

INDIAN CLAIMS COMMISSION

CHIPPEWAS OF THE THAMES FIRST NATION INQUIRY

CLENCH DEFALCATION CLAIM

PANEL

**Chief Commissioner Phil Fontaine
Commissioner Daniel J. Bellegarde**

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To the Indian Claims Commission
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March 2002

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PART I
INTRODUCTION

BACKGROUND TO THE CLAIM

This claim dates back some 150 years to the mid-19th century. The Chippewas of the Thames First Nation claim that moneys owed to the First Nation from the sale of surrendered lands were wrongfully appropriated around 1854 by Joseph Brant Clench, an officer with the Indian Department.¹ In 1974, some 27 years ago, the Union of Ontario Indians brought the matter of the “Clench Defalcation” (as the claim is known) to the attention of the then Minister of Indian Affairs, Judd Buchanan.² On February 21, 1975, Mr Buchanan informed Delbert Riley, the Acting Director of the Treaty Research Program for the Union of Ontario Indians, that, in light of a final release signed by the Chiefs and principal men of the Chippewas in 1906, the Government of Canada had found no basis for negotiating the claim.

On August 4, 1998, the Chippewas of the Thames First Nation (the “claimant”) passed a Band Council Resolution requesting that the Indian Claims Commission (ICC) conduct an inquiry into the rejection of the claim by Canada. Specifically, the claimant alleged that the Chippewas of the Thames had surrendered approximately 3,000 acres of reserve land to the Crown in 1834, but that the proceeds of sale from that surrender and other sales dealt with by J.B. Clench did not make their way to the Chippewas and had been the subject of a defalcation. Rather than seeking an inquiry *per se* as the Band Council Resolution authorized, however, the Chippewas of the Thames suggested to the Commission that a review of the research materials of both Canada and the claimant could assist the claimant in understanding why its claim had been rejected by Canada, and would perhaps enable the parties to decide whether mediation would be necessary or appropriate.³ This review was jointly carried out and ultimately led Canada to reconsider the rejection of the First Nation’s claim. Canada then offered to accept this claim for negotiation – an offer the First Nation has accepted.

¹ The Chippewas of Sarnia, Chippewas of Kettle and Stony Point, and Walpole Island First Nations have made similar allegations.

² Delbert Riley, A/Director of Treaty Research Program, Union of Ontario Indians, to Judd Buchanan, Minister of Indian Affairs, December 2, 1974 (ICC file 2105-8-2).

³ Jody Kochejo, Chippewas of the Thames First Nation, to Indian Claims Commission, September 22, 1997 (ICC file 2105-8-2).

In view of the parties' decision to enter into negotiations, no further steps have been taken by the Commission to inquire into the First Nation's claim. We make no findings of fact. This report, which contains a brief summary of the First Nation's claim and the chronology of events leading up to Canada's decision, is simply meant to advise the public that the claim has been accepted for negotiation under the Specific Claims Policy.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Indian Specific Claims Commission was established through a federal Order in Council dated July 15, 1991, as an interim body intended to assist First Nations and Canada in resolving specific claims. The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. It directs

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 upon:

- (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
- (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.⁴

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development (DIAND) entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.⁵ In considering a specific claim, the Commission must make its assessment within the guidelines provided in *Outstanding Business*:

⁴ Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

⁵ Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994], 1 ICCP 171-85 (hereafter *Outstanding Business*).

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.

...

In addition to the foregoing, the government is prepared to acknowledge claims which are 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.⁶

At the request of a First Nation, the Commission can conduct an inquiry into a specific rejected claim. Although the Commission has no authority to force acceptance of a claim rejected by the government, it can review the claim and the reasons for its rejection thoroughly with the claimant and the government. As well as conducting inquiries into rejected claims and into disputes over the application of compensation criteria, the ICC is also authorized to provide mediation services at the request of the parties to a specific claim to assist them in reaching an agreement.

⁶ *Outstanding Business*, 20, reprinted in [1994], 1 ICCP 171 at 179–80.

PART II

THE INQUIRY

The Commissioners' terms of reference enable them to choose how to proceed in carrying out their duties. Following the receipt of a claim, the Commission requests all of Canada's documents and produces a claim assessment report. A planning conference is scheduled, and timelines may be required of all parties to ensure a timely process.

During a planning conference, representatives of the parties, including their legal counsel, meet with Commission representatives to review and discuss the claim, identify outstanding issues, and plan how to proceed. Further timelines are generally agreed to by the parties during the planning conference relating to, for example, the exchange of information, clarification of positions, and completion of research.

On August 25, 1998, the ICC advised the Specific Claims Branch of DIAND that the Chippewas of the Thames First Nation had requested an inquiry. The ICC asked that Canada transfer copies of all documents in its custody and control relating to the assessment of the claim.⁷ A planning conference was scheduled, and representatives of the parties were informed that the main objectives of the conference would be to define the scope of the inquiry accurately, as well as to discuss the issues and, where possible, to narrow them.⁸

The first planning conference was held on December 14, 1998. At that time, the parties agreed that their first step would be to conduct joint research on the specific issues relating to the Clench Defalcation. Among other things, the parties agreed that a second planning conference would be held in February 1999.⁹

⁷ Ron S. Maurice, Commission Counsel, ICC, to Paul Cuillerier, Director General, Specific Claims, August 25, 1998 (ICC file 2105-8-2).

⁸ Ralph Keesickquayash, ICC, to Paul Williams, Counsel for the Chippewas of the Thames, and Robert Winogron, DIAND Legal Services, October 20, 1998 (ICC file 2105-8-2).

⁹ Ralph Keesickquayash, ICC, to Paul Williams, Counsel for the Chippewas of the Thames, and Robert Winogron, DIAND Legal Services, November 16, 1998 (ICC file 2105-8-2).

Robert F. Reid, the Legal and Mediation Advisor to the ICC, chaired that second meeting.¹⁰ The parties agreed that Joan Holmes and Associates, an historical research firm located in Ottawa, would be approached to conduct joint research. Further conference calls were held on April 16, and June 28, 1999, to finalize the terms of the Holmes research project, as well as to update the status of other commitments made by the parties during the first two planning conferences. In April, at the request of the parties, the ICC agreed to monitor the joint research to ensure its independence and compliance with the terms of reference and timelines agreed to by the parties.

An interim historical research report was completed by Joan Holmes and Associates on October 4, 1999. At a third planning conference held on October 18, 1999, at the Commission offices, the parties indicated they were generally satisfied with the progress made. Having reviewed the new research, the claimant restated its claim.¹¹ A fourth planning conference was held in December 1999 at which the parties agreed to consider the suitability of the Holmes Report as an agreed statement of facts for purposes of an inquiry.

Following the fourth planning conference, the claimant provided a written submission to Canada on February 7, 2000, outlining its legal position. At a fifth planning conference, held on February 29, 2000, in Ottawa, Canada agreed it would review the claim and submissions made by the First Nation and would respond with its own position and potential list of issues by April 14, 2000. From that point forward, however, the progress of the claim began to stall.

On April 13, 2000, Canada advised that, with the agreement of the parties, Canada would not provide a position at that time.¹² During a teleconference with the parties on April 28, 2000, the legal

¹⁰ In light of interests claimed by other First Nations, observers were invited to attend the second planning conference; those present included representatives from the Chippewas of Kettle and Stony Point and the Walpole Island First Nation.

¹¹ It alleged, among other things, that the Chippewas of the Thames had been compelled to hire its own lawyer in 1885 to recover moneys owed but had been forced to abandon court action in 1893 when the Crown refused to permit them to use their trust funds for litigation. Thus, in addition to a claim that the Chippewas of the Thames were entitled to an accounting and recovery of moneys owed as a result of the “Clench Defalcation,” the claimants alleged that they had been compelled to accept an unconscionably small settlement of the moneys owing to them and that the settlement and release obtained by the Crown in 1906 represented “an unfair taking advantage by a fiduciary,” Restatement of Claim, Chippewas of the Thames, November 15, 1999.

¹² Robert Winogron, DIAND Legal Services, to Paul Williams, Counsel for the Chippewas of the Thames, and Ralph Keesickquayash, ICC, April 13, 2000 (ICC file 2105-8-2).

counsel for DIAND advised that he was turning the file over to another lawyer. In May 2000, DIAND's new lawyer told the ICC that she had completed her opinion and that the matter would be dealt with internally no later than June 29, 2000, with a negotiator to be appointed sometime in August or September 2000. Counsel for the claimant agreed to this timetable, provided Canada's commitments were kept.¹³

In September 2000, DIAND advised the ICC that the Clench matter would not be reviewed by the Claims Advisory Committee until mid-October 2000.¹⁴ Later, DIAND counsel informed the parties and the ICC that the review had finally been conducted on October 26, 2000, but that the file had been returned to her for further work because of a "supplementary issue." Unfortunately, no explanation was provided as to what the new issue was or what further work might be involved. In reference to these developments, the claimant expressed concern that new research was being done independently by one party in response to what had been a joint research report.

DIAND informed the Commission that Canada's formal response to the claim would be provided by the end of February 2001. In March 2001, with no further progress made, the ICC requested a meeting of the parties so that Canada could update the First Nation and the ICC as to the status of the file.¹⁵ At that meeting, held on March 26, 2001, Canada indicated that the primary reason for the ongoing delay was a request from the minister's office for further information concerning the claim, which required additional research to be done. As well, Canada informed the ICC and the claimant that the analyst responsible for the file and another official with DIAND who had been working on the file had moved on to other positions, causing further delay.

In April 2001, with no position yet forthcoming from Canada, the First Nation indicated it was considering requesting an inquiry into the claim. At a meeting held on May 14, 2001, the First Nation again expressed frustration at the delays caused by the turnovers in government personnel.

¹³ Paul Williams, Counsel for the Chippewas of the Thames, to Ralph Brant, Director of Mediation, ICC, May 18, 2000 (ICC file 2105-8-2).

¹⁴ Letter confirming conversation with Ralph Brant, Paul Williams, Counsel for the Chippewas of the Thames, to Ralph Brant, Director of Mediation, ICC, September 20, 2000 (ICC file 2105-8-2).

¹⁵ Chris Angeconeb, Associate Legal Counsel, ICC, to Paul Williams, Counsel for the Chippewas of the Thames, and Michelle Brass, DIAND Legal Services, March 15, 2001 (ICC file 2105-8-2).

A further planning conference, tentatively scheduled for June 18, 2001, was cancelled in light of the apparent lack of progress on the claim. However, on the day the planning conference was to have been held, the Minister of Indian Affairs wrote to Chief Joe Miskokomon of the Chippewas of the Thames First Nation to inform him that Canada had accepted the claim for negotiation. On June 26, 2001, Barry Dewar, the Acting Assistant Deputy Minister of Claims and Indian Government with DIAND, wrote to Chief Miskokomon confirming the terms of Canada's offer to negotiate the claim.¹⁶

The Commission is extremely pleased that Canada has agreed to negotiate this longstanding claim and that the mediative processes and joint research resulting from the planning conferences ultimately contributed to Canada's decision. At the same time, we think it unfortunate that the resolution of the claim was delayed for as long as it was once the claim entered ICC processes.

It is reasonable for some delays in scheduling to take place in the progress of a claim. Although these are often frustrating for the claimant, they are to be expected given the many participants in a claims process and the need to coordinate schedules and internal reviews. As well, turnovers within a large government department are perhaps inevitable. In this instance, however, the many internal review stages within DIAND, combined with changes in personnel, meant that Crown representatives failed to meet commitments they had agreed to in the planning conferences. Needless to say, this situation was a source of considerable frustration for the claimant and placed counsel for DIAND in the uncomfortable position of having to explain why the department had made commitments, both during and before her tenure on the file, which it proved unable to meet.

As a result of the many delays, as well as the limited information Canada provided as to why they were occasioned, a process which the claimant had entered in the express hope that it would avoid the need for an inquiry very nearly culminated in one. Although the outcome was ultimately satisfactory, we can only emphasize that the effectiveness of the planning conference and mediation process depends on parties keeping their commitments within the agreed timelines.

In light of Canada's acceptance of the claim, the Commission has suspended further action on it, although we anticipate continuing involvement in our mediative role. A summary of the

¹⁶ Barry Dewar, DIAND, to Chief Joe Miskokomon, Chippewas of the Thames, June 26, 2001 (see Appendix C).

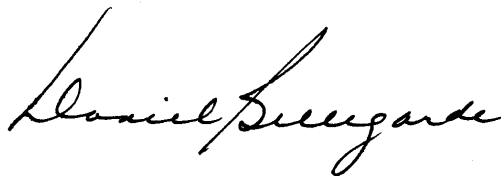
planning conferences and the balance of the record is set forth as Appendix A of this report. Because no inquiry was conducted, the Commission has not conducted any research or reviewed the research report and materials prepared by Joan Holmes and Associates for accuracy or completeness. For the same reason, the Commission has made no findings of fact. We have, however, for the purposes of providing background to the claim, attached a copy of the executive summary of the Holmes Report, which was reviewed and approved by the parties, as Appendix B to our report.

Canada's letters of acceptance of the claim are appended as Appendix C to our report.

FOR THE INDIAN CLAIMS COMMISSION



Phil Fontaine
Chief Commissioner



Daniel J. Bellegarde
Commissioner

Dated this 27th day of March, 2002.

APPENDIX A

CHIPPEWAS OF THE THAMES FIRST NATION INQUIRY – CLENCH DEFALCATION CLAIM

1 Planning conferences

The Commission held six planning conferences:

December 14, 1998
February 12, 1999
October 18, 1999
December 10, 1999
February 29, 2000
March 26, 2001

2 Content of formal record

The formal record for the Chippewas of the Thames Clench Defalcation Claim consists of the following materials:

- “Chippewas of the Thames: Report on the J.B. Clench Defalcation,” prepared by Joan Holmes and Associates for the Chippewas of the Thames and the Department of Indian and Northern Affairs, revised February 2000
- Document Index, Joan Holmes and Associates, December 1999, together with the following: Map Index, List of Records Researched, Documents 1-306, Collection of Maps

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

APPENDIX B

CHIPPEWAS OF THE THAMES – REPORT ON THE J.B. CLENCH DEFALCATION*

CLENCH DEFALCATION – EXECUTIVE SUMMARY

This report contains all the known information on the loss of Indian moneys that were under the administration of Indian Superintendent J.B. Clench. Known as the Clench Defalcation, this misappropriation of funds was investigated and acknowledged by Crown officials.

Part of the misappropriated funds were payable to the Chippewas of the Thames for lands sold pursuant to an 1834 surrender of Lots 10-16 in Ranges 2, 3 and 4 Caradoc Township (Surrender #37). These lands had been set aside for the Chippewas of the Thames according to an 1822 Treaty (Treaty #25).

In 1845 J.B. Clench was appointed agent for the sale of Indian lands belonging to several First Nations in southern Ontario, including the Chippewas of the Thames. In 1846 Clench secured his position with a bond agreement and three bonds: his own £1000 bond, a £500 bond from W. H. Cornish, and a £500 bond from Dennis O'Brien. Before Clench assumed responsibility for managing the Chippewa land sales, the sale and collection of money had been administered by the Crown Lands Department.

In 1854, the Governor General ordered an investigation into Clench's management of land sales, after receiving complaints regarding his handling of some particular transactions.

Accountant Thomas Worthington and Deputy Receiver General Anderson examined Clench's accounts and declared them "almost useless." They also reported that at that time Clench was confined to his bed by poor health and his mental processes were diminished. In their final report, Worthington and Anderson determined that Clench owed a total of £7577.8.11 (\$30,308) (exclusive of interest and deduction of agent's fees). Of this amount, £1109.13.3 (\$4,437) was missing from the sale of lands surrendered in 1834 by the Chippewas of the Thames.

Upon receiving Worthington and Anderson's report in October 1854, the Governor General dismissed Clench from his office as Superintendent and Land Agent and directed the Attorney General, John A. Macdonald, to initiate legal proceedings against Clench and his sureties (O'Brien and the Cornish heirs) and to obtain an injunction against the estates and property of Mrs. Serena Clench and their son Leon Moses Clench.

According to known historical information the following actions were taken to recover the misappropriated money.

* Report prepared by Joan Holmes & Associates, Inc., for the Chippewas of the Thames and Indian and Northern Affairs Canada, revised February 2000. This summary is reproduced exactly as it was approved by the parties.

– The Attorney General retained S. Richards as an Agent, who initiated proceedings in the Court of Chancery in Toronto in 1855. The investigation of Worthington and Anderson was considered by the Court which found that there was sufficient evidence against Col. J.B. Clench, his wife Serena J. Clench, and their son Leon Moses Clench to file *lis pendens* against their properties. *Lis pendens* were filed against their known properties in July 1855.

A second court proceeding was held in August 1855 when it was determined that family members owned additional properties that were being held by trustees J.E. Small and J. Prince. A second *lis pendens* was filed for the additional lands.

A *Writ of Extent* was issued against J.B., Serena and Leon Moses Clench for their property. Serena and Leon Moses Clench and the two trustees disputed their complicity in any default, while J.B. Clench signed an indenture releasing to the Queen any interest he might have in a group of properties.

These properties under *lis pendens* and surrendered by J.B. Clench were valued by Worthington at a total of approximately £5950 (\$23,800).

A letter from S. Richards states that Attorney General John A. Macdonald instructed him sometime in 1855 not to pursue the recovery of the bonds posted by Clench and his two sureties. Despite an extensive search, no instructions to this effect could be located.

– Sometime between January 1856 and April 1857, the Agent S. Richards recovered approximately £600, by having some of Clench's personal property seized by the Sheriff. No further action was taken to seize any other assets. The properties under *lis pendens* continued to be occupied, rented, and mortgages were paid, lands divided and sold. J.B. Clench died insolvent in February 1857.

– In 1880 a solicitor for the Department of Indian Affairs gave his opinion that the Crown did not hold clear title to the properties as no proceedings were taken under the *Writ of Extent* to determine if the properties were indeed purchased with the misappropriated funds.

Richard Bayly was retained by the Department of Justice to investigate. He opined that the *lis pendens* could be revived but was doubtful that the Crown could prove that the lands had been purchased with the misappropriated land sales money. Based on Bayly's 1882 report the Deputy Minister of Justice recommended against reviving the 1855 court proceedings and the Deputy Minister of Indian Affairs concurred.

– In 1885 the Chippewas of the Thames retained D. Macmillan to obtain information on the collection of land sales money. The Department indicated that the Carey Sale (\$1,260) had not been accounted for by Clench. The Chippewas of the Thames retained another lawyer, William Gordon, the following year and were informed that the matter of the Clench defalcation was being investigated.

William Scott of the Indian Department was instructed to investigate the status of the Clench account. He reported in 1888 that the entries in the suspense account were somewhat difficult to follow, that the opening balance of \$743.40 was unexplained and that charges against the account had been made to pay Chancery costs leaving a balance of \$614.40 in 1860, which collected interest from 1865. A payment of \$258 was made to the Wyandots in 1874 otherwise the only activity in the account was the accumulation of interest.

– In 1888 the matter was again referred to the Department of Justice, at which time the Deputy Superintendent General of Indian Affairs took the position that recovery of the capital and interest should be a claim against the old province. The case was one of many in arbitration between the Dominion and the Old Province.

During this period, efforts by the Clench family and heirs to have *lis pendens* lifted were rejected under advice from the Department of Justice who feared that it would prejudice the claim of the Dominion against the Old Province.

– While the matter of the Clench Defalcation was being reviewed by the Board of Arbitrators, Chief John Henry of the Chippewas of the Thames was pressing the Department for settlement of their claims for lost lands sales money. Consequently, their lawyer A.G. Chisholm filed a writ in the Exchequer Court in May 1893 seeking satisfaction for funds related to the sale of the Carey lands (\$1,260) and other money being the Chippewas' share of the misappropriated Clench funds (approx. £1005.13.2 or \$4,021) with interest as well as a claim related to Muncey occupation of the Caradoc Reserve.

The Superintendent General considered Chisholm's Petition of Right recommending in January 1894 that while the issues related to the Clench defalcation could not be dealt with while the matter was before the Board of Arbitrators, the government should settle the Muncey trespass matter by agreeing to a settlement of \$16,000 and 500 acres of land. This memorandum was not approved by the Privy Council, however, two years later a settlement was finally made for \$17,640 by an Order-in-Council dated April 28, 1896. This O.C. explained that the Department of Justice had referred the Petition of Right to the Lieutenant Governors of Ontario and Quebec asking if a fiat should be granted. As they declined to offer an opinion, the Minister of Justice decided that a fiat could not be properly withheld if a settlement was not reached. As the settlement was reached in April 1896, the case never went before the court.¹

According to the Deputy Superintendent General, a fiat was issued in March 1895 allowing the Clench issues to be taken before the Exchequer Court.

¹ There is some correspondence related to the payment of a \$5,000 fee to Chisholm for his work on this settlement. It is interesting in terms of information related to Chisholm's relationship to Chippewas of the Thames, his dedication in achieving settlement of their claims, and the discouragement the First Nation experienced in trying to obtain justice.

– The Dominion’s case was submitted to the Board of Arbitrators in April 1895 and Ontario made its reply the following May. It was determined that Clench was an officer of the Imperial Government and that the Dominion had no further case against the Province of Ontario. The Acting Deputy Minister of Justice reasoned that the *lis pendens* could now be discharged and that the Imperial Government could be approached to settle the claim.

The Deputy Superintendent General then recommended either presenting the claim to the Imperial Government or appealing to the Dominion to make a settlement “as a matter of grace to these wards of the Crown.”

– Subsequently in November 1896, Chisholm offered to settle the Clench defalcation claim for \$13,000. The offer was made on a “without prejudice basis” as the matter was in the Exchequer Court. The Chippewas of the Thames approved of the proposed settlement; however, the Department would not settle and the Deputy Superintendent recommended that the matter be settled in the Exchequer Court. The Crown did not believe they could recover the funds from the Imperial Government citing other failed attempts and the lapse of time. Correspondence between the Department, Chippewas of the Thames and Chisholm indicates that the Band and their lawyer believed that an agreement had been made while the Department did not.

During this period the Department of Indian Affairs was disputing the payment of Chisholm’s accounts for services to the Chippewas of the Thames, finally ordering in May 1899 that no payments should be made to him without the express consent of the Superintendent or Deputy Superintendent.

Upon having the proposed \$13,000 settlement refused Chisholm declared that he would advise his clients to “apply to the court to fix a time for the trial of this action without more delay.” In October 1899 Chisholm was informed that the Department would not authorize the disbursal of any more funds belonging to the Chippewas of the Thames for the purpose of proceeding to trial.

The Superintendent General was advised by his private secretary, J.A.J. McKenna, that in his opinion the facts of the Clench defalcation justified bringing the case to court but questioned the fairness of the Chippewas paying all of the legal costs.

While Chisholm prepared to go to trial by requesting documents for examination for discovery, the Department of Justice gave an opinion on the items which had been raised in Chisholm’s Petition of Right. The Deputy Minister stated that the mortgage money that had been collected on one of the Clench properties should be paid to the interested bands with interest accrued from the time of payment, that the government could demand the unpaid balance owing on the mortgage, the petition of right could be amended as only part had been settled (i.e. the Munsey issue), and that settlement was a good option. Furthermore, he stated that it was the duty of the Department to ensure that Band funds were not spent in useless litigation.

Consequently in March 1900, an offer was made to settle the claim by distributing the funds in the Clench deficit account which amounted to \$2,165.94. Chisholm refused that offer and the Chippewas of the Thames instructed Chisholm to pursue the claim in the courts in May 1900.

In 1905 Deputy Superintendent Pedley ordered that money due on the “Agassiz mortgage,” one of the Clench properties be collected at once. This instruction was issued in the context of a request to discharge an outstanding mortgage on one of the Clench properties.

– In 1906 Chisholm met with Deputy Superintendent Pedley and agreed that the balance of the Clench account should be paid to the interested bands. Chisholm had already obtained the concurrence of M.K. Cowan, MP, who was working on behalf of the Wyandots. Chisholm undertook to communicate with and obtain releases from the Wyandots and the Chippewas of Sarnia as well as his own clients. The amount to be paid in the settlement was \$7,355.67, (\$4,731.19 realized from a Clench mortgage plus \$2,624.48 in the Clench fund).

The release of demands was signed by representatives of the three bands and submitted to Pedley in March 1906. The \$7,355.67 was to be divided in proportion to their interest in the original defalcation.

The Memorandum to Council described the case and recommended that the money realized from the payment on the Clench mortgage be disbursed from consolidated revenue and together with the Clench fund, the total amount of \$7,355.67 be distributed to the interested bands. The Superintendent General also recommended that Chisholm be paid a \$500 fee for his work out of the available funds in addition to his regular costs. The O.C. approved the payments to the Bands, but did not mention the fee to Chisholm.

Chisholm’s ordinary legal costs were paid out of the fund for a total of \$377.58 (302.58 + 75.00). He later received the \$500.

The available funds were distributed as follows:

First Nation	Original Owing	Proportion	Settlement	Proportion
Chippewas of the Thames	\$ 5,282.64	18%	\$ 1,189.51	17.7%
Wyandots of Anderdon	\$ 17,738.98	61%	\$ 4,185.07	62.1%
Chippewas of Sarnia	\$ 6,056.94	21%	\$ 1,363.87	20.2%
Total	\$ 29,078.56	100%	\$ 6,738.45	100%

APPENDIX C

GOVERNMENT OF CANADA'S OFFER TO ACCEPT CLAIM



Indian and Northern
Affairs Canada

Assistant Deputy Minister

Ottawa, Canada
K1A 0H4

Affaires indiennes
et du Nord Canada

Sous-ministre adjoint

WITHOUT PREJUDICE

JUN 26 2001

Chief Joe Miskokomon
Chippewas of the Thames First Nation
R.R. 1
MUNCEY ON N0L 1Y0

Dear Chief Miskokomon:

On June 18, 2001, the Honourable Robert D. Nault, Minister of Indian and Northern Affairs, wrote to inform you of Canada's acceptance for negotiation of the Clench defalcation claim. I am now writing to provide you with details of the acceptance of the Chippewas of the Thames specific claim to the Clench defalcation.

Canada's position is considered to be preliminary and we will consider any additional evidence or arguments you may wish to present before a final position is taken. For the purpose of the preliminary position, this office has reviewed the following materials:

1. Joan Holmes report " Chippewas of the Thames First Nation - Clench Defalcation", dated February 2000.
2. Letter from Paul Williams to Ralph Keesickquayash and Robert Winogron, dated February 7, 2000, detailing the legal analysis of the Clench Defalcation Claim by the Chippewas of the Thames.
3. Letter from Paul Williams to Ralph Keesickquayash and Robert Winogron, dated February 15, 2000, including summary of "The Legal Fees of Andrew Chisholm".
4. Letter from the Honourable Judd Buchanan to Delbert Riley, dated February 21, 1975 rejecting the Clench defalcation claim.
5. Claim Submission, dated November 22, 1974 entitled, "Final Report: The Clench Defalcation Case- Why Proceedings Should be Revived".

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6. Letter from Delbert Riley to Irwin Goodleaf, dated October 24, 1974 with attached paper entitled, "A Brief History fo the Clench Defalcation Case".

These materials have also been reviewed by the Department of Justice.

The Claim of the Chippewas of the Thames

In brief, the Chippewas of the Thames contend the following:

- Issue 1: Clench was an agent for the Crown in his dealings with the Chippewas of the Thames and that Canada is liable for the defalcation by Clench.
- Issue 2: The Crown had a fiduciary obligation, under the terms of the 1834 surrender, to prudently sell the land, collect the money and manage the proceeds.
- Issue 3: The Chippewas of the Thames were deliberately deprived by the Crown's action of remedies that would have been available to other people in Canada in similar circumstances. The Crown used its control of band funds to prevent the Chippewas of the Thames from going to court.
- Issue 4: The Crown took undue advantage of its position and derived an immoderate benefit from the 1906 settlement. Combined with issue 3 above, these actions are sufficient that a court would set aside the 1906 settlement.
- Issue 5: The Crown conducted miscellaneous failures and breaches with respect to the handling of the Clench affair.

Summary

The preliminary position of Canada is that the Chippewas of the Thames claim regarding the Clench defalcation should be accepted for negotiation under the Specific Claims Policy. The Policy states that:

- A lawful obligation may arise in any of the following circumstances:
- (i) the non-fulfilment of a treaty or agreement between Indians and the Crown.
 - (ii) a breach of an obligation arising out of government administration of Indian funds or other assets.

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Moreover, the Government of Canada is prepared to acknowledge claims beyond a lawful obligation which are based on the following circumstances:

(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.

Canada's Preliminary Position

Issue 1: Clench was an agent for the Crown in his dealings with the Chippewas of the Thames and that Canada is liable for the defalcation by Clench.

Canada's preliminary position is that Clench's conduct amounts to fraud in his managing of the land sales of the Caradoc reserve. The Specific Claims policy allows the negotiation of such claims under the "beyond lawful obligation" category.

Issue 2: The Crown had a fiduciary obligation, under the terms of the 1834 surrender, to prudently sell the land, collect the money and manage the proceeds.

Our review of the Holmes report indicates that the Crown failed to fulfill the terms and conditions of the surrender of 1834. The terms were not fulfilled as a result of Clench's questionable administration of reserve land sales money. Although the Crown took some steps to recoup some of the missing funds by assuming some of Clench's mortgages and getting a *lis pendens* against one of his properties, it did not go far enough in trying to liquidate the assets and repay the money.

Issues 3 and 4: The Chippewas of the Thames were deliberately deprived by the Crown's action of remedies that would have been available to other people in Canada in similar circumstances. The Crown used its control of band funds to prevent the Chippewas of the Thames from going to court.

The Crown took undue advantage of its position and derived an immoderate benefit from the 1906 settlement. Combined with item 3 above, these actions are sufficient that a court would set aside the 1906 settlement.

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It is Canada's preliminary position that the 1906 release cannot be defended as fair and reasonable in the circumstances under which it was obtained from the Chippewas of the Thames First Nation. Canada will not rely on the 1906 release to avoid its lawful obligations except insofar as the settlement amount in the 1906 release will be considered an "offset" against the final settlement of this claim.

Issue 5: The Crown conducted miscellaneous failures and breaches with respect to the handling of the Clench affair.

In light of recognition by Canada of an outstanding lawful obligation, issue 5 has not been considered in any depth. To the extent that these might have been alternative arguments, they may no longer be relevant to the consideration of the claim. However, Canada is prepared to consider any further submissions the Chippewas of the Thames may wish to make on these points and give further consideration to any impact they may have on the claims acceptance.

Compensation

Should the Chippewas of the Thames First Nation agree to enter negotiations with Canada, settlement negotiation would be guided by compensation criteria 1 and 9 of the Specific Claims Policy. These criteria state that:

1. As a general rule, a claimant band shall be compensated for the loss it has incurred as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.
9. Any compensation paid in respect to a claim shall take into account any previous expenditures already paid to the claimant in respect to the same claim.

If any other criterion is found to be applicable, this will be raised in the negotiations.

Negotiations

The steps of the process for the negotiation of Specific Claims settlements are as follows: agreement on a joint negotiating protocol, development of a settlement agreement, conclusion of the agreement, ratification of the

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agreement, and finally, the implementation of the agreement. Throughout the process, all government files, including documents submitted to the Government of Canada concerning the claim, are subject to the Access to Information and Privacy legislation in force.

All negotiations are conducted on a "without prejudice" basis. Canada and the First Nation will acknowledge that all communications, oral, written, formal or informal, are made to encourage settlement of the dispute between the parties only and are not intended and will not be used to constitute admissions of fact or liability by any party. Technical defences such as limitations periods, strict rules of evidence, or the doctrine of laches, have not been considered in our review of this claim. In the event that this matter becomes the subject of litigation, Canada reserves the right to plead these and other defences available to it. Should the matter again become the subject of an inquiry by the Indian Specific Claims Commission (ISCC), Canada reserves the right to raise new issues and make new arguments.

If a final settlement agreement is reached, Canada will require from the First Nation a final and formal release on every aspect of this claim, ensuring that the claim cannot be reopened by the Chippewas of the Thames.

Canada also has concerns related to the history of the various Chippewas bands in Southwestern Ontario. Additional research may be required during the negotiation phase of this claim. Canada will require an indemnity from the Chippewas of the Thames First Nation from other First Nations that may have a potential interest in the events giving rise to claim, as well as a warranty in which the Chippewas of the Thames First Nation warrants that is the proper beneficiary to any settlement reached on this claim.

Canada will also require that the Chippewas of the Thames First Nation provide a Certificate of Independent Legal Advice.

Please note that Ms. Mary Hyde of the Specific Claims Branch and Ms. Michelle Brass of the Department of Justice would be pleased to meet with the First Nation, and your legal counsel, to discuss Canada's position on this claim and the next steps to be taken in the claims process.

If the Chippewas of the Thames First Nation is prepared to proceed with negotiations on the basis outlined in this letter, please forward a Band Council Resolution signifying such to Sharman Glynn, A/Director, Negotiations Operations Directorate, DIAND Specific Claims Branch. Ms. Glynn can be reached at (819) 994-5229.

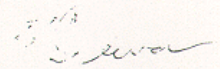
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Before you incur negotiations costs, including legal costs, I encourage you to contact Ms. Martine Larocque, A/Manager, Research Funding Division, at (819)997-0115, or by mail, at Room 1310, 10 Wellington St., Hull, Quebec, K1A 0H4, to obtain information, details and procedures for loans under the Native Claimants Loan Program.

I send my best wishes and hope that a fair settlement can be reached.

Yours sincerely,



Barry Dewar
A/Assistant Deputy Minister
Claims and Indian Government

c.c.: Mr. Ralph Brant