INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION

OF THE

CHIPPEWAS OF THE THAMES FIRST NATION

CLENCH DEFALCATION NEGOTIATIONS

August 2005

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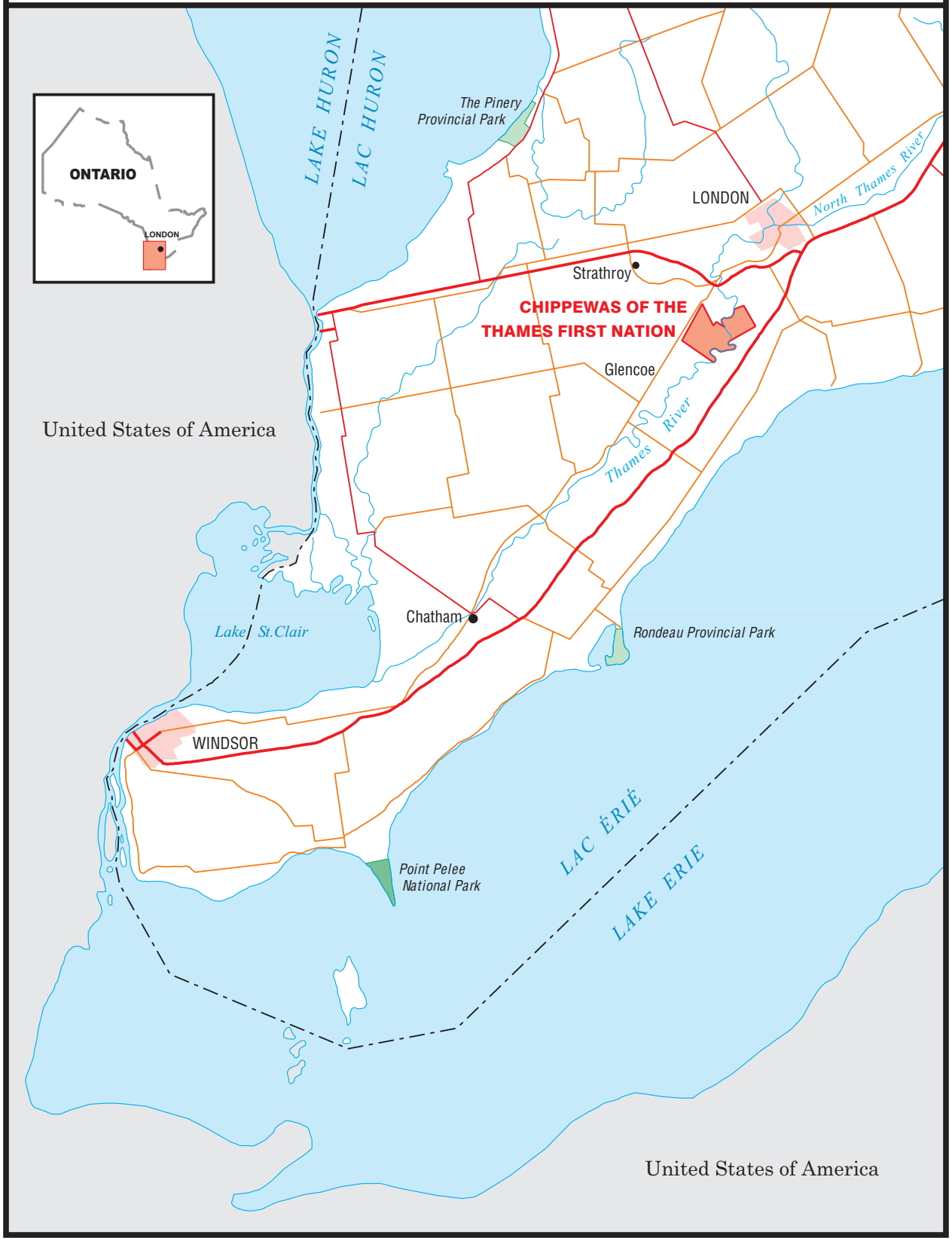
Claim Area Map



PART I
INTRODUCTION

The Chippewas of the Thames are descended from a part of the Ojibway Nation that migrated into southwestern Ontario at the beginning of the 18th century. Their land on the west bank of the Thames River, about 24 kilometres west of St Thomas and identified as Indian Reserve (IR) 42, was reserved from the area ceded to the Crown in 1819. As of May 2005, the Band had a registered population of 2,262, of whom 829 live on the reserve.[1] This report outlines how a claim advanced by the Chippewas of the Thames, based on events that occurred 150 years ago, and rejected by the Government of Canada 30 years ago, was finally resolved with the assistance of the Indian Claims Commission (ICC).

This report will not provide a full history of the Chippewas of the Thames claim. The issues involved in the Clench Defalcation and the inquiry process have been discussed by the Commission in its March 2002 publication of the report, *Chippewas of the Thames First Nation: Clench Defalcation Inquiry*.[2] This report will summarize the events leading up to the settlement of this claim and illustrate the role the Commission played in the resolution process.

The claim involved moneys owed to the First Nation from the sale of lands surrendered in 1834 – moneys that were the subject of ensuing investigations and court proceedings into the management of land sales proceeds by Joseph B. Clench, an officer of the Indian Department. In 1906, a settlement was reached with the Wyandots, the Chippewas of Sarnia, and the Chippewas of the Thames involving one of the properties Clench had purchased for himself with proceeds from the sale of Indian lands. In December 1974, the Union of Ontario Indians submitted a claim to federal Minister of Indian Affairs Judd Buchanan, stating that the 1906 settlement did not fully address the misappropriation by Clench of the moneys relating to the 1834 surrender of land belonging to the Chippewas of the Thames. In response, Canada rejected the claim on the basis that the 1906 settlement had resolved the matter.

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[1] Canada, Indian and Northern Affairs Canada (INAC), First Nation Profiles, Chippewas of the Thames, http://sdiprod2.inac.gc.ca/fnprofiles (June 1, 2005).

[2] Indian Claims Commission, *Chippewa of the Thames First Nation: Clench Defalcation Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 307.

In August 1998, the Chippewas of the Thames First Nation requested that the ICC conduct an inquiry into the rejection of its claim. Early in the inquiry process, the First Nation suggested a thorough review of the research materials, and the parties entered into a joint research project, which was monitored by ICC staff. The ICC convened six planning conferences between December 1998 and March 2001, where the parties reviewed the research and refined the issues. This work led Canada to change its position and accept the claim for negotiation. In addition, it was no longer necessary to subject the claim to the full inquiry process.

In June 2001, the First Nation was informed that its claim was accepted for negotiation on the basis that

> 1. Clench was an agent for the Crown in his dealings with the Chippewas of the Thames and ... Canada was liable for the defalcation by Clench.
> 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.
> 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.
> 4. 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 agreement.
> 5. The Crown conducted miscellaneous failures and breaches with respect to the handling of the Clench affair.[3]

Negotiations on the Clench Defalcation began in November 2001.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. Following the Commission's establishment by Order in Council on

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[3] Barry Dewar, A/Assistant Deputy Minister, Claims and Indian Government, to Chief Joe Miskokomon, Chippewas of the Thames First Nation, June 26, 2001, reproduced in ICC, *Chippewa of the Thames First Nation: Clench Defalcation Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 307at 328–29.

July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative.

The Commission's mandate is twofold: it has the authority, first, to conduct inquiries under the *Inquiries Act* into specific claims that have been rejected by Canada, and, second, to provide mediation services for claims in negotiation.

Canada distinguishes most claims into one of two categories: comprehensive and specific. Comprehensive claims are generally based on unextinguished aboriginal title and normally arise in areas of the country where no treaty exists between First Nations and the Crown. Specific claims generally involve a breach of treaty obligations or cases where the Crown's lawful obligations have otherwise been unfulfilled, such as a breach of an agreement or a dispute over obligations deriving from the *Indian Act*.

These latter claims are the focus of the Commission's work. The Commission is mandated to review thoroughly a rejected claim and the reasons for its rejection with both the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, gather information, and, if necessary, subpoena evidence. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant, it may recommend to the Minister of Indian Affairs that a claim be accepted.

In addition to conducting inquiries, the Commission is authorized to provide mediation services at the request of the parties. From its inception, the Commission has interpreted its mandate broadly and has vigorously sought to advance mediation as an alternative to the courts. In the interests of helping First Nations and Canada negotiate agreements that reconcile their competing interests in a fair, expeditious, and efficient manner, the Commission offers the parties a broad range of mediation services tailored to meet their particular goals.

PART II

A BRIEF HISTORY OF THE CLAIM[4]

Lands in Caradoc Township, in what is now southwestern Ontario, were set aside for the Chippewas of the Thames by Treaty 25 in 1822. In 1834, part of that reserve was surrendered for sale by the Crown. The money collected from the subsequent land sales was to be held in trust by the Crown on behalf of and for the benefit of the First Nation.

Initially, the sale and collection of money was administered by the Crown Lands Department. In 1845, Joseph B. Clench, the Superintendent of Indian Affairs (a position similar to that of Indian Agent) in the London and Western District, took over the responsibility for the collection of Indian land sale money in the area. He secured that position with a personal bond plus two others from W.H. Cornish and Dennis O'Brien.

In 1854, Crown officials ordered an investigation into Clench's management of land sales after receiving complaints regarding the way he handled certain transactions. It was determined that part of the money from the Caradoc land sales that had been given to Clench – an amount that the parties agree totalled $5,282.64 – was never submitted to headquarters and credited to the First Nation's trust account. Clench was immediately dismissed from his position, and the Crown made several attempts to recover the misappropriated money, including a reference to the Court of Chancery in Toronto in 1855 and a reference to the Board of Arbitrators in 1895 to seek recovery in a claim against the province of Ontario. Only a small amount of money was recovered in 1856/57 through the seizure and sale of Clench's personal property.

In 1885 and 1886, the Chippewas of the Thames retained legal counsel to inquire into the collection of the land sale money. They were informed by Indian Affairs officials that the matter of the Clench Defalcation was being investigated. Chief John Henry of the Chippewas of the Thames continued to press the department for settlement of its claims for lost land sales money. In 1893, he retained another lawyer to file a writ in the Exchequer Court and, in 1896, to make a settlement offer. The department refused to settle and, in 1899, further ordered that band funds could not be used to pursue the case in court. Canada made a counter-offer in 1900 which the First Nation refused.

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[4] The following is summarized from a report, prepared by Joan Holmes & Associates in February 2000, which is reproduced in (2002) 15 ICCP 307 at 320–25.

In 1906, the Chippewas of the Thames, perceiving that no other remedies were available, signed a release and accepted a settlement that reimbursed them for only a small portion of the missing funds (approximately $1,200), without any interest.

PART III

NEGOTIATION AND MEDIATION OF THE CLAIM

The Commission's role in settling the claim would normally have ended as soon as its inquiry was completed and the claim accepted for negotiation by Canada. In this case, however, the Chippewas of the Thames asked that the ICC remain involved in the negotiation process as a neutral facilitator, and Canada agreed. Negotiations began in November 2001.

For the most part, facilitation focused on matters relating to process. With the agreement of the negotiating parties, the Commission chaired the negotiation sessions, provided an accurate record of the discussions, followed up on undertakings, and consulted with the parties to establish mutually acceptable agendas, venues, and times for the meetings. The Commission was also available to mediate disputes when requested to do so by the parties, to assist them in arranging for further mediation, and to coordinate any research that might be undertaken by the parties to support negotiations.

Although the Commission is not at liberty to disclose the discussions during the negotiations, it can be stated that the Chippewas of the Thames and representatives of the Department of Indian Affairs and Northern Development worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at a mutually acceptable resolution of the First Nation's claim.

Elements of the negotiation included agreement by the parties on the nature of the Commission's role in the negotiations; the amount and effective date of the defalcation; beneficiary issues; appropriate interest rates; identification of damages and compensation criteria; compensation to bring forward historical losses; negotiations and ratification expenses; and, finally, settlement issues and agreements, communication, and ratification.

In this claim, there was no need for the parties to engage in the usual appraisals and loss-of-use studies required when lands are involved. Although questions about communication (both with band members and the general public) would not arise until and unless a settlement was reached, the parties began at the very beginning of the process to address these issues, discussing the requirements and ensuring that addresses of all band members were up to date.

After a series of meetings and exchanges of opinions regarding particular elements of the claim, in November 2002 Canada made an all-inclusive, global settlement offer, which was accepted by the Chippewas of the Thames the following month. The parties immediately began the lengthy process of drafting a settlement agreement, which was initialled by the Chief and Canada's negotiator in April 2004 and ratified by the First Nation in June. The final agreement, which provided $15 million in compensation to the Chippewas of the Thames, was signed by Minister of Indian Affairs Andy Scott in November 2004.

PART IV

CONCLUSION

Considering that the Chippewas of the Thames first retained legal counsel in the matter of the Clench Defalcation in 1885, it can be argued that this claim took nearly 120 years to resolve. The parties alone must get the credit for settling this claim. However, the outcome of the negotiations reflects the Indian Claims Commission's ability to advance the settlement of claims. The Commission, through its inquiry process, was able to produce movement towards validation of the claim in 2001, and, through two and a half years of negotiations, it was able to assist the First Nation and Canada in their efforts to achieve a settlement.

The parties are to be commended for their foresight in addressing communication and ratification issues from the beginning of the negotiations. Keeping band members informed of the issues and the progress of the negotiations, as well as doing the laborious work necessary to ensure that all contact information is up to date, is essential in making the ratification process run as smoothly as possible. The fact that the Chippewas of the Thames got the required "majority of a majority" on the first vote is a testament to the advance work done.

Canada and First Nations may wish to look at ways of minimizing the amount of time it currently takes to finalize settlements once an agreement is reached. In the case of the Clench Defalcation, 24 months passed between the time an offer was made and accepted to the time the settlement funds were finally transferred to the First Nation. Although the time required for finalizing settlement agreements, trust agreements, and ratification guidelines – and then moving these through the government's internal approval process – is recognized, both parties would benefit if settlement could be concluded more expeditiously.

FOR THE INDIAN CLAIMS COMMISSION

Renée Dupuis
Chief Commissioner

Dated this 2nd day of August, 2005