canada to now distinguish various sub-issues which may or may not have been considered in the rejection and characterize them as “substantively new claims” is engaging in legalistic and specious argument based on a narrow and restrictive interpretation of the Commission’s mandate.”
ISSUE

The Order in Council establishing this Commission provides:

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

(a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister.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. Bibeault² 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 “to restrict the mandate of the Commission to a narrow and literal reading of the Specific Claims Policy would prevent First Nations in certain circumstances from having their claims dealt with fairly and efficiently.”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

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³ ICC, Lax Kw’alaams Indian Band Inquiry (Ottawa, June 1994); reported [1995] 3 ICCP 99 at 158.
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 of duty. In the interests of fairness, we are prepared to proceed into the inquiry of the surrender and sale of the Peter Chapman IR 100A lands, including consideration of the mineral rights. To do otherwise, we believe, would result, not in a thorough inquiry into all matters at issue, but in a piecemeal inquiry, with some aspects of the claim before the Commission and others at various stages of review within the Specific Claims Process. This, we believe, runs
counter to our remedial mandate and would result in unfairness to the First Nation.

In agreeing to inquire into all aspects of JSCN’s TLE, including lands occupied prior to treaty and the quality of those lands, and the issue of mineral rights in the Peter Chapman IR 100A claim, we are mindful of the effect our decision may have on the course of this inquiry in so far as Canada may not have had an adequate opportunity to consider the issues or may need more time to prepare, or because additional research is needed (a fact already admitted by Canada as regards the population analysis of JSCN’s TLE). The Commissioners are, as previously stated, “firmly of the view that they must strive to be fair to both parties, not only the claimants, and will attempt to avoid any unfairness the government feels their decision to proceed with the inquiry causes.” 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 Carole T. Corcoran Elijah Harper
Commission Co-Chair Commissioner Commissioner

Dated this 2nd day of May, 2000.

APPENDIX B

INTERIM RULING TO DELIVER INTERIM REPORT

November 27, 2003

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

- And -

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

Via facsimile

Dear Sirs:


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 paylist 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 paylist analysis, land quality and lands occupied prior to treaty. The Panel is of
course open to receiving Canada's submission on paylist 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 C

CHRONOLOGY

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

1 Planning conferences
   Saskatoon, September 20–21, 1999
   Ottawa, November 9–10, 1999
   Ottawa, October 24–25, 2000
   Saskatoon, December 5–6, 2000
   Ottawa, January 10–11, 2001
   Melfort, SK, June 5–6, 2001
   Prince Albert, November 21, 2001
   Ottawa, May 16–17, 2002

2 Community sessions
   James Smith Cree Nation, June 27–28, 2001
   The Commission heard evidence from Jim Brittain, Charlotte Brittain, Robert Constant, George Whitehead, Walter Sanderson, and Violet Sanderson.

   James Smith Cree Nation, October 29–30, 2002
   The Commission heard evidence from Chief Walter Constant, Mervin Burns, Isaac Daniels, Osborne Turner, Art Turner, Chief Sol Sanderson, Wilfred Constant, Louisa Moostoos, and Oliver Constant.

3 Expert witness session
   Ottawa, June 10, 2003
   The Commission heard evidence from William P. Marion.

4 Interim rulings
   James Smith Cree Nation: Treaty Land Entitlement and Cumberland 100A Reserve Inquiries – Interim Ruling, May 2, 2000
5 **Written legal submissions**

*Mandate challenge*

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

**Written submissions**

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

6 **Oral legal submissions**

Saskatoon, June 15, 2004

7 **Content of formal record**

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

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

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

JAMES SMITH CREE NATION
TREATY LAND ENTITLEMENT INQUIRY

PANEL
Chief Commissioner Renée Dupuis, C.M.
Commissioner Alan C. Holman

COUNSEL
For the James Smith Cree Nation
William A. Selnes

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
Kathleen N. Lickers

FEBRUARY 2007
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SUMMARY

JAMES SMITH CREE NATION
TREATY LAND ENTITLEMENT INQUIRY
Saskatchewan

This report may be cited as Indian Claims Commission, James Smith Cree Nation: Treaty Land Entitlement Inquiry (Ottawa, February 2007), reported (2008) 20 ICCP 573.

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**


**ICC Reports Referred To**


**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**

COUNSEL, PARTIES, INTERVENORS
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.

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.

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

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.


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-tn-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.


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. 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 paylist 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 paylist 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.

**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).²

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.³

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.

**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

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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

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).
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 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.” 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. 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.

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 Cumberland Band first.

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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).


issue was the subject of a separate report issued in March 2005 by this panel.\(^6\) 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.

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\(^6\) 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.
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.”

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. 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.
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, clothed themselves with their skins, and were ‘truly heathen and truly barbarian.’” 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

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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).
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 “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

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

20 SC 1876, c. 18.
22 Peter Erasmus, Buffalo Days and Nights (Calgary: Glenbow Institute, 1976) (excerpts in ICC Exhibit 13d).
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. 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. 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.”

The Fort à la Corne Indians were also at an advantage because at least one 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. Elder Mervin Burns told the ICC Commissioners that his ancestors “understood the treaty. These people, their spokesmen there had fairly good English.”

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, they agreed to provisions for annuities, schools, agricultural implements, animals, a medicine chest, and

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

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.” 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 ...

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).
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 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.”

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.” The leading Chiefs of the assembled bands, Mistawasis and Ahtakakoop (Ahtakakupe), 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.

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.

...
[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 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

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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).
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).
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

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:

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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).
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).
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.\footnote{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).}

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 \textit{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.\footnote{Milner Hart, DLS, St Marys, Ont., to the Surveyor General, Dominion Lands, Ottawa, November 29, 1878, in CLSR, Field book 724, pp. 28–30 (ICC Exhibit 8a, pp. 30–31).}

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

The “Plan of Partial Survey of Indian Reserve at Ft. a la Corne, Chief James Smith,” which Hart signed in December 1878, shows a block of land with the Saskatchewan River on the north, the surveyed “East Limit 3½ miles,” a “trial line 2½ miles” on the south, and another “trial line 2 miles 2.31 chains” on the west. The block is immediately to the west of the HBC reserve, although separated from it by a narrow strip of land.\footnote{Milner Hart, “Plan of partial survey of Indian Reserve at Ft. a la Corne, Chief James Smith,” CLSR, Plan A1029 (ICC Exhibit 8b).} 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.\footnote{“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.”}

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

\footnote{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).}
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.” 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 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.

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.

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

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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).
[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.\textsuperscript{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:

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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{54} Lorraine Patrick, DLS, Field notes, township 48, range 20, W2M, April 2–18, 1883, in CLSR, Field book 3869 (ICC Exhibit 8i).
township was very broken up by swamps and marshes and high ridges. 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 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.

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, but the Chief refused to accept the latter.

... [re John Smith]

55 Lorraine Patrick, DLS, Field notes, township 48, range 20, W2M, April 2–18, 1883, in CLSR, Field book 3869 (ICC Exhibit 8i).
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.
Map 2: Natural Resources Canada, Plan 269 CLSR SK. (James Smith Cree Nation: IR 100A Inquiry, Exhibit 8k)
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.  

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.” 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.

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.” (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 Scyiise, was in the northwest corner of section 6, township 48, range 20, W2M, and adjoined the

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).
west boundary, so it was simply omitted from the reserve. Three others, those of Edward Cook, Charles Fiddler, and Alexander Fiddler, 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.

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. 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.” 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. Ponton considered that the reserve he laid out, with its combination of good soil and abundance of fish and game, was well suited to the Band:

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

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?

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

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.

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.

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.

70 ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, pp. 20, 24, Chief Walter Constant).
72 ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 40, Melvin Burns).
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 Scyiése claim is all described as being “1st class.” 77 In his field notes, Ponton described the soil above the Scyiése claim as being sandy or sandy loam, except for one area opposite section 13, township 48, range 20, W2M, which he states is unfit for cultivation. 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

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).
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).
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).
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.  

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

According to Treaty 6, the James Smith Band was entitled to a reserve equivalent to one square mile (640 acres) for each family of five, or 128 acres per person. Therefore, the area confirmed by Order in Council PC 1151, 27.8 square miles, satisfies the treaty land entitlement for 139 people \( (27.8 \times 640 \div 128 = 139) \).

One hundred and forty-two individuals were paid annuities with the James Smith Band on October 6, 1884, and two others were absent from that payment but returned in 1886 and were paid arrears for 1884. 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’.”

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

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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).
Map 3

Based on Sketch found in Bennett McCandie, "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)
members to request that their reserve be located not at Cumberland Lake, but southwest of there, near Fort à La Corne.\textsuperscript{84} In 1882, however, surveyor W.A. Austin was instructed to survey 11,040 acres for the 345 members of the Cumberland Band (345 × 32 = 11,040) in the location stipulated in Treaty 5, and, when the Band protested, it was told that “the Government would not grant to the Indians of one Treaty a Reserve in another Treaty, but were desirous of giving them the best land in their own Treaty.”\textsuperscript{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,\textsuperscript{86} land which the Superintendent General of Indian Affairs described the following year as a “miserable tract of sterile land.”\textsuperscript{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 × 128 = 44,160).\textsuperscript{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).”\textsuperscript{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 of Interior in consenting to the appropriation of lands for the reserve

\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{89} Order in Council PC 1151, May 17, 1899, pp. 54–55 (ICC Exhibit 1, pp. 655–57).
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

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

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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).
surrendered, and its membership forcibly transferred to surrounding bands. By the end of that summer, it was also decided that

[...]hereafter 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.

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.”

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.”

By early May, Kahtapiskowat and most of his followers left IR 98 for Fort à La Corne. In April 1889, Chief Chakastaypasin reportedly also decided to “come in onto the reserve [IR 100A],” as he “cannot support himself any longer.” 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 paylist for Chakastaypasin Band was discontinued in 1889. The Chakastaypasin members living at IR 100A were then paid on the Cumberland Band’s paylist until 1891. From 1892 to 1896,

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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).
they were paid separately on the paylist 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.” 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.

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 ... formally transferred” to James Smith. 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.

**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.

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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).
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).
(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

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.  

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.

**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.  

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

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.
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, 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.\textsuperscript{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),\textsuperscript{111} the son of Robert Burns, was 20 years old\textsuperscript{112} 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

\textsuperscript{110} Amalgamation Agreement, July 24, 1902, LAC, RG 10, vol. 2562, file 82, pt. 9 (ICC Exhibit 1, pp. 945–46).
\textsuperscript{111} Angus Burns was given number 175 in 1901; in 1903, when the paylist was reorganized, he was assigned number 29.
\textsuperscript{112} See James Smith treaty annuity paylist, May 4, 1950, p. 105 (ICC Exhibit 3b, Supporting worksheets and paylists, vol. 4, tab T, p. 1603).
I NDIAN C LAIMS C OMMISSION P ROCEEDINGS

learn whether there would be a sale, they were 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.
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

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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.\footnote{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 paylist for the Cumberland Band 100A notes that 115 people, including 29 adult men, were paid annuities “at James Smith’s reserve.”\footnote{114} The James Smith band paylist indicates 107 people were paid annuities that day, including 28 adult men.\footnote{115} Agent Jones’s annual report for that year notes 25 men in the James Smith Band and 27 in the Cumberland Band 100A.\footnote{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.

\footnote{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).}

\footnote{114}{Treaty annuity paylist, 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).}

\footnote{115}{Treaty annuity paylist, No. 100 James Smith Band Paid at Reserve, July 25, 1902, no file reference available (ICC Exhibit 3b, supporting documentation, vol. 4, tab T).}

\footnote{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 Entitlement

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?

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.
Based on the answer to Questions 5 and 6, did Canada breach any obligation(s)?

**D Alleged Amalgamation**

8. Did the Peter Chapman Band have a surplus of treaty lands at the time of the alleged amalgamation?

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

10. If the answers to questions 8 and 9 are positive, what effect if any did Peter Chapman’s surplus treaty land have on the entitlement of James Smith?

**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?

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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,” 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. 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.

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.”

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.  

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 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

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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.
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 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:

125 Submissions on Behalf of the James Smith Cree Nation, July 28, 2003, p. 40, para 100.
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.\(^\text{128}\)

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.\(^\text{129}\)

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 ...

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\(^\text{129}\) Submissions on behalf of the Government of Canada, April 13, 2006, p. 31, para 98.
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 ...

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.”

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”

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.

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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 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

134 W.J. Christie, Indian Commissioner, Fort Garry, Memorandum, October 10, 1876, in LAC, RG 10, vol. 3636, file 6693-1 (ICC Exhibit 1, pp. 1–3; 9–11).
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 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
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 la Corne at the time of Treaty in 1876 who had occupied and improved lands. The surveyor should have deducted these areas of these homelands from the land to which the James Smith Band was entitled pursuant to Treaty ...

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:

Canada 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 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. 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.

Canada, City 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.

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

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

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 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.

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:

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

143 Indian Act, SC 1876, c. 18.
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?

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

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As stated previously, in March 2005 this panel delivered its Report on Issue 9: Amalgamation.\footnote{See the Summary Report on Issue 9: Amalgamation, reproduced as Appendix B.} 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.

**ISSUE 11: SUFFICIENCY OF LANDS**

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?\footnote{Please refer to Part III of this report for a complete list of issues at pp. 626-27.}

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.
PART V

CONCLUSION

Following the initial stage of establishing the issues to be inquired into, the parties agreed to undertake further paylist 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

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

MAY 2, 2000

BACKGROUND

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

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

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

THE TREATY LAND ENTITLEMENT

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

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By a Band Council Resolution dated May 10, 1999, the JSCN requested that the Indian Claims Commission conduct an inquiry into the rejected TLE claim. In advance of the Commission’s first planning conference, the First Nation prepared a summary document, entitled “James Smith Cree Treaty Land Entitlement: Legal Submissions.” In this submission, Canada argues, the First Nation raised claims pertaining to land quality and land occupied prior to treaty, claims which Canada argues were not raised in the original submission. As such these claims are “new claims” not previously rejected by the Minister and therefore are not properly before the Commission. Canada maintains that “there is a distinction between a Band simply presenting new legal argument or relying on different evidence to prove the claim originally submitted and ... a Band submitting entirely new grounds for a claim.” The TLE claims based upon land occupied prior to treaty and land quality are, Canada submits, entirely new grounds for a TLE claim.

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

**PETER CHAPMAN IR 100A**

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

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

In advance of the Commission’s first planning conference, the First Nation also prepared a summary document entitled “Peter Chapman/Cumberland 100 A: Legal Submissions” which, Canada argues, raised for the first time a claim regarding unalienated mineral rights (hereinafter referred to as the “minerals issue”) thereby raising a “new claim” not previously reviewed or rejected by the Minister and therefore not properly before the Commission.
The First Nation argues that, in its original submission, it made arguments that the Crown “breached its statutory, treaty, trust and fiduciary duties in the taking of a surrender and for Canada to now distinguish various sub-issues which may or may not have been considered in the rejection and characterize them as “substantively new claims” is engaging in legalistic and specious argument based on a narrow and restrictive interpretation of the Commission’s mandate.”

ISSUE

The Order in Council establishing this Commission provides:

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

(a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister.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. Bibeault² 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

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

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

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.” 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 Carole T. Corcoran Elijah Harper
Commission Co-Chair Commissioner 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.
This report 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

Treaties Referred To
*Treaty 6.*

Counsel, Parties, Intervenors
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

Dear Sirs:


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 paylist 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 paylist analysis, land quality and lands occupied prior to treaty. The Panel is of course open to receiving Canada’s submission on paylist 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

GOVERNMENT OF CANADA'S RESPONSE TO JAMES SMITH CREE NATION: TLE CLAIM – LAND QUALITY AND LANDS OCCUPIED PRIOR TO TREATY

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.

.../2
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
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,
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,
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
APPENDIX E

CHRONOLOGY

JAMES SMITH CREE NATION: TREATY LAND ENTITLEMENT INQUIRY

1 Planning conferences

Saskatoon, September 20–21, 1999
Ottawa, November 9–10, 1999
Ottawa, October 24–25, 2000
Saskatoon, December 5–6, 2000
Ottawa, January 10–11, 2001
Melfort, SK, June 5–6, 2001
Prince Albert, November 21, 2001
Ottawa, May 16–17, 2002

2 Community sessions

James Smith Cree Nation, June 27–28, 2001
The Commission heard evidence from Jim Brittain, Charlotte Brittain, Robert Constant, George Whitehead, Walter Sanderson, and Violet Sanderson.

James Smith Cree Nation, October 29–30, 2002
The Commission heard evidence from Chief Walter Constant, Mervin Burns, Isaac Daniels, Osborne Turner, Art Turner, Chief Sol Sanderson, Wilfred Constant, Louisa Moostoos, and Oliver Constant.

3 Expert witness session

Ottawa, June 10, 2003
The Commission heard evidence from William P. Marion.

4 Interim rulings

James Smith Cree Nation: Treaty Land Entitlement and Cumberland 100A Reserve Inquiries – Interim Ruling, May 2, 2000

5 Written legal submissions

Mandate challenge

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

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, 2006
- Reply Submissions on Behalf of the James Smith Cree Nation, June 11, 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.
Chief Commissioner Renée Dupuis has had a private law practice in Quebec City since 1973 where she specializes in the areas of Aboriginal peoples, human rights, and administrative law. Since 1972, she has served as legal advisor to a number of First Nations and Aboriginal groups in her home province, including the Indians of Quebec Association, the Assembly of First Nations for Quebec and Labrador, and the Attikamek and the Innu-Montagnais First Nations, representing them in their land claims negotiations with the federal, Quebec, and Newfoundland governments and in constitutional negotiations. From 1989 to 1995, Madame Dupuis served two terms as commissioner of the Canadian Human Rights Commission, and she is chair of the Barreau du Québec’s committee on law relating to Aboriginal peoples. She has served as consultant to various federal and provincial government agencies, authored numerous books and articles, and lectured extensively on administrative law, human rights, and Aboriginal rights. She is the recipient of the 2001 Award of the Fondation du Barreau du Québec for her book *Le statut juridique des peuples autochtones en droit canadien* (Carswell), the 2001 Governor General’s Literary Award for Non-fiction for her book *Quel Canada pour les Autochtones?* (published in English by James Lorimer & Company Publishers under the title *Justice for Canada’s Aboriginal Peoples*), and the YWCA’s Women of Excellence Award 2002 for her contribution to the advancement of women’s issues. In June 2004, the Barreau du Québec bestowed on her the Christine Tourigny Merit Award for her contribution to the promotion of legal knowledge, particularly in the field of Aboriginal rights. She was appointed a Member of the Order of Canada in 2005. She was one of the first recipients of the *Advocatus emeritus* award, created by the Quebec Bar in 2007. Madame Dupuis is a graduate in law from the Université Laval and holds a master’s degree in public administration from the École nationale d’administration publique. She was appointed Commissioner of the Indian Claims Commission on March 28, 2001, and Chief Commissioner on June 10, 2003.
Daniel J. Bellegarde is a member of the Little Black Bear First Nation in southern Saskatchewan. Educated at the Qu’Appelle Indian Residential School and the University of Regina’s Faculty of Administration, he has also received specialty training at various universities and professional development institutions. Mr Bellegarde has held several senior positions with First Nations organizations, including socio-economic planner for the Meadow Lake Tribal Council and president of the Saskatchewan Indian Institute of Technologies. He was first Vice-Chief of the Federation of Saskatchewan Indian Nations, holding the treaty land entitlement and specific claims portfolio, as well as the gaming, justice, international affairs and self-government portfolios. He is currently the president and senior governance coordinator of the Treaty 4 Governance Institute, an organization mandated to work with Treaty 4 First Nations to develop and implement appropriate governance processes and structures. He has served on various boards and committees at the community, provincial, and national levels, including the Canadian Executive Service Organization. Mr Bellegarde was appointed Commissioner of the Indian Claims Commission on July 27, 1992, and continues to serve in this capacity. He also served as Co-Chair of the Commission from 1994 to 2000.

Jane Dickson-Gilmore is an associate professor in the Law Department at Carleton University, where she teaches such subjects as Aboriginal community and restorative justice, as well as conflict resolution. Active in First Nations communities, she serves as an advisor for the Oujé-Bougoumou Cree First Nation Community Justice Project and makes presentations to schools on Aboriginal culture, history, and politics. In the past, she provided expert advice to the Smithsonian Institution – National Museum of the Indian on Kahnawake Mohawks. Ms Dickson-Gilmore has also been called upon to present before the Standing Committee of Justice and Human Rights and has been an expert witness in proceedings before the Federal Court and the Canadian Human Rights Commission. A published author and winner of numerous academic awards, she graduated from the London School of Economics with a PhD in law and holds a BA and MA in criminology from Simon Fraser University. Ms Dickson-Gilmore was appointed Commissioner of the Indian Claims Commission on October 31, 2002.
Alan C. Holman is a writer and broadcaster who grew up on Prince Edward Island. In his long journalistic career, he has been an instructor at Holland College in Charlottetown, PEI; editor-publisher of a weekly newspaper in rural PEI; a radio reporter with CBC in Inuvik, NWT; and a reporter for the Charlottetown Guardian, Windsor Star, and Ottawa Citizen. From 1980 to 1986, he was Atlantic parliamentary correspondent for CBC-TV news in Ottawa. In 1987, he was appointed parliamentary bureau chief for CBC radio news, a position he held until 1994. That same year, he left national news reporting to become principal secretary to then-PEI Premier Catherine Callbeck. He left the premier's office in 1995 to head public sector development for the PEI Department of Development. Since the fall of 2000, Mr Holman has worked as a freelance writer and broadcaster. He was educated at King's College School in Windsor, Nova Scotia, and Prince of Wales College in Charlottetown, where he makes his home. He was appointed Commissioner of the Indian Claims Commission on March 28, 2001.

Sheila G. Purdy was born and raised in Ottawa. Between 1996 and 1999, she worked as an advisor to the government of the Northwest Territories on the creation of the Nunavut territory. Between 1993 and 1996, she was senior policy advisor to the Minister of Justice and the Attorney General of Canada on matters related to the Criminal Code and Aboriginal affairs. In the early 1990s, Ms Purdy was also special advisor on Aboriginal affairs to the Leader of the Opposition. Previously, she provided legal services on environmental matters and worked as a legal aid lawyer representing victims of elder abuse. After graduating with a law degree from the University of Ottawa in 1980, Ms Purdy worked as a litigation lawyer in private practice until 1985. Her undergraduate degree is from Carleton University, Ottawa. Ms Purdy is on the executive of the Canadian Biodiversity Institute, the Advisory Council of Canadian Arctic Resources Committee, and the Women's Legal Education and Action Fund (LEAF). She was appointed Commissioner of the Indian Claims Commission on May 4, 1999.