

THE OLIVER ACT:
A 1911 AMENDMENT TO SECTION 49 OF THE INDIAN ACT
AND THE CONSEQUENCES FOR THE KINGS ROAD RESERVE IN
SYDNEY, NOVA SCOTIA

by

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Dalhousie University is located in Mi'kma'ki, the
ancestral and unceded territory of the Mi'kmaq.
We are all Treaty people.

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Dedication

This paper is dedicated to my parents, Stella and Brian Meyrick,
my younger brother Paul (1951 – 2018), and his infant daughter Kelly (1978),
of *Aotearoa*/New Zealand. While they are no longer with us,
I have felt their love and support throughout this process
and know they would have been proud.

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Abstract

The focus of this thesis is the colonial context of events which led to the forced surrender of Kings Road reserve in Sydney, at the edge of Cape Breton Island, Nova Scotia, after Indian Affairs invoked amendment 49(a). Amendment 49(a) was passed by the House of Commons in 1911, and it removed the ‘consent to surrender’ clause from the Indian Act, making land security for urban reserves across the country much more precarious. The architect of the amendment, Frank Oliver, understood that this amendment violated treaties. The wording of the amendment was vague enough to allow it to be used to free reserve land for immigrants who were flooding into the country, to clear reserves that were seen to be impeding city growth, or to remove a reserve because white settlers did not want Indigenous neighbours. Kings Road reserve was the first to be forced to surrender their land when amendment 49(a) was invoked by the Department of Indian Affairs in Ottawa, and this set in motion a hearing of the Court of the Exchequer, which ruled in 1916 that the removal of people from their reserve on the King’s Road in Sydney, Nova Scotia, was ‘expedient.’

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I acknowledge the recommendations drawn up by the Truth and Reconciliation Commission, and I hope that this thesis will contribute in some small way to the expanding body of work that is moving toward true reconciliation.

I send my gratitude to my Dalhousie thesis advisor, Dr. Lisa Binkley, for her gentle encouragement and the scones, to my family, Janette, Karin, Trish, Linda, and Mike, who supported me from across Canada and around the world, and to my friends in Halifax who patiently listened and supported me throughout this process. There are too many of you to name here, but to each one of you I send my thanks for your endless patience and encouragement. I am truly grateful.

Chapter 1 Introduction

At the beginning of the twentieth century, Indigenous land surrenders were a frequent occurrence across Canada as the Dominion government continued to claw back reserve acreage allocations to free land for immigrant settlers who were flooding into the country. A significant number of these surrenders were in the prairie provinces, and often took place under circumstances that were dubious at best, while others were in direct breach of the Indian Act. Peggy Martin-McGuire writes that the demand for surrenders often did not come from local farmers but from speculators and politicians.¹ Officials from the Department of Indian Affairs (Indian Affairs) and other government officials used insider knowledge to buy surrendered reserve land through intermediaries.²

The winners in the battle for surrendered reserve lands tended to be land speculators, politicians, and their friends, as evidenced by the Enoch/Stony Plain surrender (1902), which saw eighty percent of surrendered land being purchased by friends of Frank Oliver, who became Minister of the Interior and Superintendent General of Indian Affairs.³ First Nations people were often unable to hold out against the duplicity and avarice of those in power, although many reserves continued to resist surrender demands, sometimes for decades, holding faith with the ‘requirement of consent’ clause of section 49 of the Indian Act. This clause clearly stated that “no release or surrender of a reserve shall be valid or binding, unless the release or surrender shall be assented to by a majority

¹ Peggy Martin-McGuire, *First Nation Land Surrenders on the Prairies, 1896-1911*, (Ottawa: Indian Claims, 1998), xxiii.

² Martin-McGuire, xiv.

³ Martin-McGuire, xxiv.

of male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose.”⁴

In 1911, the government of Canada amended section 49 of the Indian Act to provide Indian Affairs with a mechanism to force the surrender of urban reserves if they were close to towns of more than eight thousand people, and land security for reserves across the country vanished. Amendment 49(a) was known as the *Oliver Act* after its architect, Frank Oliver, who was Minister of the Interior and Superintendent General of Indian Affairs from 1905 to 1911.⁵ Oliver spearheaded the amendment to deal with the reserves he perceived were intransigent in the face of surrender requests. Oliver was a western politician who became frustrated with the government’s inability to overcome this Indigenous resistance to giving up their reserve land for settlers who were flooding into Canada. While many migrant settlers, particular immigrants from Scotland, were choosing to go to Nova Scotia, the scale of immigration to Cape Breton Island, when compared to the prairie provinces, was minor. Oliver made his views known in the House of Commons. He was scornful of the previous government’s immigration policy, which he called “a farce” and in 1906, he introduced the Immigration Act, which was steeped in an ideology “driven by cultural considerations” that valued European and British cultures and shied away from “culturally alien immigrants primarily from southeastern Europe.”⁶ The 1906 Immigration Act was designed to control immigration into Canada of persons

⁴ Gail Hinge, “Consolidation of Indian Legislation, Volume II: Indian Acts and Amendments, 1868-1975,” *Department of Indian and Northern Affairs* (January 25, 1985), 192. https://publications.gc.ca/collections/collection_2017/aanc-inac/R5-158-2-1978-eng.pdf.

⁵ Frank Oliver, “Parlinfo,” *Library of Parliament*, (n.d.).

https://lop.parl.ca/sites/ParlInfo/default/en_CA/People/Profile?personId=3614.

⁶ K. Tony Hollihan, “‘A brake upon the wheel’: Frank Oliver and the Creation of the Immigration Act of 1906.” *Past Imperfect* 1, (1992), 93.

Oliver believed were undesirable, and it contained a restrictive clause which “permitted the Minister to prohibit the admission of races to be specified when the occasion required it.”⁷ Frank Oliver believed that immigrant stock should be white and British, or at least European, and that white immigrants should not be held back from accessing desirable land by the resistance of Canada’s Indigenous people he believed to be inferior.

The *Oliver Act* – amendment 49(a) - was a mechanism that could be utilized by Indian Affairs to force surrenders of urban reserves close to towns of more than 8,000 people. There was a sinister undertone to the Act that was not discussed during the debates in the House of Commons, although it crystallized in testimonies given at the Exchequer Court proceedings in 1915. While the act does not specifically mention race, the underlying and perhaps primary reason for the passing of the *Oliver Act* was the colonial ideology of white racial superiority. The first time the Oliver Act was invoked was to force a surrender of the Kings Road reserve in Sydney, which was listed as Reserve # 28, in the federal reserve system.⁸

Files at Library and Archives Canada (LAC) show that the Kings Road reserve came to the attention of Indian Affairs by the letters of Joseph Alexander Gillies, who owned a property adjoining the reserve. After building a house on his land, he began a campaign to have the reserve removed. Gillies was a lawyer, a Queen’s Counsel (Q.C.), and a member of parliament, and his letters to Indian Affairs and later testimony in the Court of the Exchequer show that he was a white supremacist whose antipathy toward his

⁷ Hollihan, 101.

⁸ Canada, “Supplement to Annual Report of the Department of Indian Affairs,” *Schedule of Indian Reserves in the Dominion*. (Ottawa: Indian and Northern Affairs, 1913), 4. https://publications.gc.ca/collections/collection_2017/aanc-inac/R31-5-1913.pdf.

Mi'kmaw neighbours was virulent.⁹ Using files held at Library and Archives Canada (LAC), it is possible to track Gillies' campaign in letters, notes, memos, and other miscellaneous sources as he moved his focus from Sydney City Council to Indian Affairs, and it was here that he ran into a roadblock that was the 'requirement of consent' clause in the Indian Act.

An examination of three other surrenders within the six years before the 1911 amendment will show that Frank Oliver was held to account in the House of Commons for the behaviour of Indian Affairs officials as they had attempted to circumvent section 49. While there were many surrenders across the country during this time, the St. Peter's forced surrender in Selkirk, Manitoba (1905), the Fort William expropriation in Thunder Bay, Ontario (1907), and the Songhees surrender in Victoria, British Columbia (1911), were all conducted under circumstances that were dubious at best, and all of them were mentioned as problem surrenders in the House of Commons transcripts, as parliament debated amendment 49(a). Using these files, and histories published by these First Nations, I will show that these three surrenders played a role in Oliver's decision to remove the 'requirement of consent' clause from the *Indian Act*.

Literature Review

Mi'kmaw historians tell us that the Mi'kmaq were living and travelling in Atlantic Canada for thousands of years before Europeans came searching for cod. According to Margaret Conrad, there is archeological evidence of Indigenous occupation in the area dating back

⁹ Gillies was a Queen's Counsel (QC) until the death of Queen Victoria in 1901. This designation changed to King's Counsel (KC) after Edward VII was crowned, also in 1901.

more than 10,000 years.¹⁰ The transmission of Indigenous history does not follow the static linear method used for colonial histories but is passed generationally as stories, songs, and other forms. “Shells woven into belts served to document treaties and other important events [and] people recited their genealogies at weddings and funerals to keep alive the memory and to preserve by tradition from father to son ... the history of their ancestors [which] serves to transmit their alliances to posterity.”¹¹ Oral histories are “significant sources of knowledge for Indigenous Peoples [and] may include works that Westerners would label as folklore or myths” which are usually ignored by colonial historians.¹²

What is written about the early history of Atlantic Canada is primarily drawn from the writings of Europeans and begins after first contact around the 1500s. The first colonial reference to the Mi’kmaq of Cape Breton was written by Richard Hakluyt, an English geographer, priest, and writer who collected and published stories from ships’ captains, merchants, and adventurers returning from their travels around the world.¹³ His most famous work published in 1597, *The Principal Navigations, Voyages, and Discoveries of the English Nation*, talks of the Mi’kmaq of Cape Breton who occupied land in and around *Cibou*, which became known as Sydney.¹⁴

¹⁰ Margaret Conrad, *At the Ocean’s Edge: A History of Nova Scotia to Confederation* (Toronto: University of Toronto Press, 2020), 14.

¹¹ Conrad, 29.

¹² Indigenous Studies, “Oral Histories,” *Kwantlen Polytechnic University* (n.d.), <https://libguides.kpu.ca/indigenous/oralhistories>.

¹³ Richard Hakluyt, “Elizabethan World Reference Library,” *Encyclopedia.com*. <https://www.encyclopedia.com/people/science-and-technology/geography-biographies/richard-hakluyt>.

¹⁴ Richard Hakluyt, *The Principal Navigations Voyages Traffiques & Discoveries of the English Nation* viii, (Glasgow: James MacLehose & Sons, 1904), 166-182, 173-174.

Sydney was the capital of Cape Breton Island until 1820, losing this title when Cape Breton became part of Nova Scotia, and the capital moved to Halifax. In the 19th century, the population of Cape Breton increased considerably as immigrants poured in, particularly from the Highlands of Scotland. In 1847, land on Sydney Harbour was set aside and designated an official Mi'kmaw reserve which was called *Kun'tewiktuk* by the Mi'kmaq and King's Road reserve by colonial Sydney. After the opening of the steel plant (Sydney Steel) in 1899, there was another influx of people into Sydney, which was incorporated as a city in 1900.¹⁵ King's Road, which followed the coastline along the harbour, was now a sought-after place to live in colonial Sydney and, as Sydney's population grew, so did the population of the Kings Road reserve.

Hansard provides a record of the debates in parliament as the proposed amendment moved through three readings in the House of Commons, before the final vote at the Votes and Procedures Committee in 1911. The records will show that Indian Affairs was still smarting from accusations that the St. Peter's surrender in 1905 had not followed Indian Act (section 49) protocols. These transcripts show that parliamentarians had not forgotten the circumstances of surrenders such as St. Peter's in Selkirk, Manitoba and Fort William in Thunder Bay, Ontario. The debates on amendment 49(a) in the House were heated and contentious and were watched anxiously by First Nations chiefs across Canada, who understood the gravity of this amendment and the possible implications for their reserves if the 'requirement of consent' clause was removed from the Act.

When Gillies approached Indian Affairs with his problem, he quickly realised that Indian Affairs was unwilling to depart from section 49 and he turned to the political arena

¹⁵ D.A. Muise, "Sydney," *The Canadian Encyclopedia*, (Historica Canada, 2023) edited September 2023. <https://www.thecanadianencyclopedia.ca/en/article/sydney>.

to lobby for his cause. He suggested in a brief letter to Frank Oliver that situations such as Kings Road would continue to occur, and that perhaps an alteration to the *Indian Act* would solve future problems “in the event of the Indians proving unreasonable in their consent to a surrender.”¹⁶ It is probable that Oliver had already reached the same conclusion.

There is a common denominator as the process moved from the House of Commons to the Exchequer Court, and back to the House for approval. Throughout the years-long process, the questions and decisions were debated and decided by white men, working within a formal colonial structure designed to serve white citizens. This holds true from the beginning to the end of the process and the absence of women’s voices in general, and of Indigenous women’s voices in particular, was notable. From the bill’s inception, through three readings of the House of Commons, to the Court of the Exchequer there appears to be no instances of even a single woman’s voice that is identifiable, Indigenous or otherwise.

The amendment empowered the Superintendent General of Indian Affairs to request the Court of the Exchequer to rule on whether it was expedient to remove people from their reserve lands. Court files, published in the *Reports of the Exchequer Court of Canada* and also held at LAC, highlight the support for and against the people of Kings Road reserve. What stands out within the court testimonies is Gillies himself, who was the defendant *and* acted as his own counsel. His testimony showed deep antipathy for his Indigenous neighbours and the questioning of witnesses showed that his dislike of all non-white people went far beyond a racial bias into a hatred that could only be described as

¹⁶ “Letter from Joseph A. Gillies,” 15/12/1910, RG10, Vol. 2925, file 190,094-1, Library and Archives Canada (LAC), Ottawa, ON, 66.

white supremacist. As Martha Walls discussed in her paper, “The Disposition of the Ladies: Mi’kmaw Women and the Removal of the Kings Road Reserve, Sydney, Nova Scotia,” the portrayal of Indigenous women by Gillies in the court hearing drew on historical racist stereotypes, whereas other witnesses testified that these were fine, law-abiding people who were valued by local employers. Gillies failed to bring evidence to the court that was more than circumstantial or hearsay. However, court records show that, as a lawyer who also testified as a witness, Gillies was able to monopolize the courtroom and therefore was able to continually refocus the discussion back to his own racist agenda.

Peggy Martin-McGuire looks at a wide number of surrenders that took place on the prairies between 1896 and 1911. While Martin-McGuire is not writing within the context of amendment 49(a), many of the surrenders discussed occurred under dubious circumstances and she discusses the illegalities of members of parliament and Indian Affairs who used insider knowledge to buy and sell land. This makes her paper important to the discussion of amendment 49(a) contextually, and supports the theory that, in passing amendment 49(a), those with power in Indian Affairs were not acting in the interests of First Nations, but in the interests of the state or themselves. Martin-McGuire’s brief acknowledgement of amendment 49(a) specifically states that, by allowing the government to take reserve land without consent, it “directly contravened the treaties.”¹⁷

Consolidation of Indian Legislation, Volume II: Indian Acts and Amendments, 1868-1975, by Gail Hinge, has proven invaluable in providing a concrete way to systematically track the hundreds of amendments to the *Indian Act* and thus has contributed to the creation of a coherent timeline for this discussion.¹⁸ Hinge’s document

¹⁷ Martin-McGuire, xxiii.

¹⁸ Hinge, 1-40.

tracks the *Indian Act* through each version of the *Act* and the many amendments to each version, from 1868 to 1975. There is little accompanying commentary except when necessary for clarification. The *Indian Act* of 1880 showed the ‘consent to surrender’ clause as section 37.¹⁹ This changed to section 49 in the *Indian Act* of 1906.²⁰ In 1911, section 49 was amended by adding several clauses, and clause (a), known as amendment 49(a), removed the ‘requirement of consent’ clause if a reserve was close to a town of more than eight thousand people.²¹

“The Negotiations to Relocate the Songhees Indians, 1843-1911,” is a 1975 master’s thesis by Jeannie Kanakos, which follows more than forty years of resistance by the *Songhees* Nation as two levels of government attempted to negotiate a surrender of their urban reserve in Victoria, British Columbia.²² It is clear from debates in the House of Commons that the *Songhees*’ surrender was relevant to the development of amendment 49(a). The *Songhees* surrendered their territory just before the amendment passed in the House of Commons in 1911. Kanakos highlights the agency of the *Songhees*’ people, and their refusal to leave their urban reserve has many parallels to the *Mi’kmaq* of Kings Road Reserve in Cape Breton. Both nations depended on their proximity to urban centres for their reserve economies, and both had ocean access which was integral to their lifestyles and cultures. Kanakos’ thesis and its focus on the agency of the *Songhees* people provides a backdrop to understanding how the people of Kings Road also approached the surrender

¹⁹ Hinge, 66.

²⁰ Hinge, 192.

²¹ Hinge, 193.

²² Jeannie Kanakos, “The Negotiations to Relocate the Songhees Indians, 1843-1911,” (master’s thesis, Simon Fraser University, 1982).

https://summit.sfu.ca/_flysystem/fedora/2022-07/b16167624.pdf.

requests with clarity about their needs, and how they never relinquished their agency as they continued to request a fair and just settlement.

The two nations of *Peguis* and *Membertou* were aware of the violations by government around the surrender of their land in the early 1900s and have publicly acknowledged their current positions in rectifying these historical forced surrenders. *Peguis Surrender Claim Trust*, “Our History” is a publication of the Peguis Nation (formerly St. Peter’s Reserve), which gives a brief outline of the surrender, the circumstances of which have been ruled illegal one hundred years later.²³ The history of the Kings Road Reserve is published on *Membertou*’s website, “Kings Road Reserve 100 Years Later: The Story of *Membertou*’s Reconciliation.”²⁴ The people of Kings Road were the founding members of *Membertou* reserve, and this centenary publication brings to life the humanity of the people who endured the relocation, and the corresponding inhumanity of those who forced it. I have used both websites to provide other detail when necessary.

Other useful sources were Andrew Parnaby, “The Cultural Economy of Survival: the Mi’kmaq of Cape Breton in the Mid-19th Century,” in which he provides an economic context for the Kings Road reserve as its people moved toward a waged economy. He also discusses another unofficial reserve at North Sydney, which is usually not mentioned except perhaps in passing. North Sydney had strong connections to Kings Road reserve, and it was a fear of Indian Affairs that those living at North Sydney would move to Kings Road, something that was discussed in both the House debates and the Court proceedings.

²³ *Peguis* First Nation Surrender Claim Trust, “History,” *Peguis* First Nation, 2020. <https://www.peguissurrendertrust.com/our-history/>.

²⁴ *Membertou* Communications, “Kings Road Reserve 100 Years Later, *The Journey On ...*, The Story of *Membertou*’s Reconciliation,” *Membertou* Communications, 2016. <https://www.membertou.ca/wp-content/uploads/2019/05/kings-road-reserve.pdf>.

A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada by Brian Titley is a discussion of Duncan Campbell Scott, who began his career as a copy clerk for Indian Affairs in 1880, when he was eighteen years old and quickly rose through the ranks of the civil service.²⁵ Scott was chief clerk and accountant at Indian Affairs from 1893 to 1913, and in the role of accountant, was responsible for the Indian Affairs budget nationwide. In this position, he authorized the building of the school and other infrastructures such as the communal well at the Kings Road reserve, and he followed developments at the reserve closely, as evidenced by his initials on hundreds of documents and letters held in RG10 files at LAC. His promotion to Deputy Superintendent General of Indian Affairs in 1913 gave him considerable power within Indian Affairs. While Kings Road is mentioned only briefly in Titley's book, it has provided useful background on the workings of a centralized Department of Indian Affairs and of Duncan Campbell Scott, a powerful and frugal man who supervised the fifteen years between 1912, after amendment 49(a) was passed, until 1926, when the Kings Road reserve was finally moved to what is now *Membertou*. Letters and memos on file at LAC show that Scott was sympathetic to the *Mi'kmaq* at Kings Road and did not appear to support Gillies or Frank Oliver, who lost his seat in Parliament in the election of 1911 and was no longer his boss.

Methodology

My approach to this research is qualitative and I have used a range of archival documentation, which includes House of Commons debates, available online from

²⁵ Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs In Canada*, (Vancouver: University of British Columbia Press, 1986), 24.

Canadian Parliamentary Historical Resources, Exchequer Court files, and Record Group 10 (RG10) files held at Library and Archives Canada (LAC). While there exists a large body of other historical sources, such as newspapers and other media sources, my research has focussed primarily on the archival files such as Hansard and LAC RG10 files. I have excluded other sources, such as newspaper archives, because they are more likely to contain opinions rather than verifiable facts and this makes these sources difficult to verify with any certainty. This was particularly true during early 1900s, as the *Sydney Post* during this time was owned by Joseph Alexander Gillies, and the *Edmonton Bulletin* was owned by Frank Oliver. Both these men were instrumental in the development and passing of amendment 49(a), and both used their newspapers to promote and advance their personal causes. For example, Oliver used the *Edmonton Bulletin* to influence public opinion, using his paper to “steadfastly oppose the establishment and maintenance of Papaschase Indian Reserve Number 136.”²⁶

RG10 files hold the historical records of the Department of Indian Affairs and Northern Development and its predecessors, and they include detailed documentation of the daily work done by Indian Affairs in the form of letters, memos, maps, notes, directives, and a huge and varied range of miscellaneous documents written by government bureaucrats, elected politicians, Indigenous chiefs, surveyors, Indian agents, citizens, etc. These primary sources reflect the daily work of the administration within Indian Affairs at its headquarters in Ottawa and in far-flung field offices.²⁷

²⁶ Dwayne Trevor Donald, “Edmonton Pentimento: Re-reading History in the Case of the Papaschase Cree,” *Journal of the Canadian Association for Curriculum Studies* 2, No. 1, (Spring, 2004), 36.

²⁷ “Gladue Rights Research Database, Indian Affairs Record Group 10 (RG10) Inventory,” Legal Aid Saskatchewan. <https://gladue.usask.ca/node/6064>.

What is missing from the historical archives is the voices of women, particularly Indigenous women. Even though the Mi'kmaq were a matriarchal society, the presence of women was profoundly ignored by the colonial decisionmakers. There is an accusation made by Joseph Gillies in the Exchequer Court about the degradation of Indigenous women who frequented an undesirable district near Sydney known as 'the coke ovens,' although this was not verified or followed through in court. The "well-worn tropes emphasizing the moral and physical depravity of Mi'kmaw women" were the only mention of Mi'kmaw women, who were presented by the opposing counsel as respectable and hardworking.²⁸

Amendment 49(a) - the *Oliver Act*

Amendment 49(a) is known as the *Oliver Act*, but it appears that little academic interest has been shown in its creation or in the circumstances and motivations that led Frank Oliver to introduce this legislation, which contravened treaties, removed land security for reserves across the country, and uprooted Indigenous lives. It is clear that 'difficult' surrenders in the ten years prior to 1911 led Indian Affairs to play 'loosey-goosey' with their interpretation of section 49 of the Indian Act, which is the 'consent to surrender' clause, but information about the amendment and its causal relationship to the forced surrender of the Kings Road reserve on Cape Breton Island, N.S., and the linkages to the Songhees surrender in Victoria., B.C., is sparse. Through the use of existing primary and secondary sources, this thesis will look at this causal relationship, and examine the

²⁸ Martha Walls, "The Disposition of the Ladies: Mi'kmaw Women and the Removal of the King's Road Reserve, Sydney, Nova Scotia," *Journal of Canadian Studies*, 3, Vol. 50, (Fall 2016), 538.

amendment and its progress through the House of Commons and the Exchequer Court of Canada within the context of the Kings Road reserve surrender, and how white men in positions of power banded together to help one of their own. Oliver had the support of liberal Prime Minister Sir Wilfrid Laurier, and there was a significant liberal majority in parliament.²⁹ Oliver was able to convince the House of Commons to pass the 1911 amendment, which Peggy Martin-McGuire states “directly contravened the treaties.”³⁰

The removal of the ‘right to consent’ clause gave Indian Affairs the power to force surrenders at their own discretion. The first reserve in Canada to be forced to surrender their land under this amendment was Kings Road reserve, which had become engulfed by the town of Sydney on Cape Breton Island, Nova Scotia.³¹ The reserve was an adjunct of *Eskasoni* reserve about thirty miles south. In 1899, Grant Chief John Denny of *Eskasoni* wrote a letter to Indian Affairs in response to a request to surrender the reserve. “... we agree that we would sell it providing we get another piece in exchange ... on the Main Road leading from Sydney.... When going to market it is always our resting and camping place. We cannot sell under any other condition.”³² There appears to be no acknowledgement of this letter by Indian Affairs.

After amendment 49(a) was passed in the House of Commons, Oliver requested the Court of the Exchequer to decide on whether ‘it was expedient’ to remove people from

²⁹ The Liberal party held a significant majority in the House of Commons, 133 seats to 85 for the Conservative party. House of Commons Practice and Procedure, Appendix 10: General Election Results since 1867. <https://www.ourcommons.ca/procedure/procedure-and-practice-3/App10-e.html>.

³⁰ Martin-McGuire, xxiii.

³¹ Cando, “Membertou First Nation, Community Profile,” *Council for the Advancement of Native Development Officers*. <https://www.edo.ca/downloads/membertou-first-nation-profile.pdf>.

³² “Letter from Chief John Denny,” 28/11/1899, RG10, Vol. 2925, file 190,094-1. LAC, Ottawa, ON.

Kings Road reserve. It is clear that the *Mi'kmaq* of Kings Road reserve did not stand alone and that there was support for them to remain on their land. Indian Agents, physicians, pastors and priests, and property owners all spoke on behalf of the *Mi'kmaq*. The judgement, however, was final and the people of Kings Road were removed in 1926.

To position the forced surrender of the Kings Road Reserve within a broader national context, this paper will look at three other reserves that had been resisting Indian Affairs' requests to surrender their urban reserves. These three reserves were engaged in struggles provincially and federally. The circumstances of these surrenders were suspect, and all three took place in the six years before amendment 49(a) was passed in 1911, during the time Oliver was Superintendent General of Indian Affairs. They were the St. Peter's Reserve surrender (Selkirk, Manitoba, 1905), the Fort William Reserve expropriation (Thunder Bay, Ontario, 1907), and the *Songhees* Reserve surrender (Victoria, British Columbia, 1911).³³ It took until 1926 to move the people of the Kings Road reserve to their new location, but a national context will show that events leading to this surrender were set in motion long before this date, and that these surrenders were inextricably linked to the passing of amendment 49(a) in 1911.

Frank Oliver was a politician who became frustrated with the government's inability to overcome Indigenous resistance to giving up their reserve land for settlers who were flooding into Canada. While many migrant settlers, particular immigrants from Scotland, were choosing to go to Nova Scotia, the scale of immigration to Cape Breton Island, when compared to the prairie provinces, was minor. Oliver was scornful of the

³³ Expropriation of land for railways, Indigenous or other, was legal under federal law, and it was also written into section 49 of the Indian Act. However, in the context of this discussion, the expropriation of a significant acreage of the Fort William Reserve land base, which has since been ruled illegal, falls within the definition of a forced surrender.

previous government's immigration policy, which he called "a farce" and in 1906 introduced the Immigration Act, which was steeped in an ideology that was "driven by cultural considerations" that valued European and British cultures and shied away from "culturally alien immigrants primarily from southeastern Europe."³⁴ The 1906 Act was designed to control immigration of persons Oliver believed to be undesirable, and it contained a restrictive clause which "permitted the Minister to prohibit the admission of races to be specified when the occasion required it."³⁵ Frank Oliver believed that immigrant stock should be white and British, or at least western European, and that white immigrants should not be held back from accessing desirable land by the resistance of a people he believed to be inferior.

This thesis interrogates the Oliver Act, the Debates in the House of Commons, and the testimonies given at the Court of the Exchequer. While the *Oliver Act* was a tool to enable Indian Affairs to force surrenders of urban reserves, there was a sinister undertone to the Act that was not discussed during the debates in the House of Commons, although it crystallized in testimonies given at the Exchequer Court proceedings in 1915. I will argue that it was Frank Oliver's white supremacist ideology that drove the amendment and that it found support in the white superiority ideology pervasive in the House of Commons and the Court of the Exchequer. When Joseph Gillies began his campaign to rid himself of his neighbours, Oliver agreed with him immediately. House of Commons debates clearly show that elected members of Parliament, on the whole, were infected by the pervasive colonial ideology of white superiority, and this was fundamental to the support found for this amendment in the House of Commons and the Court of the Exchequer. Oliver, who

³⁴ Hollihan, 93.

³⁵ Hollihan, 101.

introduced the first reading of the Act in the House of Commons, found support for his racist ideology in Prime Minister Wilfrid Laurier. Both men were clear that the amendment violated treaties, and Laurier's racist agenda was reflected in his bill to ban black immigrants from Canada about the same time.

Thus, I will argue that amendment 49(a) gave Oliver the means necessary to continue his personal and political agendas. His dislike for Indigenous persons extended to non-white people generally, and his intent was to allocate Indigenous land to settlers he deemed appropriate and prevent non-white migrants from entering Canada. Oliver was driven, not by intelligence but by racism, and the letters of Joseph Gillies show that he too was blinkered by a profound dislike of his Indigenous neighbours. I argue that, by the time Oliver came to the position of Superintendent General of Indian Affairs, he had already crossed the line into white supremacy and was unable to view Indigenous peoples as equals. Because of this, he did not hesitate to introduce harmful legislation, in spite of his position at Indian Affairs, which was to protect Indigenous people and their land. Oliver profited from surrenders across the country and his point of view may have included that of Prime Minister Wilfrid Laurier, but did not include women's points of view, particularly those of Indigenous women. The design and implementation of amendment 49(a) was a shameful piece of legislation driven by Oliver's white supremacist view and fueled by the letters and petitions of Joseph Alexander Gillies in Sydney.

Breakdown of Chapters

Chapter Two

This chapter will look at the circumstances surrounding the forced surrender of Kings Road reserve in Sydney, Nova Scotia, and examine three separate forced surrenders

in other parts of the country which occurred in 1905, 1907 and 1911 respectively. The Kings Road reserve was the first reserve to be forced to surrender their land after Indian Affairs invoked amendment 49(a). It is possible that amendment 49(a) would not have passed into law if Joseph Alexander Gillies had not lived next door to the reserve and undertaken a virulent and lengthy campaign to rid himself of his neighbours. While this is speculation, it is possible that without Gillies, Grand Chief Denny and his Captains may have been able to negotiate for a new reserve that met their needs. Letters at LAC show that they were willing to negotiate but the hard line approach dictated by Gillies and Oliver did not seem to allow for new reserve land that was not of the government's choosing.

Three Earlier Surrenders: Fort William, St. Peter's, and the Songhees

The 1905 Fort William expropriation at Thunder Bay, Ontario took sixteen hundred acres of the reserve for a major railway expansion project that never happened. The relocation of the reserve split the community into two sites and necessitated that the people of Fort William remove their graveyard. The 1907 surrender of the St. Peter's reserve in Selkirk Manitoba was a debacle for Indian Affairs and a tragedy for the people of St. Peter's. This surrender caused a furor in parliament and a scandal in the broader community regarding the loose and self-interested way section 49, the 'requirement of consent' clause of the Indian Act, was interpreted by Indian Affairs. The third surrender took place in Victoria, British Columbia., where, in 1911, the Songhees people surrendered their land after a decades-long struggle. Technically, the government could claim that they had negotiated a surrender with the Songhees, but this was not the case. The Songhees had resisted this surrender for almost fifty years, and, when the passing of

amendment 49(a) was imminent in the House of Commons, the Songhee's surrendered their land because their chief understood the possible dire consequences for the band if a surrender was forced on them by invoking amendment.

Chapter Three

Chapter Three looks at the fierce opposition amendment 49(a) encountered while being debated in the House of Commons. While liberals held the party line, the opposition party was well aware of the ramifications of this bill and the harm it could do. This chapter will look at what was said in the House, and by whom. Members of the House who spoke to this bill were supportive of it, or fiercely against it. Those against it spoke eloquently, others viewed the bill as a tool which could be used to manipulate their own communities, and many showed indifference to the First Nations people whose lives would be affected. Regardless of their stance, there was not enough opposition to derail the bill, and, in the end, it passed easily.

Chapter Four

The proceedings about Kings Road held in the Court of the Exchequer is the focus of Chapter Four. It was at the Court of the Exchequer that Justice Louis Audette was asked to decide if "it was expedient" that the people of Kings Road be relocated. This chapter looks at the question before the court, which was further complicated by the fact that Joseph Gillies, Q.C., chose to represent himself and in doing so, made every effort to influence the judge to his point of view. There were more than thirty witnesses, many of them land agents, and the court files document their testimony. While G.A.R. Rowling, lawyer for Kings Road, made a valiant effort to hold the court and witnesses accountable,

the outcome was inevitable, and the Judge ruled that it was expedient to relocate the people of Kings Road reserve.³⁶

³⁶ G.A.R. Rowlings (George A.) was known only by his initials throughout his student and professional life.

Chapter 2 Four Surrenders 1905 – 1926:

St. Peter's, Fort William, the Songhees and Kings Road

The turn of the century saw a huge influx of immigration into Canada. Established towns and cities across the country were expanding as infrastructure, such as railways and road systems, gave access to parts of the country previously inaccessible. Between 1901 and 1911, Canada's population increased rapidly and, along with the increased population, came an increased demand for agricultural land. Towns and cities were pushing against the boundaries of established reserves that had previously been isolated. Settlers began to covet Indigenous lands, and the government looked for ways to orchestrate surrenders. Across the country, negotiations for surrenders for the reserves of Kings Road (Sydney, Nova Scotia), St. Peter's (Selkirk, Manitoba) and Fort Williams (Thunder Bay, Ontario) had proved unsuccessful, and Indian Affairs adopted different tactics to confiscate these reserve lands.

The Indian Act clearly defined conditions that were required for any surrender. Section 49 of the Indian Act was a 'requirement of consent' clause, which stated that no release or surrender of a reserve,

“... shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose.”¹

Without informed consent, there could be no surrender. This requirement could, and sometimes did, thwart government attempts to move and relocate communities. An 1894 amendment to the Indian Act gave power to the Superintendent General of Indian Affairs to override this requirement “... in cases of aged, sick and infirm Indians and

¹ Hinge, 192.

widows or children left without a guardian”² Brian Titley called this “the thin edge of the wedge of confiscation,” as it set precedent and provided a path forward to circumventing the ‘requirement of consent’ clause.³ Titley notes that the terms of this 1894 amendment were changed the following year to require consent of the “location ticket holder to the lease,” but still did not include band consent.⁴

Further pressure on the ‘requirement of consent’ clause came from the *Indian Advancement Act*, which was a 1906 amendment to the Indian Act that allowed Indian Affairs “to distribute immediately to band members up to fifty percent of the purchase price of [surrendered] land.”⁵ Until 1906, the Indian Act had allowed for just ten percent of the price realized from a surrender to be distributed, and the remaining ninety percent was held by Indian Affairs to be used for roads, bridges, and other local infrastructure deemed appropriate by Indian Affairs. Reserves were under pressure to surrender land that was judged to be ‘unused’ and therefore unproductive, and reserves near urban centres were being squeezed to move beyond town boundaries. It was hoped this fifty percent of land value would provide an incentive to sell reserve land and serve to remove reserves that were next to towns. The *Indian Advancement Act* appears to be a precursor to amendment 49(a) that passed in the House five years later.

However, in spite of the fifty percent payout guaranteed by the 1906 *Indian Advancement Act*, Indigenous resistance to surrendering their urban reserves continued. Using historical House of Commons debates, this chapter will show that there was general agreement by members of parliament that land allocated to Indigenous reserves

² Hinge (c. 32, s. 3), 125.

³ Titley, 16.

⁴ Titley, 16.

⁵ Hinge, 138.

should not be allowed to interfere with the land needs of white settlers, nor should it impede the expansion and growth of towns. With this support, Frank Oliver, Minister of the Interior and Superintendent General of Indian Affairs, began to look at legislating a way to circumvent the Act entirely, and the term ‘forced surrender’ entered parliamentary vernacular.⁶

In 1911, the government again amended the Indian Act. Bill 177, *An Amendment to the Indian Act*, included amendment 49(a) and Martin-McGuire writes that this clause “directly contravened the [western] treaties by dispensing altogether with the requirement for a surrender where reserve lands were being taken in order to make space for large municipalities or for other public purposes.”⁷

It is clear that the development and passing of amendment 49(a) did not take place in a vacuum. These three separate surrenders, and the forced surrender of the Kings Road Reserve in Nova Scotia after Indian Affairs invoked amendment 49(a), will show how Superintendent General of Indian Affairs Frank Oliver refused to allow what he saw as the unreasonable intransigence of reserve residents who refused to surrender their lands when requested to do so. I will show that the resistance by the people of these four urban reserves played a direct role in the formulation of amendment 49(a), which was designed

⁶ ‘*Forced surrender*’ is a contradiction in terms. The Oxford Dictionary defines *force* as “coercion backed by the use or threat of violence;” and *surrender* as “to stop resisting an opponent, to give up.” ‘Forced surrender’ is colonial obfuscation which became entrenched in the language of bureaucrats and politicians to make the forcing of Indigenous peoples off their land more palatable. A modern example of this type of obfuscation is the term ‘*collateral damage*’ a seemingly innocuous phrase that obscures its true meaning - ‘*the ‘necessary’ deaths of civilians who are in the way of a military target.*’ See: Concise Oxford English Dictionary, ed., Catherine Soanes and Angus Stevenson, 11th Edition, Revised. (Oxford: Oxford University Press, 2006), 555, 1451, 280.

⁷ Martin-McGuire, xxiii.

to eliminate future resistance. The House of Commons debates will show that Oliver believed the land requirements of white settlers should take precedence over the land needs of Indigenous people, and that the allocation of land to white settlers should take precedence over Indigenous rights, even if these were Treaty rights. Through the debates, it becomes clear that Oliver's personal belief system of white superiority was a driver in the design and passing of amendment 49(a) in 1911, which was then invoked to force the surrender of the Kings Road Reserve in Nova Scotia, making Kings Road "the first reserve in Canada where amendment 49(a) was used to force a land surrender."⁸

Across the country, negotiations for surrenders for the reserves of Kings Road (Sydney), St. Peter's (Selkirk) and Fort Williams (Thunder Bay) had proved unsuccessful, and Indian Affairs adopted different tactics to confiscate these reserve lands. Kings Road was lost after amendment 49(a) was invoked, St. Peter's was surrendered under illegal circumstances, and Fort Williams was expropriated for an infrastructure project that never happened. The circumstances of the Songhees surrender were different again. While technically, Indian Affairs could claim this was a negotiated surrender, the Songhees had resisted for more than forty years, and their eventual surrender was precipitated by the threat of amendment 49(a). These were forced surrenders with differing strategies.

Surrender: Kings Road Reserve, Sydney, Nova Scotia

Kun'tewiktuk was a small Mi'kmaw reserve situated on the shores of the harbour of Sydney, Nova Scotia and was known to colonial Sydney as Kings Road Reserve. Sydney

⁸ Cando, "Membertou First Nation, Community Profile," *Council for the Advancement of Native Development Officers*. <https://www.edo.ca/downloads/membertou-first-nation-profile.pdf>.

had been the capital of Cape Breton Island until 1820, when the island became part of Nova Scotia. *Kun'ewiktuk* had been a 'stopping place' long before the town of Sydney was founded in 1785 as a refuge for Loyalists fleeing America after the War of Independence.⁹ As the town expanded, *Kun'ewiktuk* continued to be a Mi'kmaw meeting and gathering place. In 1832, the Dominion government conducted a survey of Mi'kmaq reserves on Cape Breton Island and set aside 12,205 acres of land for Indigenous reserves.¹⁰

In 1847, the Nova Scotia government formally set aside land for a reserve on the shores of Sydney harbour, making Kings Road an official provincial Mi'kmaw reserve, a fact that is recorded in a barely legible document held at LAC.¹¹ The Canadian census of 1871 was the "first census that starts to identify Mi'kmaq in the communities that they inhabit [and this included] Mi'kmaq who were now residing on the Kings Road Indian Reserve in Sydney."¹² In 1888, the government of Nova Scotia granted the provincial reserve land on King's Road to the Dominion government and Kings Road reserve became 'Reserve No. 28 Sydney' within the federal reserve system.

⁹ D.A. Muise, "Sydney," *The Canadian Encyclopaedia*, September 2023.

<https://www.thecanadianencyclopedia.ca/en/article/sydney>.

¹⁰ Andrew Parnaby, "The Cultural Economy of Survival: The Mi'kmaq of Cape Breton in the Mid-19th Century," *Labour / Le Travail* 61, (Spring, 2008), 69-98.

¹¹ "Plan and Letter (10), Reserve for the Indians," RG 10, C VI, C-13330, 494-495, LAC, Ottawa, ON. https://heritage.canadiana.ca/view/oocihm.lac_reel_c13330/494.

¹² Membertou Heritage Park, "Timeline."

<https://www.membertouheritagepark.com/gateway/timeline/html>.

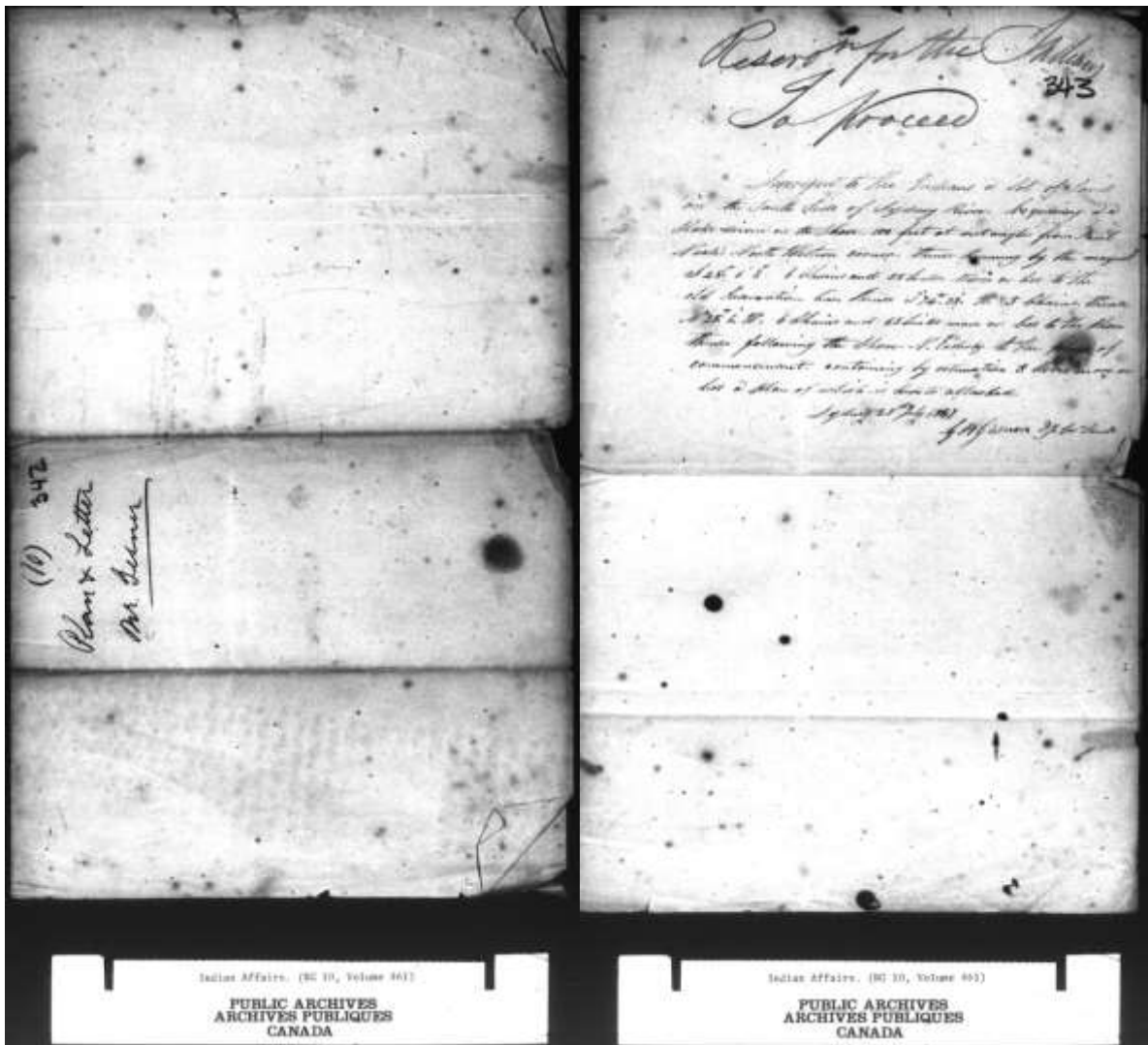


FIGURE 2.1. Nova Scotia documents allocation land for a reserve at Sydney, N.S. in 1847.

In the 19th century, the population of Cape Breton increased considerably as immigrants poured in, particularly from the Highlands of Scotland. Another influx of people to the Sydney area occurred after the opening of the Sydney Steel Corporation (SYSCO) in 1899, and Sydney was incorporated as a city in 1900.¹³ Over the years, the

¹³ D.A. Muise, "Sydney," *The Canadian Encyclopedia*, Historica Canada, edited September 2023. <https://www.thecanadianencyclopedia.ca/en/article/sydney>

already small land base of the Kings Road reserve became smaller. In 1878, the Intercolonial railway expropriation took .66 acres, which technically left 2.09 acres.

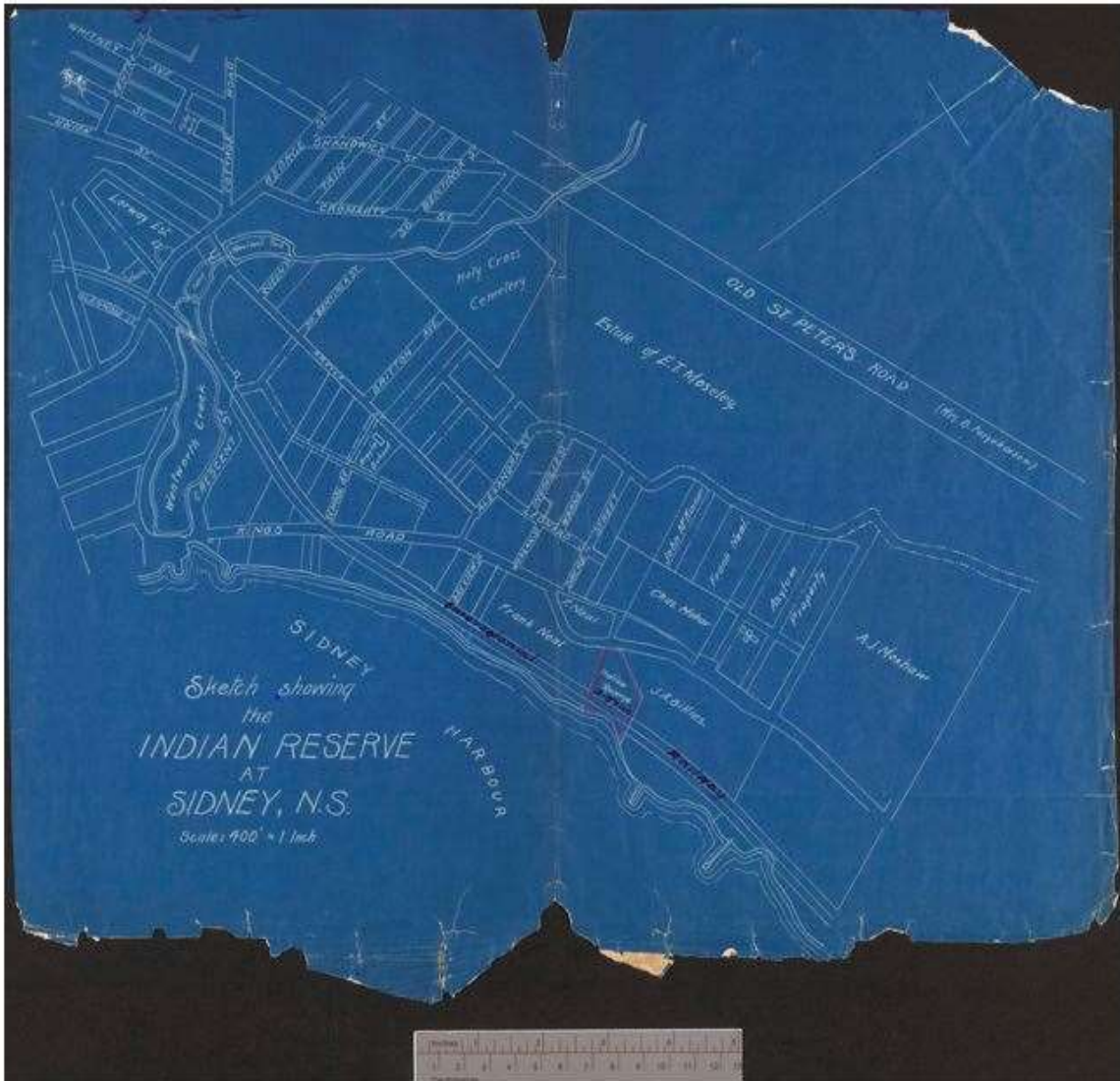


FIGURE 2.2. “Sketch showing the INDIAN RESERVE AT SIDNEY , (sic) Nova Scotia.” Kings Road Reserve is faintly outlined in red.

Figure 2.2 shows the difficulties created by the expropriation of reserve land for the railway, which was officially listed as .66 acres and included acreage for the tracks,

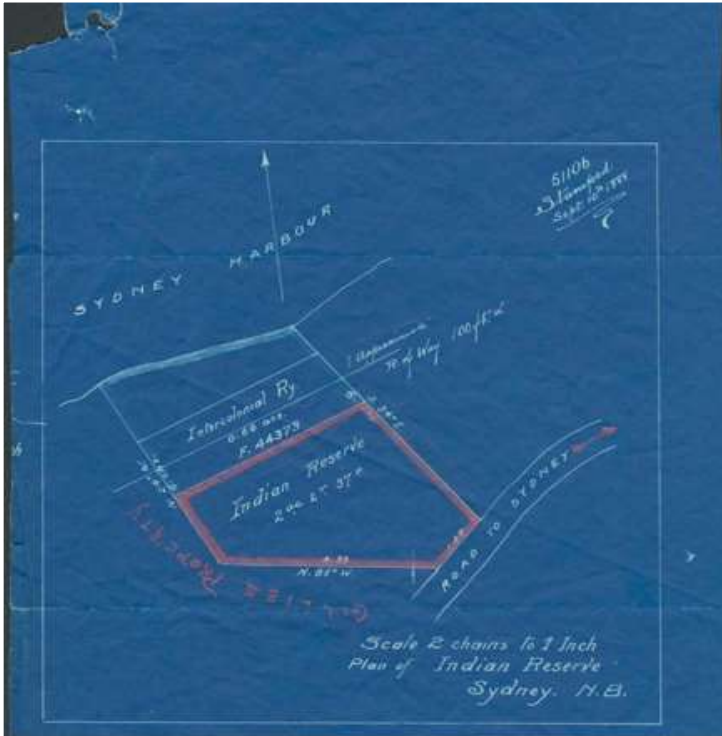


FIGURE 2.3 Map of reserve showing available land after expropriation.

plus a required right-of-way.¹⁴

The railway cut through the reserve and orphaned the land between the railway and the harbour, which became difficult to incorporate into daily life.

The expropriation effectively reduced usable land on the reserve to little more than an acre, or about the size of two football fields.

Figure 2.3 is a small detail map which shows the original size of the reserve situated between Sydney harbour and King’s Road, and the available usable land which is highlighted in red.¹⁵ This map was included in a report sent to Indian Affairs in Ottawa by Inspector of Indian Agencies Charles Parker, who red-inked the map to illustrate to Indian Affairs the amount of usable land remaining after the railway expropriation, and he clearly stated this fact in his report.¹⁶ However, in future years, the area outlined in red became the standard used by Indian Affairs to illustrate the inadequate size of the reserve.

¹⁴ Sketch showing the Indian Reserve at Sidney (sic.), Nova Scotia, RG10M 78903/78, Box number: 2000002207, File number: 190094-1, LAC, Ottawa, ON.

¹⁵ “Plan of Indian Reserve, Sydney, N.B. (sic.), 1888.” RG10M 78903/78, Box number: 2000002207, file number: 190094-1, LAC, Ottawa, ON.

¹⁶ “Report from Office of the Inspector of Indian Agencies,” 20/01/1913, RG10, Vol. 2925, file 190,094-1, LAC, Ottawa, ON, 87.

The Intercolonial Railway expropriation was not the only loss of the Kings Road Reserve land base. It was also a victim of encroachment by a neighbour. An 1877 surveyor's report notes that a "reserve for road" was illegally taken by the owner of a property next door to the reserve, Mrs. McNeil.¹⁷

... she had taken possession of, and fenced in, during the last twenty years or more, a reserve for road ... that was one hundred feet wide and went to the shore. This reserve [for road] was originally between lots 8 and 9, but owing to a brook that runs directly there, the Road Commissioner by consent, had the Reserved [for road] shifted between Lot 9 and the Indians, and the result seems to have been that Paul McNeil has seized the whole thing years ago, and the only road to the shore of the River is now through the Indians' land.

I don't think the Indians have lost much of their area as I am told originally it only contained 2 ³/₄ acres ... but certainly she had no right to take it.¹⁸

First Nations' land surrenders in Nova Scotia were complicated by the unusual legal status of the Mi'kmaq under the Indian Act.¹⁹ The Nova Scotia Mi'kmaq were considered to be one band and were able to move freely from one reserve to another. This was different from the rest of Canada, where band members were affiliated with a single reserve. In Nova Scotia, this meant that surrenders required the approval of a majority of males over twenty-one living in the province.²⁰ By the early 1900s, this regulation had been modified, but the new regulation still required consent from Mi'kmaq male adults living in the County of Cape Breton. In the case of Kings Road, this meant that a

¹⁷ A 'reserve for road' would have been a right-of-way.

¹⁸ Certified letter from Philip Morgan to A. J. White, Attorney General, 22/12/1877, Fonds RG10, Vol. 7762, file 27061-F, LAC, Ottawa, ON.

¹⁹ William Wicken, "Moving into the City: The King's Road Reserve and the Politics of Relocation," *The Colonization of Mi'kmaw History and Memory, 1794-1928: the King v. Gabriel Sylliboy* (Toronto: University of Toronto Press, 2000), 216.

²⁰ Wicken, 216.

surrender would require majority consent from adult males living at Kings Road, Eskasoni, and North Sydney reserves, a complicated and time-consuming process.²¹

By the mid-1900s, land use on the Kings Road reserve was changing. It continued to be used as a stopping place for those traveling from Eskasoni and around Cape Breton Island, but it was becoming a place of permanence. When Joseph Alexander Gillies bought a sizable property on King's Road which shared a boundary with the reserve in 1877, the Mi'kmaw family of John Isaac was already living on Kings Road "in a birch bark camp," which the judge of the Exchequer Court later verified was a "tepee."²² About four years later, Isaac had built his family a small log house.²³ This is the first record of permanent housing on the reserve. About 1887, according to Gillies' testimony, two families had arrived, and, by the turn of the century, there were several small, two storey houses as well as storage sheds and small barns.²⁴ Indian Affairs had constructed brick communal toilets, a communal well, a schoolhouse, and it had hired a teacher. On weekends, the population of the reserve increased as people from Eskasoni Reserve made the 50-mile round trip into Sydney to sell products at the weekend markets. During these years, the town of Sydney had expanded in both size and population, and the town had gradually encompassed the reserve on King's Road.

Gillies was intolerant of his Mi'kmaw neighbours. Gillies was white, a lawyer, a Queen's Counsel, and a member of Parliament from 1881 to 1900, and, in August 1899, he wrote to Walter Crowe, the Mayor of Sydney, asking if something could be done to

²¹ Wicken, 216.

²² Canada, Nova Scotia. Exchequer Court re King's Road Reserve, Department of Indian Affairs, Testimony, RG10, Vol. 7762, file 27061-F, item 12, LAC, Ottawa, ON.

²³ Testimony, 12.

²⁴ Testimony, 12.

remove them.²⁵ Crowe wrote to Indian Affairs, asking “whether the Indians on the small Reserve at Sydney would consent to a surrender [while] being compensated for their improvements ... and transferred to another locality?”²⁶ This letter set in motion a fifteen-year campaign by Gillies to remove the reserve, which involved Indian Affairs, the town of Sydney, various Indian Agents, Inspectors of Reserves, members of Parliament, and several men in positions of power within Indian Affairs, including the Superintendent General of Indian Affairs, who, at that time, was Clifford Sifton. It was Sifton’s office that responded to Crowe’s letter by sending a request to the local Indian Agent on Cape Breton Island, asking him to enquire as to whether the Mi’kmaq would consent to a surrender.²⁷ While it seems Sifton was not opposed to requesting a surrender from the Mi’kmaq, the Indian Act again proved to be a stumbling block. Section 49 of the act did not allow the surrender of a reserve, or any portion of a reserve, “unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose ...”.²⁸

Indian Affairs proved unwilling to disregard this clause, in spite of many requests by Gillies and others advocating on his behalf. This adherence to the Indian Act was probably due to the aftermath of surrenders such as St. Peter’s reserve in 1907. It would appear that Indian Affairs’ had clarified section 49, the ‘consent to surrender’ clause to its staff. After some years of correspondence, Gillies finally understood that Indian Affairs

²⁵ This letter is not in the RG10 file, which begins with Walter Crowe’s letter to Indian Affairs, in which he makes reference to this (Gillies’) letter of 28th September, 1899.

²⁶ “Letter from W. Crowe to the Secretary of Indian Affairs,” 8/09/1899, RG10, Vol. 2925, file 190,094-1, item 5-6, LAC, Ottawa, ON.

²⁷ “Letter from J. McKenna to Rev. A. Cameron, Indian Agent,” 18/10/1899, RG10, Vol. 2925, file 190,094-1, item 7, LAC, Ottawa, ON.

²⁸ Hinge, 193.

would not step beyond the strictures of section 49, and he would not find a solution to his problem this way. In 1910, he took his campaign into the political arena and wrote to Frank Oliver, Minister of the Interior and Superintendent General of Indian Affairs, Frank Oliver. His letter dated February 15, 1910, was brief and to the point.

I have your letter of the twelfth instant, for which I thank you. I am very glad indeed to know that you have dealt so promptly with the subject matter set forth in my letter ... I would respectfully suggest that some change be made in the Indian Act to enable the Department to easily and readily deal with a case of this kind, in the event of the Indians proving unreasonable in their consent to a surrender.²⁹

At the direction of Frank Oliver, J.D. McLean, Assistant Deputy and Secretary of Indian Affairs wrote to Indian Superintendent A.J. Boyd on December 10, 1910, asking that the matter of relocation be considered,

“with a view to getting some better location not in the immediate vicinity of Sydney. It would not be the intention to removed [them] to Caribou Marsh, where it is doubtful they could make a living but to arrange a Reserve for them not far from the City of Sydney, but not within its limits, so that they could still engage in employments at which they are now occupied”

Boyd was aware that people on the reserve relied on employment in Sydney and needed to maintain easy access to the town. Gillies immediately wrote a short letter of thanks to Frank Oliver. He had realized that berating Indian Affairs to solve the problem would not bring the results he wanted, for two reasons. The first was that Indian Affairs was hampered by the Indian Act which required a majority of band members to assent to a surrender, and this was not forthcoming. He understood that it probably would not change, as the Mi'kmaq had made it clear that they wanted to keep their access to the

²⁹ “Letter from Joseph Gillies,” 1910/12/14, RG10, Vol. 2925, file 190,094-1, LAC, Ottawa, ON, 66.

town of Sydney and Indian Affairs continued to remind him they were bound by the Act.³⁰

The second reason became clear in his letters and emerged in his testimony to the Court of the Exchequer in 1915. Gillies' objective was not to resolve the problems he had with his neighbours that he listed in his frequent letters of complaint. He did not want to resolve issues with the Mi'kmaq. He wanted the reserve relocated away from his land, and when he understood that Indian Affairs was unwilling to take any action that contravened the Indian Act, he moved his complaints into the political arena. On November 30, 1910, he wrote directly to Frank Oliver, Superintendent General of Indian Affairs, again requesting that the reserve be moved, and informing the Minister that the reserve "is not a part of the Indian Reservation or lands as understood by the Indian Act."³¹ This was not true, and Oliver would have known that. It has been shown that the reserve was a provincial reserve before becoming Federal Reserve No. 28. Indian Affairs had never queried the legitimacy of the reserve's standing. Oliver referred this letter to Duncan Campbell Scott, Chief Accountant for Indian Affairs, who reported back to him on December 7, 1910.

Scott's response brought some clarity to the situation. There are about "100 Indians domiciled there," he wrote. "... we have an excellent day school with a competent teacher in charge, and the Department has spent a considerable sum of money in

³⁰ It would seem that the backlash from the St. Peter's reserve surrender in 1905 has made Indian Affairs a little more cautious, and their loose interpretation of the 'consent to surrender' clause of the Indian Act had received clarification, as requests to Indian Affairs to move the people of Kings Road reserve to a new location continued to be met with refusal, while quoting the Act.

³¹ "Letter from J.A. Gillies to Frank Oliver," 30/11/1910, RG10, Vol. 2925, file 109,094, LAC, Ottawa, ON, 57.

connecting the Reserve with the City waterworks and providing sanitary water closets [and] under the present state of the law we cannot move these Indians without their consent.”³²

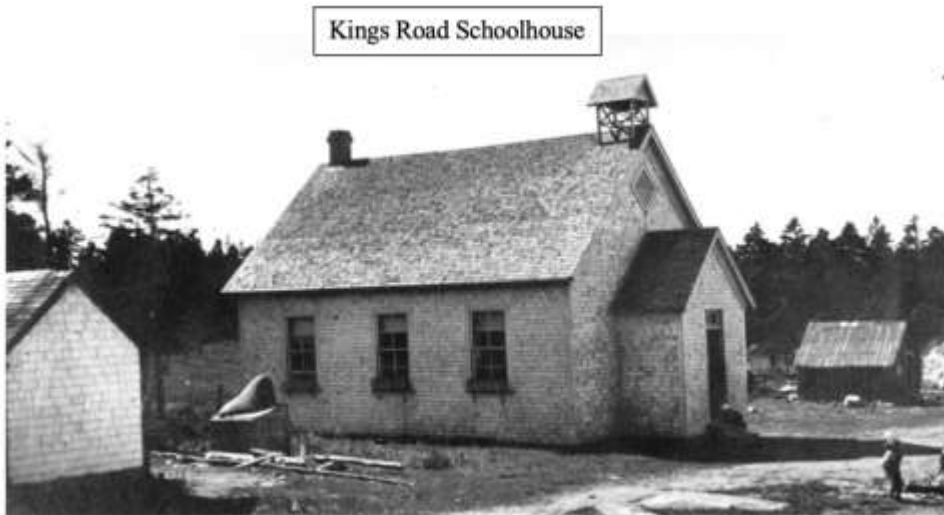


FIGURE 2.4. Schoolhouse at Kings Road Reserve, circa. 1902. Photo courtesy of Beaton Institute, Sydney, Nova Scotia.



FIGURE 2.5. School children with their teacher, Miss Edna Gough, circa 1902. Photo courtesy of Beaton Institute, Sydney, Nova Scotia.

³² “Letter from Duncan Campbell Scott to Frank Oliver,” 7/12/1910, RG10, Vol. 2925, file 190,094-1, LAC, Ottawa, ON, 61-62.

Scott spoke against using Caribou Marsh as an alternate location. The land is poor, he wrote, and it is too far from the city.³³ Scott understood reserve economics. Kings' Road residents were valued members of the Sydney labour market, he said in his letter. He suggested that a surrender might be possible if land could be found on the outskirts of the city. He recommended further investigation to see what arrangements could be made for the surrender and sale of the present reserve.³⁴ Scott recognized that urban reserves had a problem in common. People had adapted to a waged economy and were employed in the nearby towns. This was true of all four reserves discussed in this thesis: Kings Road, Nova Scotia, St. Peter's Reserve, Manitoba, Fort William Reserve, Ontario, and the Songhees Reserve in British Columbia.

In the case of the Kings Road Reserve, both women and men worked in Sydney, doing laundry, cleaning houses and working as bricklayers, masons, plasterers, carpenters, and pick and shovel men. Some worked on the Cape Breton Electric Trams and winter, they were employed to keep the tram lines clear of snow.³⁵ They also made pick handles, tubs and baskets which they sold at the markets in Sydney.³⁶ As Scott noted, they had become integral to the workforce of Sydney and its surrounds. He spoke against moving the reserve to Caribou Marsh, an issue that continues to arise in future correspondence. "... the land is reported to be very poor and the Indians if moved there would not be able to maintain themselves as they now do by working in the city."³⁷ Scott seemed to understand reserve economics. He was clear that living within reach of Sydney

³³ Letter, 61-62.

³⁴ Letter, 61-62.

³⁵ "Court of the Exchequer," RG10, Vol. 7762, file 27061-F, LAC, Ottawa, ON, 523.

³⁶ Court, 523.

³⁷ "Letter from Duncan Campbell Scott," 7/10/1910, RG10, Vol. 2925, file 190,094, LAC, Ottawa, ON, 62.

was essential for this community and that abandoning an established lifestyle would cause a disruption that was not in the interests of the Mi'kmaq, nor was it in the interest of Indian Affairs.

Reserve economics did not interest Gillies. When he realized that Indian Affairs was not going to put aside the Indian Act's requirement of consent, he moved his crusade into the political arena, looking for support from politicians to change the Act itself. On December 15, 1910, he responded to a letter from Oliver in which he "respectfully [suggested] that some change be made in the Indian Act to enable the Department to easily and readily deal with a case of this kind, in the event of the Indians proving unreasonable in their consent to a surrender."³⁸ Four months later, the Indian Act was amended to permit Indian Affairs to forcibly remove reserves that were close to towns of more than eight thousand people. The process was not simple. It required that legislation be drafted and introduced in the House of Commons, which had to pass three readings and debates in the House before the final vote to amend the Act was held in 1911.

Amendment 49(a) provided a mechanism to force a surrender, and it was not specific to Kings Road. It gave the Superintendent General of Indian Affairs the power to ask the Court of the Exchequer to conduct a hearing and rule on whether or not it was expedient to remove a particular reserve and its people. If the ruling was in the affirmative, the amendment needed to be invoked by Indian Affairs. In the case of Kings Road, in 1916, the court ruled that yes, it was expedient to remove the Mi'kmaq from their Sydney Harbour location, although Indian Affairs showed a real hesitancy to invoke the amendment and continued to ask the people of Kings Road to agree to a surrender for

³⁸ "Letter from Joseph Gillies," 15/12/1910, RG10, Vol. 2925, file 190,094-1, LAC, Ottawa, ON, 66.

the next two years. When eventually the amendment was invoked, it took until 1926 before Kings Road was finally moved to a new location on Alexandra Road which was still within the bounds of Sydney, Nova Scotia.

Three Earlier Surrenders: St. Peter's, Fort William and the Songhees.

The people of St. Peter's Reserve in Selkirk, Manitoba, Fort William Reserve at Thunder Bay, Ontario, and the Songhees Reserve in Victoria, British Columbia, had also been actively resisting relocation by Indian Affairs in the years preceding the Oliver Act in 1911. These three forced surrenders, as well as the Kings Road reserve in Nova Scotia which was forced to surrender after Indian Affairs invoked amendment 49(a), were 'development' relocations.³⁹ As city expansion mushroomed outwards, the reserves had become engulfed by towns. While there were hundreds of surrenders of Indigenous reserves across the country during this period, there are similarities between these three surrenders that link them to the passing of amendment 49(a) in 1911. With the exception of Fort William, which was an expropriation, the *Indian Advancement Act* had proved ineffective in providing incentives for people to surrender their urban reserves. St. Peter's, Fort William, and the Songhees reserves were all named by members of Parliament as the House debated amendment 49(a), and these earlier surrenders set a dangerous precedent for what would happen at Kings Road reserve.

The Fort William Expropriation 1905

³⁹ Expropriation of land for railways was legal under federal law, and it was also written into section 49 of the Indian Act. However, in the context of this discussion, the expropriation of a significant acreage of Fort William Reserve land base, which has since been ruled illegal, falls within the definition of a forced surrender.

The traditional territories of the Ojibwa people of Fort William had originally stretched from Pigeon River in southern Manitoba to the Treaty 9 boundary in northern Manitoba and extended east to Nipigon near Thunder Bay, Ontario. The land had been set aside as a reserve by the 1850 Robinson Superior Treaty.⁴⁰ Within the treaty, the people of Fort William agreed to not interfere with foreign settlers. In return, the Crown made several promises, including the freedom to hunt and fish as before. In 1905, sixteen hundred acres of Fort William reserve land was expropriated at the request of the Grand Trunk Pacific Railway, which planned to build a railway terminus along the waterfront at Thunder Bay.⁴¹ The Fort William First Nation website identifies it as the single largest railway expropriation in the history of Canada.⁴² A report from the Board Railway Commission outlined the necessity of taking such a large area. Because it was a branch line, the new terminus needed direct access to Lake Superior, facilities for movement between railway and ships, and considerable water frontage for docks, warehouses, elevators, as well as a passenger station and facilities.⁴³ A letter to the Minister of Railway and Canals from the chief engineer dated June 1905 concluded that the sixteen hundred acres applied for was a reasonable estimate of requirements.⁴⁴

⁴⁰ Fort William First Nation website, About Us, accessed 5th June 2024.
<https://fwfn.com/about-us/>.

⁴¹ Section 49 predated amendment 49(a), and it defined conditions for land expropriation.

⁴² Fort William First Nation (FWFN), “1900s Expropriation of Lands,” in *The Importance of the Duty of Consult and Accommodate*, Fort William First Nation Website, 16. <https://fwfn.com/wp-content/uploads/2019/08/Duty-to-Consult-Accommodate.pdf>.

⁴³ “Indian Lands Fort William Reserve,” 21/06/1905, RG2, Privy Council Office, Series A-1-a, LAC, Ottawa, ON, 1. <https://recherche-collection-search.bac-lac.gc.ca/eng/Home/Record?app=ordincou&IdNumber=124894&q=fort%20william%20reserve%201905&ecopy=e008371975-v8>.

⁴⁴ Indian Lands, 3.

Houses and buildings on the reserve were evacuated, and the Fort William reserve was split into two locations. About half the community was relocated to Squaw Bay and the other half went to Mountain Village. The report of the Board Railway Commission discussed infrastructure needs for the planned facility, present and future. It did not make mention of the homes that would be evacuated, nor did it note that the community would be fractured into two locations, or that the people of Fort William would have to move their graveyard.

The expropriation necessary for the Grand Trunk Pacific Railway to develop a terminus that would provide land and water access was approved by Wilfrid Laurier on June 27 1905.⁴⁵ The railway company, however, was beset with financial difficulties, some of which were beyond its control. The outbreak of World War I in 1914 in Europe caused capital markets to close, and this affected the company's ability to raise funds. Immigration, which had been a good source of revenue to the company, almost stopped.⁴⁶ The Grand Trunk Pacific never recovered from these financial problems and the terminus was never built. In 1919, the company declared bankruptcy and passed into government receivership.⁴⁷ The reserve land expropriated for this huge development was never returned to its original Ojibway owners.⁴⁸

⁴⁵ Indian Lands, 6.

⁴⁶ David W. Horky, "Guide to the Grand Trunk Pacific Railway Cartographic Series," *National Archives of Canada*, n.d., http://data2.archives.ca/pdf/pdf002/GTP_Construction_Guide.pdf.

⁴⁷ Horky, 6.

⁴⁸ In 2017, after almost twenty years of negotiations, Fort William First Nation received an offer of settlement from the federal government "to make up for the expropriation of reserve land for construction of the Grand Trunk Pacific Railway terminus in 1905." See their website, <https://fwfn.com/wp-content/uploads/2019/08/Duty-to-Consult-Accommodate.pdf>, 8.

Members of the House of Commons were aware of this expropriation. In the debate on Bill 177, which included amendment 49(a), a member commented, “I presume the Fort William Indian reserve would come within the scope of the Bill.”⁴⁹ Yes, was the answer from Wilfrid Laurier. When questioned about how these reserves would be disposed of, Laurier let the question slide, saying it had been provided for in the bill. This non-answer was accepted, there was no further discussion, and Bill 177 passed first reading.⁵⁰

The St. Peter’s Reserve Surrender 1907

On September 24, 1907, Frank Pedley, Deputy Superintendent General of Indian Affairs (DSGIA), was alleged to have taken a bag of cash and distributed it at a council meeting on St. Peter’s Reserve as an inducement to encourage the people of the reserve to sign a surrender. The *Peguis* First Nation website describes the event and the effect on the surrender vote.

The deputy superintendent general of Indian Affairs Frank Pedley was present at the surrender meeting and had \$5000 in a satchel which it was made clear would be distributed if the surrender carried, and if it was defeated “the satchel with its precious contents would go back to Ottawa.”⁵¹ The commissioners found clear evidence that up to the time of the “parading the satchel” before them, the band was not favourable to the surrender and had not asked for it. When the vote was taken it was found that 107 were standing in favour and 98 against, but no record of the vote was taken as was customary in

⁴⁹ Refers to Bill 177, the amendment to section 49 of the Indian Act.

⁵⁰ House of Commons Debates, 10 April, 1911, 7020-7021.
parl.canadiana.ca/view/oop.debates_HOC1103_04/1.

⁵¹ Debates, 5891.

elections for chief and councillors. There could well have been people there who had no right to vote as no attempt was made to authenticate band membership. Certain additions to the surrender document were made after the vote and were never voted on or ratified by the band, so that the surrender submitted to the vote was not the same as the one signed.

A debate in the House of Commons about the methods used to facilitate this surrender was long and angry. Accusations were made about the legality of the ‘bag of cash’ method of inducement. While most members of the House appeared to agree with Pedley that it was in the town’s interest “that the reserve should be moved to a part of the country more remote from the white settlers,” the anger of the opposition was at how the surrender had been achieved and the betrayal of trust it represented.⁵² Specifically, Pedley was accused of attempting to bribe the people of St. Peter’s, of providing deliberate misinformation, and of not following the terms of the Indian Act in surrender negotiations.⁵³ Pedley asserted his innocence of any attempt at wrongdoings and went so far as to present a sworn affidavit to the House, saying that his bag of cash had been misunderstood.⁵⁴

This was five years before section 49 of the Indian Act was amended. Prior to its passing, the ‘consent to surrender’ clause (section 49) stated that a surrender must be agreed to by a majority of male members of the band, who are over twenty-one, and that the vote must be held at a council meeting according to the rules of the band.⁵⁵

⁵² House of Commons Debates, 3rd Session, 11th Parliament, 5884-5885.

⁵³ Debates, 5890.

⁵⁴ Debates, 5890.

⁵⁵ Hinge, 192.

A statutory declaration given by John Flett, a band member of St. Peter's, was read to the House.⁵⁶ Flett stated that notices announcing the meeting were not posted until Sunday, one day before the meeting, and that no notice was given that the final vote would take place on Tuesday. Flett believed that, with proper notice, people would have voted against a surrender. St. Peter's was a large reserve, so posting notices late was perhaps a deliberate strategy to prevent word spreading among the entire community. Young men had gone to work off reserve and did not know about the vote. Flett also believed that non-treaty men and minors, who were not eligible to cast a ballot, were among those who voted for the surrender.⁵⁷ It is possible that, given the chaos of the voting circumstances and Pedley's bag of cash, these men could have been bribed to participate in the vote.

The circumstances surrounding the surrender of St. Peter's reserve made the surrender itself suspect, and the government was called to account in the House of Commons. The debate in the house was lengthy and, despite Pedley's protestations that he had done nothing wrong, the circumstances of the surrender remained vague and contradictory. When questioned about the eligibility of those present to vote, Pedley said that his interpretation of the Act was that fifty percent of the men present at the meeting could approve the surrender. Mr. C. J. Doherty, representing St. Anne, Montreal, summed it up as the debate came to a close:

... I would not have intervened in the debate at all if it had not been for the magnificent indifference the Minister of the Interior this afternoon exhibited as to what the law might be governing the rights of these wards of his. He told us that he did not know whether this surrender was legal or illegal and it is a perfectly fair inference that he did not care whether it was legal or illegal....⁵⁸

⁵⁶ Debates, 5840.

⁵⁷ Debates, 5840.

⁵⁸ Debates, 5891-5892.

Mr. Doherty then went to the heart of the matter. We have been told, he said, that it has always been done that way. [Oliver] “has not told us whether the question ever has previously arisen whether the majority of the persons present at the meeting is the equivalent of the majority of the members of the tribe at a meeting”⁵⁹

Pedley’s response was that he had made enquiries to Indian Affairs and that the department’s opinion was that “all that is necessary is a majority of men at the band [who are] present at the meeting and entitled to vote, and that in every surrender dealt with by the department, that has been the practice.”⁶⁰ He then read section 49 to the House. “Surely,” he said, “that applies to a smaller number than a majority of the voters of a band.”⁶¹

As is evidenced by the House of Commons backlash around the circumstances of the St. Peter’s forced surrender, it was clear to members of the House of Commons that Indian Affairs was not acting in the best interests of the people of St. Peter’s. This surrender closely followed the Fort Williams expropriation (1905), which split this community into two separate locations and desecrated the sacred burial grounds of generations of Ojibway people. It is reasonable to assume that the powers within Indian Affairs, in this case Frank Oliver and Frank Pedley, were indifferent to the suffering of these First Nations peoples. This lack of humanity should have been enough to remove them from their positions of power, but they reported to the Prime Minister of Canada who was, at this time, Wilfrid Laurier. As evidenced in Chapter 3, Laurier was a proven racist who had taken a stand against allowing blacks to settle in Canada and had prevented

⁵⁹ Debates, 5893.

⁶⁰ Debates, 5891.

⁶¹ Debates, 5893.

this when he could.⁶² It was Laurier who had introduced the first reading of amendment 49(a) – the Oliver Act – into the House of Commons, which linked him to the reasoning behind the amendment. Given this, it becomes difficult to separate Laurier from Oliver and Pedley on the subterfuge undertaken by these men at St. Peter’s reserve. In this context, the disingenuous interpretation of the ‘consent to surrender’ clause of the Indian Act by Pedley would go unchallenged by his superiors.

It did not, however, go unchallenged by members of the House of Commons. St. Peter’s reserve fell under the jurisdiction of George Bradbury, M.P. for Selkirk.⁶³ The statute is precise, he said, and it is careful not to leave the determination of this question to be decided at a meeting. Using the adage of ‘two wrongs don’t make a right,’ Bradbury said that regardless of how many times the process has been done incorrectly, it cannot be allowed to set a precedent.⁶⁴ His speech lasted for about four hours, and he was obviously angry. He began by reading section 49 of the Indian Act to the House. There is a comma in the wording, he said, and that comma enforces the fact that only a majority of male members of the band who are over twenty-one *and* who were present at the meeting could vote on the surrender. It could *not* be interpreted as a majority of males attending the meeting.⁶⁵ Pedley’s interpretation of section 49 was not without precedent. Martin-McGuire writes that there had been much discussion within Indian Affairs about whether

⁶² Debates, 5911.

⁶³ George Henry Bradbury served as a Member of Parliament for Selkirk for 9 years, and as a Senator for more than seven years.

https://lop.parl.ca/sites/ParlInfo/default/fr_CA/Personnes/Profil?personId=3236.

⁶⁴ Debates, 5893.

⁶⁵ Bradbury’s interpretation of section 49 was correct. The comma in the wording after ‘age twenty-one’ breaks the paragraph into two separate statements. The first part is that a surrender should be agreed to by a majority of male band members who are twenty-one years old *and* present at the meeting, and the second part details the terms of a meeting that is summoned for that specific purpose (emphasis is mine).

‘majority’ meant “a majority of only the qualified members attending the surrender meeting or an absolute majority of all eligible members of the band.”⁶⁶ According to Pedley’s statement to the House, this interpretation of section 49 had been condoned and/or encouraged by Indian Affairs in other surrenders, and, given Martin-McGuire’s observation, there seems no clear way to understand how many land surrenders were illegally procured using Pedley’s interpretation of section 49.⁶⁷

The vote at the St. Peter’s council meeting, according to House of Commons minutes, was passed by a majority of seven – 105 for the surrender and 98 against.⁶⁸ According to the *Peguis* First Nation website, the voting was chaotic and confused, names were not recorded properly, and “additions to the surrender document were made after the vote had been taken but these were not voted on or ratified by the band, so that the surrender submitted to the vote was not the same as the one signed.”⁶⁹ Bradbury voiced his anger. “... here are ninety-eight men who went to the meeting and voted that they would not surrender their property, yet their property is gone from them ... without due process of law! It is a perfect disgrace.”⁷⁰ He accused the government of twisting the law, of manipulating it for the benefits of the white citizens and of depriving Indians of their land, before finally calling for an investigation into the surrender. The people of St. Peter’s took their dissatisfaction to the press, declaring the meeting had not been legal, that they

⁶⁶ Martin-McGuire, xxxii.

⁶⁷ “On June 29, 1998, after 91 years of struggle by Peguis First Nation, Canada confirmed it agreed with Peguis that the 1907 surrender of the St. Peter’s Reserve was void and legally invalid due to Canada’s failure to comply with requirements of the Indian Act of 1906.” Details of the long struggle are on the Peguis First Nation, Surrender Claim Trust website. <https://www.peguissurrendertrust.com/our-history/>.

⁶⁸ Peguis First Nation website. <https://www.peguissurrendertrust.com/our-history/>.

⁶⁹ Debates, 5897.

⁷⁰ Debates, 5897.

had been dispossessed of their land and they asked for a royal commission to investigate the circumstances.”⁷¹

For the government, the St. Peter’s surrender was an embarrassment, one which continued when the auction to sell the reserve land happened under dubious circumstances.⁷² Pedley was Frank Oliver’s deputy minister and his subordinate. While it is improbable that he would have gone to the meeting with \$5,000 cash without Oliver’s knowledge, it is more probable that they decided the ‘moneybag’ strategy together. The tactics of both Oliver and Pedley encapsulate the contempt these men had for the legalities of the Indian Act generally, and how little thought they cared about the tens of thousands of Indigenous families entrusted to their care.⁷³ Section 49 of the Indian Act was clear on process. Oliver and Pedley, as the top-ranking officials within Indian Affairs, used bribery and deceit to create a chaotic situation at the council meeting in order to obfuscate and manipulate the voting process.

⁷¹ Debates, 5905.

⁷² Debates, 5905.

⁷³ The people of St. Peter’s Reserve fought back against this forced surrender using both the Courts and the media. It took more than one hundred years before they were heard. The facts outlined here are brief and assembled primarily from historical House of Commons debates in an attempt to show how the colonial and racist perspectives of those in power were paramount in obtaining this surrender. These details are a sketch of the full circumstances and for that I apologize. My intention is to create linkages between the difficulties experienced by Indian Affairs in their attempts to elicit surrenders from the people of St. Peter’s Reserve in Selkirk, Manitoba (1907) and the Songhees people in Victoria, B.C. (1911), and how this led to the passing of amendment 49(a) of the Indian Act in 1911, which was then invoked to force the surrender of the Mi’kmaq of Kings Road Reserve in Sydney, Nova Scotia. For a more complete telling of the history of St. Peter’s, please visit the website of the Peguis First Nation. <https://www.peguissurrendertrust.com/#history> and the St. Peter’s Reserve page of the city of Selkirk museum, <https://selkirkmuseum.ca/places/st-peters-reserve/>.

Whether the misinterpretation of section 49 of the Indian Act by Pedley at the council meeting was deliberate or not, it is relevant to the events leading to the creation and passing of amendment 49(a), which changed the rules regarding surrenders for urban reserves. If the amendment had been in place in 1907 when Indian Affairs was attempting to bribe the people of St. Peter's, Frank Oliver and his deputy would have had a simple template to follow. This would not have escaped Oliver's notice. The 1906 changes to the Indian Act gave the Department of Indian Affairs the ability to distribute fifty percent of the proceeds of land sales directly to bands. This fifty percent incentive payment would have been what Frank Pedley was capitalizing on when he went to St. Peter's with his briefcase of cash, although there is no record of the money being distributed according to an agreed-upon process of calculation. A conclusion drawn from the House debates and from the declarations of the St. Peter's reserve members is that Pedley arrived at the reserve with the intent to deceive, and that this deception would have been condoned by his superior, Frank Oliver.

The Songhees' Surrender 1911

The town of Victoria, and the provincial government of British Columbia, had been in negotiation with the Songhees people to surrender their reserve land for decades, with little success. This reserve was seen to be impeding urban development in the town of Victoria. The Songhees reserve on the west coast of British Columbia was a counterbalance to the Mi'kmaq reserve at Kings Road on the east coast of Cape Breton Island. There were some similarities. They were both small and both were situated on harbours, on one the Pacific coast, the other on the Atlantic Ocean. They were urban reserves, and both were seen to be impediments to the development and expansion of the

towns that encompassed them. Between 1871 and 1910, the Songhees were asked several times to relocate and surrender their reserve. There were several reasons the Songhees had not reached an agreement to surrender. A particular grievance was an outstanding debt owed by the government for a land transaction the Songhees felt was dubious. There were previous land agreements that remained outstanding and the Songhees wanted these outstanding grievances settled before entering into another land negotiation.⁷⁴ However, in the forefront was the fact that the Songhees did not want to move. They had ocean frontage and the benefit of living and working within a city which was a source of livelihood.⁷⁵ Jeannie Kanakos writes that much of their resistance came from their attachment to the site itself, which was “land occupied by their forefathers from time immemorial and consequently dearer to them than anything they could possess.”⁷⁶ They were disturbed by repeated requests from the government that they leave their reserve, in spite of their unqualified refusal to do so.⁷⁷

By the 1900s, the advantages of their city location were eroding and the Songhees understood that “federal, government and commercial interests as well as Victoria residents were determined that the reserve should be moved, with or without their consent.”⁷⁸ Encroachment continued to be a problem. While they were able to halt a planned immigrant shed that was planned for their land, they were less successful about an expropriation for the Esquimalt and Nanaimo Railways, which was legal in accordance with Indian Act. They continued to resist ‘piecemeal encroachment’ but, by 1910, there

⁷⁴ Kanakos, 94.

⁷⁵ Kanakos, 92.

⁷⁶ Kanakos, 93.

⁷⁷ Kanakos, 93.

⁷⁸ Kanakos, 86.

were real fears about the possibility of losing the entire reserve land base through expropriation.⁷⁹

When the provincial government offered the Songhees a large cash settlement, they agreed to a surrender. This particular surrender was complicated by the necessity to involve federal and provincial levels of government. According to Dorothy Kennedy, the evolution of land policies and practices in British Columbia was not the same as for the rest of Canada.⁸⁰ In most provinces, allocating reserve lands was relatively straightforward, and, once allocated by a province, reserve land simply moved to federal control. When British Columbia entered Confederation, it maintained control over its provincial crown lands and there was a long-standing dispute between the province and the Dominion regarding acreage allocation when laying out reserves.⁸¹ A compromise agreement that was reached in 1875 "... agreed that any lands alienated from a reserve for whatever reason would revert to the province."⁸² Known as a 'reversionary interest,' this part of the agreement was contentious and the administration of Indigenous land in the province would prove difficult for years to come.⁸³ When an agreement was finally reached with the Songhees, it required ratification in both the provincial legislature and in parliament, as the three-way agreement was outside the terms of the Indian Act.

The Songhees finally agreed to surrender after almost fifty years of resistance because the band had new leadership and because of changes in internal and external

⁷⁹ Kanakos, 86.

⁸⁰ Dorothy I.D. Kennedy, "A Reference Guide to the Establishment of B.C. Indian Reserves, 1849-1911," *Indian and Northern Affairs*, 1994, 1.

⁸¹ Titley, 135.

⁸² Titley, 136.

⁸³ Titley, 136.

conditions.⁸⁴ The band was already under threat from a possible expropriation by the Esquimalt and Nanaimo Railway and the Canadian Pacific Railway.⁸⁵ Reserves across the country were anxiously watching the passage of amendment 49(a) through the House of Commons, and this would have been true for Chief Michel Cooper of the Songhees Nation. He would have understood that that, if the amendment passed, a forced surrender of their reserve was a very real danger and the Songhees had a lot to lose. The chief believed that the time was right for a move.⁸⁶ The 1906 amendment to the Indian Act which allowed the government to distribute up to fifty percent of the purchase price of the land immediately to band members had recently passed in the House of Commons.⁸⁷ The surrender agreement for the Songhees allowed for a significant cash payment of \$10,000 per head of family, the cost of which would be borne by the provincial government.⁸⁸ Chief Michel received an additional fee of \$28,000, which was not uncommon for arbitrators of these agreements.⁸⁹ If the Chief and his advisors had not agreed to surrender, it is possible that a surrender would have been forced by amendment 49(a). The Songhees surrender was timely and allowed “the Songhees to receive a cash payment rather than nothing, as might have been the case if they delayed their decision”⁹⁰

The distribution of cash payments to individual families was outside the terms of the Indian Act and therefore required special federal legislation to legalize them.⁹¹ The

⁸⁴ Kanakos, iii.

⁸⁵ Kanakos, 106.

⁸⁶ Kanakos, iii.

⁸⁷ Gladue Rights Research Database: Legal Aid Saskatchewan, Indian Act Amendment, <https://gladue.usask.ca/node/2356>.

⁸⁸ Debates, 7248-7249.

⁸⁹ Kanakos, 105.

⁹⁰ Kanakos, 106.

⁹¹ Kanakos, 107.

surrender arrangement was between the government of British Columbia, the Dominion government and the Songhees Nation. Parliamentary sanction was necessary in the form of two specific pieces of legislation. *The Songhees Reserve Act 1905* was passed by the government of British Columbia, perhaps in anticipation of an agreement. Bill 179, *An Act respecting the Songhees Indian Reservation, Vancouver Island*, was introduced into the House of Commons by Frank Oliver on April 26, 1911, and this gave the necessary statutory authority to a transaction for the surrender of an Indian reserve near the city of Vancouver (sic.), B.C., which has been a source of difficulty for a number of years.⁹² As Oliver said in the House of Commons, this was an extraordinary case and needed to be dealt with in a separate piece of legislation.⁹³ After the second and third readings, Bill 179 passed without debate and the House moved directly to the next item on the agenda, which was the second reading of Bill 177, “*An Act to Amend the Indian Act.*” This act included amendment 49(a) and it was intended to create the legal framework to allow Indian Affairs to force Indigenous communities off their reserve lands when it was needed for town expansion.⁹⁴ The amendment legalized a direct way to acquire valuable reserve land without the need to negotiate. It is probable that Frank Oliver also saw that the amendment was a way for the government to limit expensive cash settlements when negotiating surrenders with urban reserves.

The circumstances and outcomes of these three surrenders differed from the eventual outcome of the Kings Road Reserve, but none of these surrenders were straight-

⁹² Oliver’s explanation referred to Vancouver. While there were negotiations with a reserve in Vancouver, in this case it is clear he was clearly referring to the Songhees Reserve in Victoria, B.C.

⁹³ Debates, 7825.

⁹⁴ Debates, 7825.

forward. They are discussed here because there are significant similarities. They all happened while Frank Oliver was Minister of the Interior and Superintendent General of Indian Affairs. As shown in parliamentary discussions, members of the House of Commons were aware of the circumstances of these surrenders, which had been difficult and protracted. All these forced surrenders, including the Fort William expropriation, had been resisted. While the Songhees people eventually did negotiate a settlement with the federal and provincial governments, it took almost fifty years. The pressure to reach the final settlement was influenced by the threat of two railways expropriations and the imminent passing of amendment 49(a). Negotiating a surrender had enabled the Songhees “to accept a cash payment rather than nothing, as might have been the case if they delayed until the reserve was expropriated,” or if amendment 49(a) had passed the House of Commons before their surrender. The surrender agreement of the Songhees people was voted into law just ahead of the passing of amendment 49(a). If this had happened after the amendment had passed, it would have removed the necessity to negotiate.

Oliver would have been aware of the protracted and difficult nature of the surrenders outlined in this chapter. As head of Indian Affairs, he would have been active, or at least knowledgeable, of negotiation decisions. It is my contention that his involvement in the circumstances of these three surrenders played a direct role in the emergence of amendment 49(a), otherwise known as the Oliver Act, as a way of circumventing protracted and difficult future negotiations for the surrender of reserve lands.

By 1911, changes to the Indian Act allowing the forced removal of urban reserves had changed the landscape of reserve surrenders. Peggy Martin-McGuire writes that this amendment to the Indian Act “dispensed altogether with the requirement for a surrender

where reserve lands were being taken in order to make space for large municipalities or for other public purposes.”⁹⁵ Martin-McGuire gives the amendment a broader scope that ‘just being close to towns with populations of 8,000 or more.’ What is not mentioned is that powerful men such as Frank Oliver, Wilfrid Laurier and Joseph Gillies believed that white people deserved more rights and privileges than non-white people. It is documented that Oliver and Wilfrid Laurier tried to reduce or keep out blacks who were attempting to immigrate.⁹⁶ Neither man believed that blacks suited their vision of Canada, which was white, and British or European. On August 12, 1911, about four months after amendment 49(a) had become law, Wilfrid Laurier signed and approved a provision to Section 38 of the Immigration Act that prohibited the landing in Canada “of any immigrants belonging to the Negro race, which race is deemed unsuitable to the climate and requirements of Canada.”⁹⁷ The colonial structures of parliament and the courts absented non-white men and women from access to power. The biases of these powerful white men were reflected in the shaping of amendment 49(a) in 1911, making racism the hidden driver of this legislation and in the eventual judgement of the Exchequer Court, as I will discuss in Chapter Four.

It is reasonable to assume that, in developing amendment 49(a) of the Indian Act, Oliver was looking for a way to eliminate the time-consuming and sometimes expensive process of negotiating surrenders, which may not necessarily give him the outcome he wanted. It is also reasonable to assume that the racial bias shown by Wilfrid Laurier in an Order-in-Council to ‘keep out negroes’ which was referred to the [Department of the]

⁹⁵ Martin-McGuire, xviii.

⁹⁶ Debates, 5911.

⁹⁷ “Order-in-Council,” 12/08/1911, RG2-A-1-a, Vol. 1021, PC 1911-1324, LAC, Ottawa, ON.

Interior on 15 August 1911 would not be confined to a bias of only “the negro race” but to all non-white citizens. Canada was unable to ‘keep out Indians’ but it could and did create legislation in the form of the Indian Act that affirmed their place as second-class citizens. By amending section 49 of the Act, Oliver replaced Indigenous surrender rights explicitly defined by law with a legal process whereby the government could force the reallocation of Indigenous land of reserves that were ‘in the way.’ He removed the need for time-consuming negotiations and/or expensive cash settlements or incentives. With the support of Prime Minister Sir Wilfrid Laurier, Oliver carefully and knowingly put in place a legal vehicle to bypass the Dominion government’s treaty obligations.

In his article, “‘Not One More Bloody Acre’: Land Restitution and the Treaty of Waitangi Settlement Process in Aotearoa New Zealand” Matthew Wynard argues that “the Māori people of New Zealand were systematically dispossessed of all by a fraction of their land through a variety of mechanisms, including confiscation, individualisation of title, excessive Crown purchasing and the compulsory acquisition of land for public works.”⁹⁸ In Canada, he writes, the “dispossession of Indigenous land is absolutely central to settler colonialism” with its primary motive being access to territory.⁹⁹ For Indigenous peoples in Canada, this dispossession of land was an act of brutality, and the loss of land experienced by the four reserves briefly discussed in this chapter was not unique. They suffered the same colonial-enforced outcomes: loss of territory and an inability to regain it, in spite of circumstances that have called the legality of these surrenders into question. The colonial mechanisms in Canada and Aotearoa New Zealand to gain access to land

⁹⁸ Matthew Wynard, “‘Not One More Bloody Acre’: Land Restitution and the Treaty of Waitangi Settlement Process in Aotearoa New Zealand,” *Land* 8, 162, 1.

<https://www.mdpi.com/2073-445X/8/11/162>.

⁹⁹ Wynard, 4.

were similar: expropriation, forced surrenders, and Crown confiscations. While this thesis looks at a single amendment within the Indian Act, this amendment exists within the context of an act of Parliament which could be amended at will to provide necessary access to land. The failure by Indian Affairs to protect these four reserves is not surprising. Those in power within Indian Affairs were following a model of settler colonialism that required land for settlers, and the Indian Act existed as part of the British model of settler colonialism which endorsed land confiscation at any cost.

Chapter 3 The Debate in Parliament

In 1911, Bill 177, *An Act to Amend the Indian Act*, made its way through the House of Commons (the House). The bill was to amend the ‘consent to surrender’ clause which was section 49 of the Indian Act that required that any surrender of reserve land must have the approval of more than fifty percent of male residents of a reserve who were over twenty-one, and who were present at a meeting called for the purpose of voting on the proposed surrender.

Bill 177 parceled section 49 into seven clauses, the first of which was 49(a), which removed the ‘consent to surrender’ clause entirely if a reserve was close to a town with a population greater than eight thousand. The remaining six clauses were numbered consecutively as 2, 3, 4, 5, 6, and 7. Parliament’s approval of the amendment put in place a mechanism by which Indian Affairs could force a surrender of urban reserves without the requirement of consent. The amendment could be invoked by the Superintendent General of Indian Affairs if it was deemed necessary, and the matter was then referred to the Court of the Exchequer for a judge to decide if removal was considered expedient.¹

Using historical Hansard files, this chapter will look at the debates in the House as amendment 49(a) passed through the required three readings before the final vote on May 16, 1911. Amendment 49(a) was also known as the *Oliver Act* after its architect Frank Oliver, and the removal of the ‘consent to surrender’ clause changed the landscape of

¹ The word ‘expedient’ is used frequently in the House of Commons at this time, and is defined as “convenient or practical, although possibly improper or immoral”. *Concise Oxford English Dictionary, 11th Edition*, revised, edited by Catherine Soanes and Angus Stevenson. (Oxford: Oxford University Press, 2006), 501.

Indigenous/settler relationships in Canada, and land security for First Nations urban reserves across the country became much more precarious.²

The vote in parliament on Bill 177, *An Act to Amend the Indian Act*, was not unanimous. It was supported or opposed by some members of the House according to their conscience, and by most members according to their political affiliation, although, as Prime Minister Wilfrid Laurier led a majority government, the outcome of the vote was never at risk. An examination of the debate as it happened, as well as the final vote in the House and the Exchequer Court judgement gives some insight into the entrenched institutional and racist underpinnings of the colonial political and legal systems which were in place at that time in Canada and which made the outcome of the vote on the amendment inevitable, regardless of the opinions and arguments of individual members of the House.

The Amendment in the House

Frank Oliver was Superintendent General of Indian Affairs from 1905 to 1911, and he was the architect of amendment 49(a). The first reading of the bill, however, was introduced into the House of Commons by Prime Minister Sir Wilfrid Laurier.³ It is possible that Laurier stepped in on this occasion as a way of sending a signal to his caucus that this was an important bill and that members need to hold the party line. The bill had two objectives; he told the House. The first was to expand the scope of infrastructure work already permissible under Provincial statute. The second objective was to provide a legal

² In the Indian Act of 1880, the ‘consent to surrender’ clause was section 37 of the Act and became section 49 in the Indian Act of 1906.

³ Debates, 7019.

avenue to deal with reserves that were seen to be impeding the expansion of towns and cities.⁴ He used the Songhees reserve in Victoria as an example of a reserve restricting a town's development. The Indians are there by virtue of a "compact" (*sic.*) with the Crown, he said, and the government did not believe it was advisable to dispossess them arbitrarily. He mentioned the satisfactory agreement that had been reached with the Songhees but told the House that there were other reserves where negotiations had proved unsuccessful.⁵

The amendment was a true 'Oliver' document. In the House, Oliver answered questions with many words that reflected his tendency toward non-specificity, while padding his answers with generalities. He seldom addressed factual questions with factual answers. Within the construction of this amendment, there is a vagueness that would not have been accidental, and which allowed the bill some flexibility of interpretation. For example, none of the seven paragraphs in the 1911 amendment specified that a reserve needed to be impeding the expansion of a town or city in order to be removed under this Act. Clause 1, which is called 49(a) in the Act, reads,

In the case of an Indian Reserve which adjoins or is situated wholly or partly within an incorporated town or city having a population of not less than eight thousand, and which reserve has not been released or surrendered by the Indians, the Governor in Council may, upon the recommendation of the Superintendent General, refer to the judge of the Exchequer Court of Canada for inquiry and report the question as to whether it is expedient, having regard to the interest of the public and of the Indians of the band for whose use the reserve is held, that the Indians should be removed from the reserve or any part of it.⁶

Clause 2 outlines the process for the Court of the Exchequer.

Clause 3 outlines the power of the judge and assignation of counsel.

⁴ Debates, 7827.

⁵ Debates, 7838.

⁶ Hinge, 193.

Clause 4 asks the judge to ascertain compensation for individual loss and damages.

Clause 5 outlines the logistics of how the findings are transmitted and distributed.

Clause 6 gives instructions re: finances for compensations, new land purchase, etc.

Clause 7 gives the Superintendent General the powers of the Expropriation Act when selecting and acquiring land for a new reserve.

Amendment 49(a) left the reasons to force a surrender open to interpretation, and Oliver's explanation to the House that the bill was to provide a legal avenue to deal with reserves that were seen to be impeding the expansion of towns and cities was simply a possible scenario that became the unwritten reason behind the amendment. Amendment 49(a) is not explained. Its essence is that a judge would decide "whether it is in the interest of the public and of the Indians of the band for whose use the reserve is held," to remove people from the reserve or part of it.⁷ 'The public' is undefined but its intent was almost certainly to include white townfolk and exclude their Indigenous neighbours. The conclusion to be drawn from this is that Oliver (and Laurier) wrote the amendment to be as generic as possible. When discussing it in the House, Oliver used examples such as the Songhees reserve that had been encompassed by the city of Victoria, B.C., and the inference was that the amendment will solve similar such cases that arise. The wording of the amendment allows for a much broader interpretation than this example. This is a deliberately racist amendment which grants power to the Superintendent General to relocate reserves if he deems it 'in the public interest,' a vague and meaningless phrase that is open to many interpretations, including not wanting reserves as neighbours, or wanting reserve land that was ever-increasing in value, or both.

⁷ Hinge, 193.

Oliver did not attempt to define what ‘situated wholly or partly within an incorporated town or city’ meant in relation to the amendment, nor was there an attempt to identify what would be considered a reasonable distance, beyond which the amendment would not apply. It did not take into account the fact that, when reserves were originally allocated their land base, they would have been set apart from towns, and that it was town expansion that was intersecting with reserve boundaries, not the reverse. There was no attempt to understand that effective town planning could have avoided unwanted contact with reserve boundaries and could avoid this in the future. This would have been possible had town planners been instructed by town councils and the Dominion government to take this into account. The lack of definition in the new amendment, and the unwillingness to assume responsibility for issues caused by shortsighted town planning, were serious flaws in the amendment that Oliver left open, to be interpreted on a case-by-case basis.

In the same parliamentary session, the second reading of Bill 179, *An Act Respecting the Songhees Indian Reserve*, was introduced by Frank Oliver. This is extraordinary legislation, but this was an extraordinary case, Oliver told the House. Bill 179 provided the necessary authority for British Columbia to retain ownership of the Songhees land after it was surrendered, an unusual scenario. This surrender, said Oliver, “was required in connection with the growth and extension of the city,” as it was impeding city expansion.⁸ After Bill 179 was passed, Bill 177 *An Act to Amend the Indian Act* was introduced, which links the timing of this bill to the difficulties experienced by Indian Affairs in the long and difficult negotiations of the Songhees surrender.

⁸ Debates, 7825.

The Songhees and the Mi'kmaq lived on opposite sides of the country, and it is not clear whether either reserve was aware of the continued attempts by Indian Affairs to affect surrenders of their reserves. What is clear is that the passing of the first reading of Bill 177, *An Act to Amend the Indian Act*, had not gone unnoticed by other First Nations across the country. After the second reading was introduced by Oliver, the M.P. for Nova Scotia and leader of the opposition, Robert Borden, immediately asked Oliver to explain the bill. Across the country, First Nations people were watching the amendment's progression through the House of Commons and Indigenous groups had been making inquiries of Borden, anxious to understand how this affected their own reserves. George Bradbury, M.P. for Selkirk, Manitoba, had received letters from Chiefs of the Six Nations Reserve located about ten miles outside Brantford, Ontario, a town that already had a population greater than ten thousand.⁹ The letters expressed concern about how the amendment would affect their reserve, and suspicion about the pending legislation. We "are of the opinion that an aim is being made by some unscrupulous persons to legislate us out of our reserve ... in a similar manner as was done at St. Peter's reserve."¹⁰ The letters were signed by Chief Josiah Hill, Chief Jamieson and Chief J.W.M. Elliott, Secretary of the Correspondence Committee of the Six Nation Indians. The chiefs asked for unrevised copies of Hansard to be forwarded to them, which showed the deep Indigenous distrust of the political process and of its elected politicians. A second letter asked if this would be applicable to all Indian Reserves in Canada, and will it include or apply to the Six Nation

⁹ It is probable that First Nations chiefs from Six Nations reserve in Ontario would have contacted Bradbury from Selkirk, Manitoba, because he had been highly critical of the dubious circumstances of the St. Peter's reserve surrender outlined in Chapter 2, and therefore would have been seen as sympathetic to First Nations in their opposition to this bill.

¹⁰ Debates, 7834.

Indians or not? It also asked bluntly, “what is the full intention of this Bill?”¹¹ First Nations understood the duplicity of those in power, and their ability to mould the wording of bills such as this to allow gaps for later use, which was the case with this amendment. The Chiefs would have seen that, and, although Oliver said that it probably would not apply to them, their anxiety and distrust was not assuaged by the vagueness of Oliver’s words.

Later in the debate, Bradbury again asked whether this legislation would affect the Six Nation Indian Reserve. True to form, Oliver’s answer was complicated and evasive, and he seemed to avoid the question altogether. It is probable, Oliver said, that expropriation for railway and other purposes would conflict, but it was the same for everyone and reserves were not being singled out.¹² It was the second section of the proposed amendment that Oliver said was a radical departure from previous legislation in regard to Indian rights and Indian land, and it was the circumstances of the Songhees reserve surrender, which had required the sanction of parliament, that had made the Bill necessary. This surrender had been complicated, difficult and lengthy and, according to Oliver, had played a direct role in the fashioning of amendment 49(a).¹³

Oliver told the House that if similar circumstances should happen again, and he believed they would, there needed to be a provision to deal with them that would protect the material interests of the reserves, while also providing protection for the interests and welfare of the white communities who lived next to reserves.¹⁴ There are certain treaty

¹¹ Debates, 7835.

¹² Debates, 7827.

¹³ Debates, 7827.

¹⁴ Debates, 7827.

rights that protect Indigenous land from encroachment, he said, but there are certain circumstances and conditions in which,

the Indian, by standing on his treaty rights, does himself an injury and an injury to white people whose interests conflict [and] while we want to pay every respect to treaty rights – and I think nobody will accuse any government of Canada of doing otherwise than paying the fullest respect to treaty rights [we do not wish that] the condition existing in regard to the Songhees reserve should be repeated.¹⁵

Once again, Oliver’s speech was rambling and unspecific. A quick dissection of this short speech could interpret his words this way, 1. First Nations do not understand that their treaty rights are often not in their best interests, 2. The ‘interests that conflict’ are because First Nations do not stand aside to accommodate white settler interests, and 3. Amendment 49(a) rules out the possibility of lengthy negotiations and good settlements, such as the Songhees had negotiated. Perhaps Oliver was still smarting from difficulties from the long drawn-out Songhees settlement, which included new reserve land and a significant cash settlement for male heads of family.¹⁶ It was clear that Oliver does not want this lengthy and expensive process repeated. This short speech about how the government wants to pay ‘every respect to treaty rights’ was out of context, without detail, and lacked any cohesive argument. It was true ‘Oliver’ obfuscation. Peggy Martin-McGuire writes that the 1911 amendment “directly contravened the [western] treaties.”¹⁷

The Prime Minister came to Oliver’s aid. The principle involved in this legislation, he told the House, is that when the population of a town or city in the vicinity of a reserve had expanded to more than ten thousand people, the superintendent-general could ask the court “whether or not it would be in the interest of all concerned, the Indians’ interest first

¹⁵ Debates, 7828.

¹⁶ Debates, 7828.

¹⁷ Martin-McGuire, xxiii.

of all, and the interest of the communities in these growing cities, that the Indians should be dispossessed, upon fair compensation of course, and given another reserve, as we have done with the Songhees.”¹⁸

Laurier did not mention that the Songhees resistance to this move had lasted for almost fifty years, and that the agreement finally reached between the government and the Songhees Nation was almost surely a direct result of this impending amendment. Given these circumstances over such a period of time, the Songhees’ surrender could legitimately be categorized as a forced surrender.

Oliver then explained the government’s rationale behind the bill and his explanation was masterful political double-speak. He talked about the protection of Indigenous material interests, the protection of Indigenous lands from encroachment, Indigenous rights and the government’s need to respect treaties, while denigrating attempts by Indigenous people to hold onto their reserve lands, as the law of treaty entitled them to do so, and the resulting cost to white people who are denied land as a consequence of Indigenous intransigence.¹⁹ Oliver believed that this should not be allowed to happen, and that the needs of white citizens must be paramount. There were members of the House who were skeptical of Oliver’s motives. George Foster voiced his cynicism on the floor of the House. “I have not as much confidence in the Superintendent General of Indians Affairs ... I used to think [his] whole object was to conserve the rights of the Indian first and entirely. I have modified my opinion, and now look upon that official as the paid officer of a party government.”²⁰ Foster was a member of the opposition, and his

¹⁸ Debates, 7831.

¹⁹ Debates, 7829.

²⁰ Debates, 7838.

comments, while quickly made, voiced a growing distrust in Oliver's manipulation of a process that so obviously violated Treaty rights.

Oliver's final comment before the bill passed third reading was again different from where he started. This time, when asked how he could justify taking such action, he replied,

We recognize that the power asked for is arbitrary, and that it should not be exercised except under exceptional circumstances, such exceptional conditions being that the land of the Indians, by reason of their being contained within or adjoining a city, has reached an abnormal value altogether out of comparison with the original value or intention in setting apart (sic.) of the reserve, the result being that it is in interest of the Indians that the townsite value which their reserve has attained should be translated into cash so that they may get the benefit of it rather than that they shall merely continue to occupy land having that value, but of which they are not getting the benefit.²¹

This was a very loose interpretation of amendment 49(a) and after this extraordinary piece of 'Oliver' reasoning, the bill passed third reading on May 4, 1911. Oliver had alluded to land value previously in the House during debates about this bill but in this rambling speech, he had given land value as the primary reason for implementing amendment 49(a), and he used this rationale to avoid stating what was his personal driving force - Oliver did not believe non-white people were his equals, and his ulterior motives were profoundly racist. An article in the Winnipeg Citizen on March 21, 1911, reported that he had banned Blacks from crossing the border into Canada, on the grounds that they were of a "less desirable class."²² While he was questioned on this article in the house, he would not clarify his statement further, other than to say that it was a misunderstanding of the government's immigration policy, which he described as

²¹ Debates, 8409.

²² Debates, 5911.

necessarily “restrictive, exclusive and selective.”²³ Six months later, the Laurier government banned black people for one year through an Order-in-Council which read, “For a period of one year from and after the date hereof, the landing in Canada shall be and the same is prohibited of any immigrants belonging to the black race, which race is deemed unsuitable for the climate and requirement of Canada.”²⁴

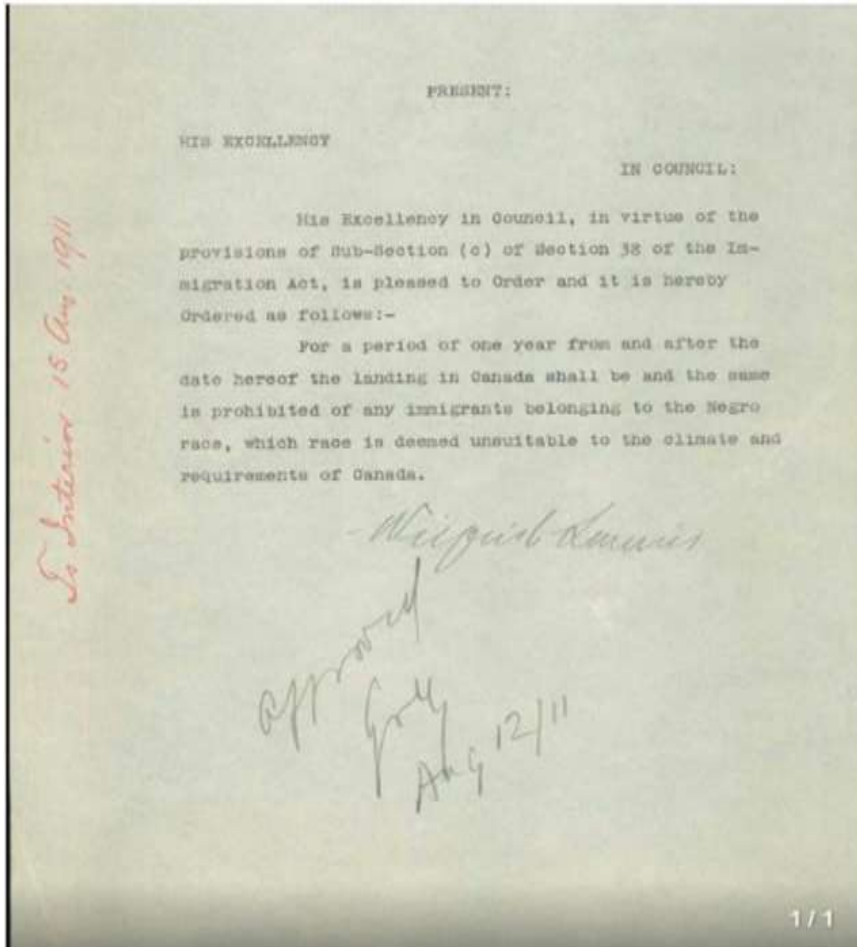


FIGURE 3.6. 1911 Order in Council signed by Wilfrid Laurier, prohibiting “immigrants belonging to the Negro race” for one year.

Both Oliver and Laurier used their power as elite parliamentarians to ensure that non-white persons were not easily admitted to Canada. Oliver could not exclude

²³ Debates, 5912.

²⁴ “Orders in Council,” RG2-A-1-a, Vol. 1021, PC 1911-1324, 12 August 1911.

Indigenous people, but he could ensure they remained second-class citizens. The restrictive measures Oliver and his party were legislating through these at First Nations were ‘kept in their place,’ which was outside the boundaries of white towns. Oliver’s statement regarding the realization of cash for land value to enrich First Nations’ coffers was simple sophistry that went unchallenged in the House.

Bill 177 *An Act to Amend the Indian Act* did not pass through the House of Commons without debate. Oliver (and Laurier who stood beside Oliver as they justified the Bill to members of the House) began by stating that the Bill was indeed a radical departure in regard to Indian rights, but that land is valuable, and the requirements of settlers should not be held hostage to technicalities of legislation such as the Indian Act, which he believed interfered with the requirements of white settlers.²⁵ In this statement, the ‘valuable land’ comment is not developed, but has been introduced. Traditionally, he said, both Great Britain and Canada have adhered to a policy of fair dealing with the Indians, and that the government does not wish to depart from that, but Indian land is for occupation, not speculation and Oliver did not believe a reserve should be held for its speculative value.²⁶

In raising the point that reserve land could be sold for its speculative value, Oliver seems to be intimating that the reason reserves were being ‘intransigent’ was because they were holding out for a greater cash payment. This is colonial thinking that portrayed a profound lack of understanding of the relationship Indigenous people have to their land. His rationale for this statement was vague, and he seemed to be inferring that First Nations were holding onto their urban reserves because they wanted to allow the value of

²⁵ Debates, 7850

²⁶ The amendment was later changed to 8,000 inhabitants.

reserve land to increase in value, an absurd statement which reflects his disconnection from the people he was in power to serve. As was shown in Chapter Two, Oliver was involved in some land deals that had suspicious circumstances and his white, colonial perspective would have been to create an amendment that gave cities and towns opportunity to resell the land for its maximum value. It is an interesting argument because what Oliver avoided saying is that white townspeople do not want Indigenous neighbours. In the case of Kings Road reserve, their land on Sydney harbour had become desirable as land values continued to increase on these waterfront properties. If, as Oliver said, the primary reason for the bill was to ensure that the land value (of the Kings Road reserve) can be realized while not inhibiting “the progress of the white population,”²⁷ he perhaps was thinking of the reserve’s neighbour, Joseph Gillies, who was attempting to subdivide the property that adjoined the reserve into smaller lots.

However, the intent behind his summation is clear. The Indian Act should not be allowed to elevate privilege to Indigenous nations to hold their land, while diminishing the privilege of white settlers who need it. Oliver’s belief in white superiority was instrumental in the bill’s development and reflected an attempt to ensure that white privilege was not subsumed to Indigenous land rights.

It was Bradbury who pointed out what Chief Michel of the Songhees Nation had clearly understood. The amendment “... will deprive the Indians on every reserve in Canada of that right to negotiate a fair settlement.”²⁸ Both Bradbury and Chief Michel understood that the amendment would remove any need for Indian Affairs to negotiate settlements, and that they would receive payment only for compensation for lost buildings

²⁷ Debates, 7850.

²⁸ Debates, 7836.

and other infrastructure. Chief Michel was savvy enough to end the Songhees decades-long resistance before amendment 49(a) was voted into law and he had negotiated a good settlement of cash and land for the Songhees people before the bill passed.

The debate in the House continued at length, and again and again, the opposition brought up the fact that there was a contract made between First Nations and His Majesty's government that no one, "not a bench of judges, or even fifty judges," had the right to set aside.²⁹ Although there was opposition and discussion about the bill, of those members who spoke to the amendment, many seemed to agree with the intent of the bill, which was to move reserves beyond the boundaries of towns with populations greater than eight thousand people. Some members wanted to broaden the parameters further by reducing the size of the town to far less than eight thousand. William Staples from Manitoba had been petitioning the government about the towns of Swan Lake and Marieopolis (sic.), which were anxious to extend their boundaries but were inhibited by a reserve situated between the two towns. Staples suggested that three thousand residents could be considered instead of eight thousand, saying that smaller places are also anxious to develop their localities and extend their boundaries to open up more land for production.³⁰ Others felt the legislation was dealing with a legitimate problem.³¹ Charles McGrath said it was "not always be desirable to have masses of white people thrown up against the boundary of an Indian Reserve. It is not good for the Indian physically [or] morally" and it inhibits town expansion.³² McGrath was using parliamentary double-speak perfected by Oliver. The intent of what McGrath is saying is that white people do not want

²⁹ Debates, 7836.

³⁰ Debates, 7850.

³¹ Debates, 7850.

³² Debates, 7850-7851.

Indigenous reserves as neighbours, that the two races should not live side by side and that, in order to achieve this desired segregation, the reserves should move. Once again, the lack of incorporating town planning into this equation is notable by its absence. McGrath also said that towns with smaller populations would find themselves in a difficult position if its citizens had to wait until the baseline of eight thousand was reached. He suggested two thousand. Liberal Frederick Pardee held the hard party line in support of Oliver. ‘Indians’ should not be allowed to refuse to surrender their land when it is badly needed to expand the land base of colonial communities, he said. He did not define ‘need’, nor was it suggested that forward thinking town planning could allow expansion that would suit everyone.³³

Oliver and Laurier both responded to questions about this bill, which shows the joint effort that had gone into its development. Laurier was asked if the bill provided for the dispossession of reserves, and if the Fort William Indian reserve came within the scope of the Bill, and also how the Reserves would be disposed of?³⁴ While the speaker did not elaborate on the reasoning behind his question about the disposal of reserve land, it is probable that it was a reference to other land transactions that had come under scrutiny, such as the disposal of St. Peter’s reserve land which had caused a furor in the House of Commons. Upon brief assurance from Laurier that “this has been taken care of,” the bill passed second reading without further debate.³⁵

There are four independent sections of the bill, Oliver told the House, and they are designed to meet changing conditions caused by increasing populations.

³³ Debates, 7837.

³⁴ Debates, 7820.

³⁵ Debates, 7820.

Consequently, with increase of population and increase of value of land, there necessarily comes some clash of interest between the Indian and the white man. Now, while the purpose of the Indian Act is to protect the rights and interests of the Indians, and while the administration of the Indian Department is also for that special purpose, it is not right that the expansion of white settlement should be ignored, - that is, that the right of the Indian should be allowed to become a wrong to the white man. Certain provisions of this Bill are made with a view, as far as possible, to protect the rights of the Indians and still protect the public interest, which, as the House is well aware, sometimes clashes to a certain degree with the rights of the Indian as set out in the Indian Act”³⁶

Again, Oliver has made it clear that the land needs and interests of ‘the white man’ were paramount and will always take precedence over Indigenous rights. The ‘view to protect the rights of the Indians’ does not mean anything in the context of his next words, which are to ‘protect the public interest’. Oliver suggested that the public interest would supersede First Nation’s interest if there was a conflict, and his wording makes it clear that he did not consider First Nations people to be part of the general ‘public.’ His words are strategic, emphasizing his view of First Nations people as inferior and ‘not one of us.’ Laurier entered the debate to clarify the question of treaty rights, although he was careful not to mention the word ‘treaty’ in this speech, and continued to emphasize that the public was inconvenienced by the presence of reserves.

To a certain extent this legislation does interfere with the rights of the Indians. It has been at all times under British government, on this continent a principle that the rights of the Indians must be preserved. That is the primary law, and we have had evidence of great inconvenience to the public and to growing communities arising out of strict adherence to that principle. [Oliver] has just introduced a Bill – an exceptional Bill – to deal with a question such as this is ... Everyone knows that when a city is growing up in the vicinity of an Indian reserve, it is not a benefit, but rather an injury both to the Indian and the white man. What are we to do under such circumstances? We must preserve faith with the Indians³⁷

³⁶ Debates, 7826.

³⁷ Debates, 7831.

The words ‘we must preserve faith with the Indians’ in the context of legislation designed to break this faith absolutely made his words meaningless. With this amendment, Oliver and Laurier were creating a ‘legislative loophole’ in the Indian Act to allow the Court of the Exchequer to make rulings which would circumvent treaty obligations. There was no requirement to allow First Nations an opportunity to voice their opposition. It was clear to M.P. Gus Porter that treaties *were* being violated and he argued that the Court of the Exchequer should not be given this power. It must come back to parliament, he said. Borden agreed with him. This was “an extreme step” to bypass parliament and allow the Superintendent General and the courts to depart from treaties that have “been sacredly observed for a hundred and fifty years.”³⁸

It appears that much of the opposition of both Porter and Borden was not to the content of the Bill that Oliver and Laurier were proposing, but to the process which did not allow for parliamentary oversight. If a judge of the Exchequer Court ruled in favour of forcing a surrender, the judgement could be acted upon by Indian Affairs without further discussion in parliament. In an impassioned speech, Borden challenged parliament to scrutinise this amendment, addressing the unfair treatment toward Indigenous peoples.³⁹ This is a very extreme step, he said, and one which is out of step with Canadian government tradition. We can be proud that we are able to boast that contracts and treaties have been “scrupulously observed” by the British Crown. While the growth of this country provides some justification for this Bill, “you treat the Indians as not being capable of dealing with their own affairs”⁴⁰ Borden argued that, if treaties are to be

³⁸ Debates, 7833.

³⁹ Robert Borden was leader of the opposition and became Prime Minister of a conservative government in the federal election of 1911.

⁴⁰ Debates, 7833.

departed from, First Nations should be consulted, and the final decision must come back to parliament “every time a treaty is to be violated.”⁴¹ Borden’s statement about treaty violations stands out as a statement that the cause was lost. It reflected the structural racism inherent within the House of Commons. In spite of his vigorous opposition, Borden accepted the racist reality that the power of Parliament was ‘reasonable,’ when white needs were obstructed by Indigenous rights. Borden and Porter were able to influence the process, albeit marginally, and the wording was changed to require that the Ways and Means committee of the House of Commons give final approval of any Exchequer Court decision that approved a surrender under amendment 49(a).

The letters received from the Six Nations chiefs made it clear that there had been no consultation with First Nations about the pending changes to the Indian Act. In spite of Laurier declaring that “the rights of Indians must be preserved,” there was no trust that the proposed amendment would be anything but detrimental to First Nation’s people. Laurier statement that “... we must preserve faith with the Indians. That is the first principle we must adhere to” was meaningless without a guaranteed process to ensure this.

The transcripts of the House of Commons debate on amendment 49(a) give an understanding that there was no doubt that members of the House understood the gravity of the changes Oliver and Laurier were proposing, and the debates show that both men understood that these changes were in conflict with existing treaties. Oliver and Laurier were powerful men within a majority government, so the bill was never at risk of being defeated. Members of the Opposition were unable to make a real difference, but those who spoke against the amendment did manage to achieve some process changes, the most

⁴¹ Debates, 7833.

important being that another step was added to ensure that surrenders judged to be ‘expedient’ in the Court of the Exchequer would return to parliament for final approval. This had not been Oliver’s original intent. He had designed the amendment so the judgement of the Court would be the final decision which would remove from the House an important decision that would force a surrender of a reserve. He understood this would break treaty agreements, and that the decision would be left in the hands of one man who holds the position “at the will or whim of a party, and who is under the absolute domination of one of the members of the cabinet ...”⁴² What the opposition achieved was to have the verdict of the judge be sent back to the House for ratification, which ensured that the members of the House would have the final responsibility of any forced surrenders achieved through this mechanism. The wording of the amendment was changed to ensure that the final decision was not left in the hands of the Superintendent General of Indian Affairs but was returned to parliament for final approval.

The passing of the amendment in parliament and the Exchequer court proceedings were two inextricably linked but separate events. When, in 1915, Indian Affairs asked the Exchequer Court to decide on the expediency of removing the Kings Road Mi’kmaq from their reserve, this two-step process proved final. It is possible that the decision of the Court could have been appealed to the Supreme Court, but this did not happen, and the judge’s ruling was ratified by the House of Commons. In 1926, the people of Kings Road finally signed a surrender and were moved to a new reserve which is today known as Membertou.

⁴² Debates, 7839.

Extracts from these debates illustrate that the perspectives of the majority of men elected to the House of Commons fundamentally believed in white superiority, regardless of their party affiliation, which was in keeping with the times at the turn of the twentieth century. This racist bias was clear during the debate on the amendment. People on reserves were referred to as ‘the Indians,’ and, with the occasional exception of men such as Robert Borden (Nova Scotia) and George Bradford (Manitoba), were spoken of as a generic, disposable group that was in the way. There was no recognition that ‘the Indians’ of Kings Road reserve were people living in a community who worked hard to feed their families, sent their children to school and lived their lives like people everywhere. The picture that emerged on the floor of the House of Commons as the amendment was debated was a stereotypical, generic illustration of ‘the Indians’ who made very poor neighbours.

The final vote took place in the House of Commons in May 1911, and the amendment passed. The Liberal government was defeated in the general election of that same year, which removed the principal architects of the amendment, Frank Oliver and Wilfrid Laurier, from power. Robert Borden, member for Nova Scotia, became Prime Minister of a conservative government and amendment 49(a) seemed to go into abeyance for a time.⁴³ In spite of Borden’s vigorous arguments in the House during the debates on the amendment, his government did not move to repeal it, which seems to suggest that, while Borden understood the issues regarding the amendment, he was not opposed to the intent of the legislation, and it remained as part of the Indian Act for another forty years. In the early 1950s, there was major overhaul of the Act which removed “some of the most

⁴³ William Wicken speculates that this was because there had been a change in government.

political, cultural and religious restrictions.”⁴⁴ Section 49 and its concomitant subsections, including 49(a) are absent from the Indian Act of 1951.⁴⁵

⁴⁴ Zach Parrot, “Indian Act: the Revised Indian Act of 1951,” *The Canadian Encyclopedia*, 2023. <https://www.thecanadianencyclopedia.ca/en/article/indian-act>.

⁴⁵ Hinge, 315-354.

Chapter 4 The Court of the Exchequer
Proceedings, Testimonies and Judgement

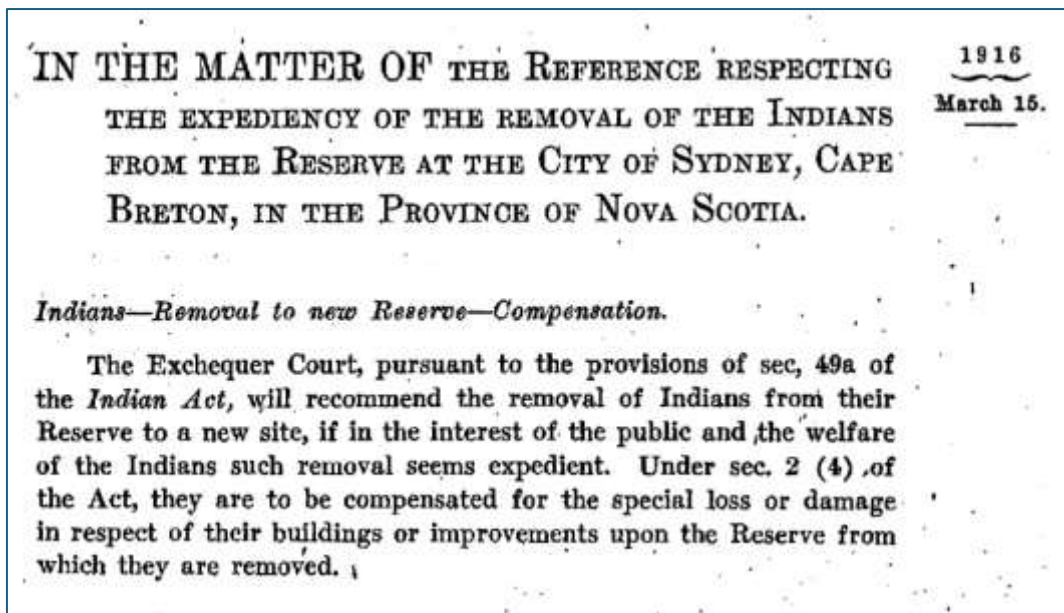


FIGURE 4.7. The Question before the Court of the Exchequer.

Testimonies, Case No. 2787¹

The passing of amendment 49(a) in the House of Commons in 1911 did not mean that the people of Kings Road would automatically be forced to surrender their land. The amendment provided a vehicle to meet this end, and the Superintendent General of Indian Affairs could ask the Court of the Exchequer for a decision on the expediency of forcing a surrender of any urban reserve if it fell within the guidelines of the amendment. The passing of the amendment and the Exchequer Court proceedings were linked but separate.

¹ “Reports of the Exchequer Court of Canada, Vol. 17,” *Canada Law Book Co.*, Toronto: 1918, 517-528. https://publications.gc.ca/collections/collection_2020/cmf-fja/JU1-2-1-17-eng.pdf.

The hearing of the Exchequer Court of Canada, Case No. 2787 *The King vs. Joseph Alexander Gillies*, was another step in the process toward the first legislated surrender under amendment 49(a) of the Indian Act.² The Court convened in Sydney, Nova Scotia, over five days in September 1915, with Justice Louis Arthur Audette presiding. The question given to the court was to decide on whether or not it was “expedient, having regard to the interests of the public and of the Indians of the band ... that the Indians should be removed from the Reserve or any part thereof.” Justice Audette was considered a highly experienced judge. An article in the *Canadian Bar Review* praised his “infinite capacity for taking pains ... and that he had mastered British common law as well as the law in Quebec, his native province.”³ He had been promoted to the Exchequer Court in 1912 and was considered a highly experienced judge whose judgements had “served to mould the jurisprudence of the court.”⁴ He had “figured prominently in several treaty disputes, and was well-versed in the role of the Exchequer Court within the Canadian legal system.”⁵ He graduated from Laval University in 1880, and served the courts in a variety of roles before being appointed to the Court of the Exchequer. In 1895, he published *The Practice of the Exchequer Court of Canada*, which covered the laws and statutes in the Dominion and this book is considered by scholars to be an important record

² Cando, “Membertou First Nation, Community Profile,” *Council for the Advancement of Native Development Officers*. <https://www.edo.ca/downloads/membertou-first-nation-profile.pdf>.

³ “Retirement of Mr. Justice Audette,” *Canadian Bar Review*, December 1931, 742-744. <https://cbr.cba.org/index.php/cbr/article/download/4193/4186/4193>.

⁴ “Retirement, 743.

⁵ Louis Arthur Audette, *Hon. L.A. Audette Ex-Justice passes*. *The Gazette*, (Montreal, P.Q.), January 20, 1942. <https://www.newspapers.com/article/the-gazette-obituary-for-l-a-audette/98904793/>.

that should be preserved and made available to the public into the future.⁶ The court proceedings took place from 20th to 24th September, 1915, and Justice Audette's decision was given in April 1916 and published in *Reports of the Exchequer Court of Canada* in 1918.⁷

The Judge appointed G.A.R. Rowlings, a young Sydney lawyer, to represent the interests of the people of Kings Road. Rowlings had graduated from Dalhousie Law School in Halifax nine years earlier, in 1902, and had tried several cases in the years he had been practicing law.⁸ He was a partner in a small law firm in Sydney. Joseph Alexander Gillies, K.C., was the plaintiff and also represented himself in court. Born in Cape Breton in 1849, he was educated at Saint Francis Xavier University and after entering the bar in 1875, he worked in Cape Breton as Registrar of Probate for the county of Cape Breton, a clerk of the Peace, a municipal clerk, and a solicitor of the municipality of Sydney, before resigning to run for the Conservative Party of Canada in the federal election of 1887.⁹ He was unsuccessful. He ran again in 1891, was defeated and then won the seat in a by-election. He remained in federal politics for nine years, from 1891 until his defeat in the general election of 1900. He was defeated again in 1904 and 1911.¹⁰ In 1901, he bought the *Sydney Daily Post* which he used to promote his cause regarding his

⁶ Louis Arthur Audette, *The Practice of the Exchequer Court of Canada*, (Arkose Press, 2015.) <https://www.amazon.ca/Practice-Exchequer-Court-Canada/dp/1345976011>.

⁷ "Reports of the Exchequer Court of Canada: Re Indian Reserve," Vol.17, 517, (Toronto: Canada Law Book, 1918). https://publications.gc.ca/collections/collection_2020/cmf-fja/JU1-2-1-17-eng.pdf.

⁸ Composite photograph of Law Faculty and Class of 1902, Dalhousie University Composite Library, File PC1, Box 24, Folder 24. <https://findingaids.library.dal.ca/composite-photograph-of-law-faculty-and-class-of-1902>

⁹ *The Canadian Parliamentary Companion, 1891*, J.A. Gemmill, ed. (Ottawa: Durie & Son, 1891), 133.

¹⁰ Canadian Elections Database/Candidates/Joseph Alexander Gillies. <https://canadianelectionsdatabase.ca/PHASE5/?p=0&type=person&ID=4738>.

Mi'kmaw neighbours.¹¹ Gillies had years of varied legal experience, and his persistence in running for federal Parliament in spite of four defeats (1887, 1900, 1904 and 1911) showed that he was ambitious and determined, and that he would not allow setbacks to deter him from achieving his goals.

I N D E X.

	D	C	Ms
Joseph Alexander Gillies	13		
Wilfred Arthur Winfield	37	41	
John Knox McLeod	49	54	57
John Midgley	58	61	62 - 67 - 304
Alexander A. Beaton	64	65	
Rev. Ronald L. McDonald	69	79	81
Major Walter Crowe	83	88	
John G. McCurdy	92		
Robert B. McLean	102	106	119 #
John P. Parker	126	128	
Charles Richard Lerway	132	135	139
Phillip Henry Worgan	142	143	
George W. Archibald	146	147	
Benjamin Franklin Blake	149	151	
Henry A. Frowde	152	158	
Frank G. Konig	162	165	
Calin McKinnon	168	174	
Daniel McGuais	179	183	
Thomas C. Herald	187	191	
Arthur M. Crofton	195	203	
Frederick James Hardison	208	209	
Duncan McIntyre	212	217	
Cecil J. Sparrow	220	244	
Donald McAdam	227	264	
Daniel A. Cameron	270	273	
Aileen Doyle	279	280	
Miss Mina Gough	285	287	
George A. Ross	290	294	
William E. Fanjoy	303	303	
Andrew Harold Mann	305	308	
Gordon S. Spencer	307	308	
Joe Julian	310	318	
Sam H. Christmas	326	330	
Joe Christmas	333	340	

Indian Affairs. (RC 10, Volume 7762, File 27061-F)

FIGURE 4.8. Cape Breton Agency, List of Witnesses in the Court of the Exchequer, 1915.

¹¹ Walls, Martha, "The Disposition of the Ladies: Mi'kmaw Women and the Removal of the King's Road Reserve, Sydney, Nova Scotia, *Journal of Canadian Studies* 50, no. 3 (Fall 2016), 544.

As the week unfolded, it became apparent that many of those who testified had little to do with the Kings Road reserve. Some witnesses were dealers in real estate, and their testimony reflected a deep prejudice against the reserve that was not based on direct experience with the people of Kings Road, but on land values and profit motives. The list of witnesses showed that thirty-three people were paid to attend the court.¹² They were mainly white men from Sydney with the exception of two women and four Indigenous men.¹³ The two women on the list were Edna Gough, who travelled from Halifax by train and who had been the schoolteacher at Kings Road, and Aileen Boyle of Sydney who replaced her as schoolteacher at the reserve. The four Indigenous men were Joe Julien, Joe Christmas, Ben Christmas and Solomon Morris. It remains unclear if either woman or the Mi'kmaw men spoke at the trial. Mi'kmaw women were entirely absent. According to Martha Walls, this under-representation was not surprising. The Indian Act ruled that women could not take part in land surrenders, nor could they hold office or vote provincially or federally or vote in their "communities' triennial system of federal band elections."¹⁴ They could not serve on band councils, or as chiefs.¹⁵ The misogyny that was integral to the Indian Act disenfranchised Indigenous women specifically, which ensured their powerlessness within their own communities as well as in the broader political community. It was not surprising, therefore, that Indigenous women's participation as witnesses was ignored by the Exchequer Court proceedings. This absence is exacerbated by the fact that the trial transcripts that exist are sometimes difficult to follow. While it

¹² Cape Breton Agency, List of Witnesses, RG10, Vol. 7762, File 27061-F, LAC, Ottawa, ON. <https://recherche-collection-search.bac-lac.gc.ca/eng/Home/Record?app=fonandcol&IdNumber=2044774>.

¹³ Testimony, 4

¹⁴ Walls, 548

¹⁵ Walls, 548.

was usually clear when Rowlings, Gillies and Justice Audette were speaking, other speakers were not always identified by name and the transcripts record the interchanges as Q (question) and A (answer), making it difficult or impossible to identify a witness's name or gender.

Justice Audette began the proceedings by outlining the problem before the court. He had been asked to decide whether it was in the public's interest and in the interest of reserve residents to remove the Mi'kmaw reserve on King's Road to another location. In the court's view, the public and the Mi'kmaq were separate groups, and this remained so throughout the proceedings. Both lawyers would call witnesses to inform the judge's decision, there was no jury and the judge's decision would be referred back to parliament for final approval by the Votes and Procedures Committee of the House.

From the beginning, Gillies attempted to control the narrative, and, throughout the five days of the hearing, he relentlessly pursued his attempts to divert the discussion at hand toward his own agenda. He was emphatic that the judge understood the issues as they related to his problem. He was argumentative and sometimes proffered incomplete or began disingenuous half-truths throughout the hearing. In spite of the judge's protestations, he began his opening statement by reading amendment 49(a) of Indian Act to the court. He then began what could only be called a lecture to the judge about the points of the case that should be addressed. "... first, you conclude as to whether it is expedient that the removal should be brought about.... Secondly, that you shall proceed to ascertain what compensation would be paid to the Indians for their removal," and thirdly, he said, your findings will go to the Governor-in-Council and the House of Commons to

decide if they will “alter, or amend, or reject or adopt your Lordship’s report.”¹⁶ He concluded his lecture with “Am I right?”¹⁷ These instructions to the judge, along with his reading of the amendment, were a reflection not just of Gillies’ arrogance but of his need to define the case from his point of view, and to ensure the justice understood the scope of the court’s responsibilities. He seemed willing to risk the judge’s wrath to achieve this. He was very sure of himself, and it appears he was not confident the judge understood the ‘real’ issues at hand.

The judge refused to be intimidated. “The paramount question,” he said, “is whether they should be removed or not ... the other [issues] would be a sequel to that.”¹⁸ He disagreed with Gillies often throughout the proceedings and showed his unwillingness to be rushed or diverted to secondary issues, continuing to bring the focus of the court back to his own understanding of the issue at hand. In the face of Gillies’ arrogance, it was clear that Justice Audette’s experience on the world stage and his knowledge and experience of Exchequer Court procedures and processes gave him the confidence to ignore Gillies’ barrage.

Figure 4.6 is a plan of King’s Road by surveyor George Ross dated 1914, the year before the Exchequer Court hearing. It shows more than twenty houses, all located between the railway line and King’s Road.¹⁹ The building within the red outline on the edge of Gillies’ property is the schoolhouse, which had been built by Indian Affairs around 1902. They had also installed a water closet (w.c., also outlined in red) and a communal

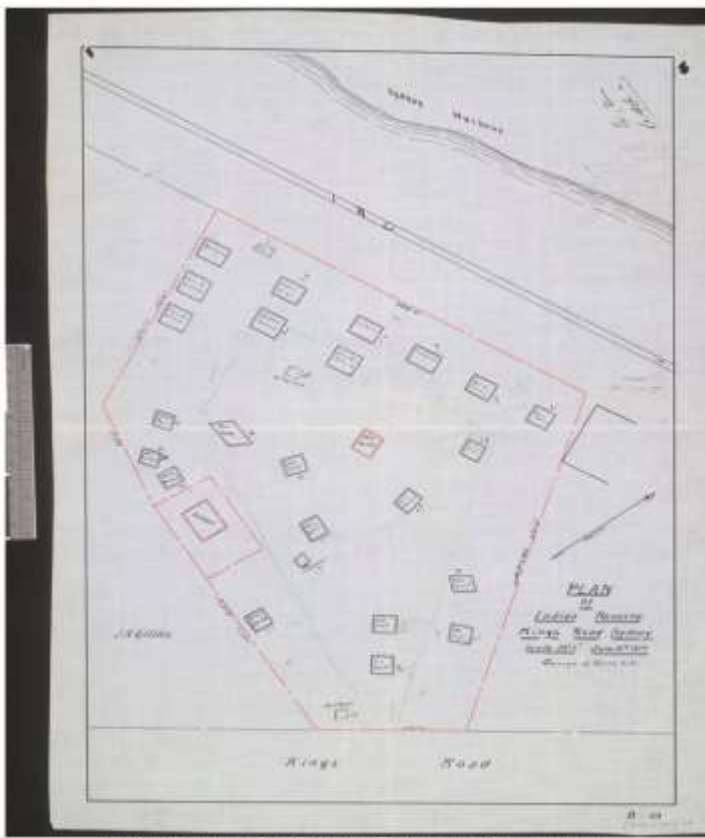
¹⁶ Testimony, 7.

¹⁷ Testimony, 7.

¹⁸ Testimony, 7.

¹⁹ “Plan of Indian Reserve, King’s Road, Sydney. RG10, RG10M 78903/78, Box number 2000002207, File number 190094-1, 1914. LAC, Ottawa, ON.

well. The judge asked how many people were living there in 1882 at the time Kings Road moved from provincial to federal jurisdiction. When Gillies began to provide the figures, the judge interrupted him, saying, “I want it proved.” Gillies was then sworn in as a witness and began his statement. It was obvious from the outset of the trial that the judge was skeptical of Gillies’ veracity, and perhaps believed that his self-interest and driving need to prove his case would override the need to provide the court with proven facts.



PLAN of Indian Reserve, King's Road Sydney: Scale 30' = 1 inch (George J. Ross, C.E.)
Source: Library and Archives Canada

FIGURE 4.9. Plan of Indian Reserve, King's Road, Sydney, N.S.
Scale 30' = 1 inch (George J. Ross, C.E.)

Gillies testimony provided the court with useful historical information that would not have been intentional. He began by giving a simple chronology of his history with the property he owned. He had bought his Kings Road property for \$3,000 in 1877, a year before the railway to Sydney was built, while the reserve was still under provincial

jurisdiction.²⁰ At that time, he said, there was a high picket fence around the reserve and the family of John Isaac was living in a birch bark camp on the property. About four years later, John Isaac “built a small log hut” and this was how it was until the railroad came into Sydney.²¹ About 1887, “one or two families more came in. They had birch bark teepees, the same as John Isaac and his family had used for a time and later, the new families also built a couple of huts.”²² The opening of the Dominion Iron and Steel Company in Sydney in 1889 produced a demand for labour, and Gillies testified that there was “a considerable inrush of Indians upon the place ... [who] became very troublesome to me [and] the original fence was at last so destroyed that I had to replace it in 1896.”²³ Within this testimony, Gillies has verified that, when he bought the property in 1877, the reserve was already a stopping and gathering place. Families were living on this land in traditional *wikoums*, and houses.

The judge asked if the Government had ever put up a fence. Gillies said no, they had never spent a penny. Rowlings immediately challenged him, and Gillies changed his testimony, saying that the present fence was put up by the Government about a year ago.²⁴ However, Gillies also documented in his testimony that when he bought his land, it had “a high picket fence,” which may have been built by the provincial government when it allocated the land as a provincial reserve.²⁵

The language Gillies uses in his testimony repeats the language he used in his correspondence with Indian Affairs and various politicians. Gillies’ selection of words was

²⁰ Testimony, 12.

²¹ Testimony, 12.

²² Testimony, 12.

²³ Testimony, 12.

²⁴ Testimony, 12.

²⁵ Testimony, 12.

repeated over and over as the week progressed - insanitary, rubbish, odours, common, breakage, disrespect, private property, dirty, smelly. These negative words of filth and dirt became the overarching theme, both within his own court testimony and in his extraction of testimony from witnesses. Gillies was creating an unforgettable and very negative picture of Kings Road reserve for the Court, and this would have been deliberate as Gillies was an experienced legal strategist.

A letter from Gillies to Deputy Superintendent of Indian Affairs James A. Smart dated October 28, 1899, was introduced. It was on Gillies' legal letterhead, but scrawled in his difficult handwriting, which perhaps meant that he could not afford, or was unwilling, to pay a stenographer. It also could have meant that he wished to not make his complaints public. The judge felt this letter was important, as it outlined most of the problems Gillies' had with the reserve and insisted that it be placed in the court files in its entirety.²⁶ The letter was transcribed by the court stenographer so it could become part of the court files. The Judge had astutely ascertained that Gillies complaints in this letter would be continually repeated throughout the trial.

The RG10 file at Library and Archives Canada begins in 1899 with a letter written to Indian Affairs by the Mayor of Sydney, Walter Crowe.²⁷ In it, Crowe referred to a letter from Joseph Gillies. G.A.R. Rowlings had asked Indian Affairs to provide him with a copy of this letter and was told that they were unable to locate it.²⁸ Gillies testified that he met

²⁶ "Letter from Joseph Gillies," 4/11/1899, RG10, Vol. 2925, file 190-094, LAC, Ottawa, ON, 11.

²⁷ "Letter from Walter Crowe," 11/10/1899, RG10, Vol. 2925, File 190,094-1, LAC, Ottawa, ON, 6.

²⁸ I too searched for this letter unsuccessfully. My conclusion is that Gillies did not write it to Indian Affairs but to the Mayor of Sydney, Walter Crowe. Crowe then wrote to Indian Affairs and referenced Gillies' letter. It is Crowe's letter dated 11/10/1899 that opens the LAC RG10, 190,094, file in question.

with Walter Crowe, Mayor of Sydney, about his neighbours, and “his desire of getting rid of these people and have them settled in some suitable locality – and he agreed with me – and wrote to the Department [of Indian Affairs].²⁹ It is Crowe’s letter that opens the RG10 file at LAC.

On October 28, 1899, Gillies wrote to Indian Affairs directly, and this letter contains the often-used quote about damage done to his property. “They are annoying me to a point really beyond endurance. They cut down my trees, they break my fences, they milk my cows, and steal everything they can lay their hands on. They cannot be allowed to remain there, and I am ready to do anything that is just and fair in the matter.”³⁰ A closer look at this letter is informative. While it is written to James Smart, Deputy Minister of Indian Affairs, Gillies name-drops Smart’s boss, the Minister of Indian Affairs, Clifford Sifton. Gillies gets straight into his complaints. He does not provide proof, or give examples, nor does he give dates and times. Gillies is a lawyer, and he would have understood the “burden of proof rule,” which is much lower for a civil case than it is for a criminal case.³¹ However, throughout the proceedings, Gillies’ statements were mainly accusations and complaints. The judge asked questions, but according to the testimonies on file, there was little actual evidence introduced to prove these statements.

Gillies’ letter, which the judge asked to include in the court files, laid out Gillies’ complaints which did not appear to waiver throughout the hearing, and which he continues to reiterate in his correspondences to Indian Affairs and government officials.

²⁹ Testimony, 16.

³⁰ “Letter from Joseph Gillies,” 28/10/1899, RG10, Vol. 7762, File 27061-F, LAC, Ottawa, ON, 10-11.

³¹ According to Canada’s system of Justice, the standard of proof for a civil case is that the content of what is claimed should be more than 50% true, <https://www.justice.gc.ca/eng/csj-sjc/just/08.html>.

October 28, 1899

To James Smart, Deputy Minister of the Interior

I have had some correspondence with Mr. Sifton about the small Indian Reserve near Sydney and as you were absent at the time this correspondence took place, I would be grateful to you if you look it over carefully. This Indian Reserve is adjoining my place and is used by a few Indian families as a sort of camping ground. They are annoying me to a point really beyond endurance. They cut down my trees, they break my fences, they milk my cows, and steal everything they can lay their hands on. They cannot be allowed to remain there, and I am ready to do anything that is just and fair in the matter. I will either pay a reasonable sum for the place which amount can go into the Indian fund for their benefit, or I will buy a larger area of ground for them as a camping place in a much better locality for them than where they are and let them surrender this place to me. The Minister has given a good hearing to my complaints and sympathises with me in my effort to get relieved of them in some honourable and fair way. I wish you would hurry this matter through. In doing this I am not interfering with any one or any one's rights. I am simply trying to rid myself of a great nuisance and I want you to help me to do this speedily. The local Indian Agents understand the case very well, and if you write to either (or both) Rev'd Dr Cameron, Grand Narrows, or the Rev'd Colin Fraser, St Peters, Richmond County, I think they will agree with what I have said and will endorse my proposition in buying another place for the Indians a little further than the present reserve from town – whatever you do for me I will regard as a marked piece of personal favour.

I am yours very truly, J. A. Gillies.³²

The content of this letter sums up Gillies' complaints, but it also contains untruths and/or defamatory statements, reflecting his arrogance and sense of entitlement. The statement "I am not interfering with any one or any one's rights" is untrue. Under the Indian Act, the Mi'kmaw residents of Kings Road reserve had clear and defined rights of occupancy. A phrase such as "... rid myself of a great nuisance" is an analogy to getting ridding oneself of vermin. In his closing line, he asks for "a marked piece of personal favour," which makes it clear that his letter assumes membership in a closed 'white men's' club.

³² "Letter from Joseph Gillies," 28/10/1899, RG10, Vol. 2925, File 109,094-1, LAC, Ottawa, ON,10-11.

This letter was written about the time the Steel Works had opened in Sydney, which would have attracted people to the area looking for work. Through his testimony, Gillies is showing that the reserve population was expanding. By the time Gillies wrote this letter to James Smart, a community of Mi'kmaw families was already established on the Kings Road reserve, and John Isaac's small house would have been the prototype of other permanent dwellings that were built on the property. Whether living in *wikoums* or houses, Gillies testimony showed that there was an established community of Mi'kmaw families living at Kings Road reserve. He has documented the emergence of Kings Road as a community of permanence.

In his testimony, Gillies claimed that Kings Road was not a 'real' reserve, the inference being that the judge could easily set it aside. However, he did not substantiate this statement, and, as a lawyer, a Gillies must have known (or should have known) this claim was not true. Documentation shows that the land on King's Road was purchased as a reserve by the Nova Scotia Government in 1847, although the area where it was located on the shores of Sydney Harbour had been used as a meeting and gathering place by the Mi'kmaq for millennia. It had been granted to the Dominion for use as a reserve in 1882.³³ The *Indian Act of 1906* defined 'reserve' as "any tract or tracts of land set apart ... or granted to a particular band of Indians, of which legal title is in the Crown"³⁴ The *Schedule of Indian Reserves in the Dominion* (Figure 4.9) clearly shows that Kings Road

³³ "Schedule of Indian Reserves in the Dominion," Supplement to Annual Report of the Department of Indian Affairs for the Year ended June 30 1902, Department of Indian Affairs, LAC, Ottawa, ON. <https://recherche-collection-search.bac-lac.gc.ca/eng/Home/Record?app=indaffannrep&IdNumber=15973>.

³⁴ Hinge, 175.

was a federal reserve. Gillies would have known this, so perhaps he was hoping that the judge did not.

SCHEDULE OF INDIAN RESERVES IN THE DOMINION.
NOVA SCOTIA.

No.	Name.	Where Situated.	Tribe or band.	Area, Acres.	Remarks.
<i>Victoria County.</i>					
1	Middle River.....	At the mouth of the Wammatook or Micmac Middle river.	"	790-00	Transferred to the Dominion by the Provincial Government at Confederation.
<i>Inverness County.</i>					
2	Whysoonagh.....	On the north shore and near the head of Whysoonagh basin.	"	1,555-00	" " "
4	Malagawatch.....	At the entrance of Donny River Basin.	"	1,200-00	" " "
25	Margrove.....	At the mouth of the Margrove river.	"	2-00	" " "
28	Port Hood.....	Near Port Hood.	"	Not surveyed.	" " "
<i>Cape Breton County.</i>					
3	Eskasoni.....	In St. Andrew's township, on the north side of St. Andrew's channel.	"	2,900-00	" " "
28	Sydney.....	In Sydney harbour, one mile from Sydney.	"	2-73	Granted to the Dominion for the purposes of an Indian reserve by the Province, April 28, 1882.
29	Cariboo Marsh.....	On the Merivie road five miles from Sydney.	"	650-00	Granted to the Dominion for the purposes of an Indian reserve by the Province, April 28, 1882. A road 60 feet wide from the main highway in the reserve was purchased from Charles Brown on May 2, 1916.
<i>Richmond County.</i>					
4	Chapel Island.....	On the north shore of Bras d'Or lake.	"	1,281-00	Transferred to the Dominion by the Provincial Government at Confederation.
<i>Digby County.</i>					
6	Bear River.....	On the Bear river partly in Digby and partly in Annapolis counties.	"	1,600-00	" " "
<i>Annapolis County.</i>					
7	Keljikujik or Coptmooega Lake (north of county boundary).	On the boundary between Annapolis and Queen's counties.	"	400-00	" " "

FIGURE 4.10. Reserve 28 & 29, Schedule of Indian Reserves in the Dominion, 1902.

There was support for moving the reserve. The local Indian Agent, the Reverend Dr. A. Cameron, spoke in favour of this. However, Dr. Cameron also understood that any new land must be within easy distance of Sydney. While Kings Road reserve was now a settlement, with houses, barns, and other outbuildings, it remained a ‘stopping place’ for people who came to Sydney from Eskasoni to sell goods at the town markets.³⁵ They cannot return the same day, said Dr. Cameron, nor can they afford hotels so “they camp on that little reserve, which was formerly on the outskirts of town, but is now near its very

³⁵ Exchequer Court Judgement, RG10, Vol. 7762, File 27061-F, LAC, Ottawa, ON, 10.

centre.”³⁶ Dr Cameron refers to the reserve as it had been referred to for generations, as a ‘stopping place,’ used by people as they moved about the province and he understood the complexity of reserve economies, a topic which came up several times in the Exchequer Court hearing. In his final judgement, Justice Audette clearly outlined that the families of Kings Road were dependent on a mixed economy, which included waged labour, and the sale of crafts such as axe handles, baskets, etc.³⁷

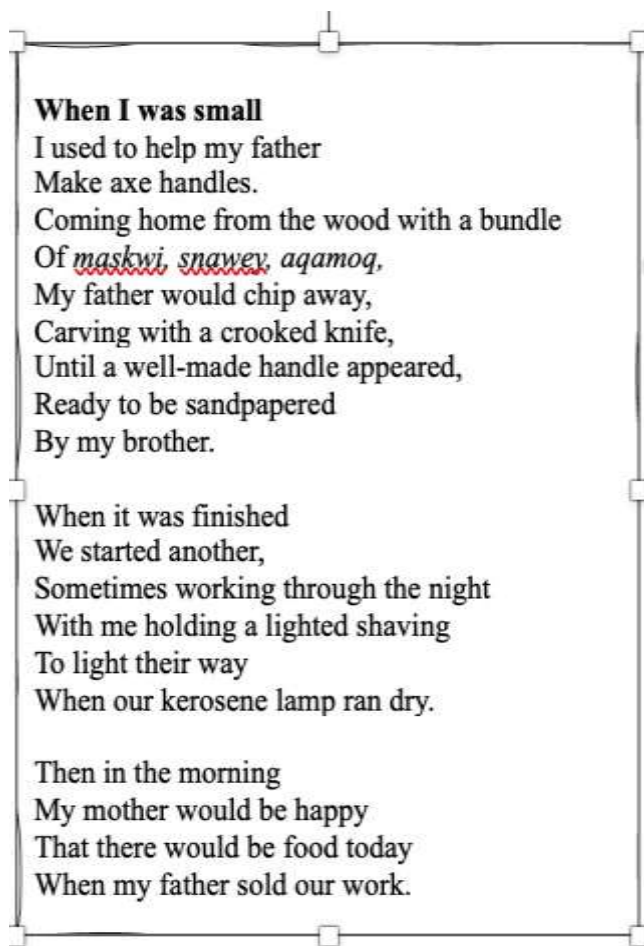


FIGURE 4.11. "When I Was Small," from *Song of Rita Joe: Autobiography of a Mi'kmaw Poet*.

Rita Joe's poem describes how the adults and children of a Mi'kmaw family each made a contribution to the family's economy.³⁸ Through the eyes of a small child (who was Rita) Joe describes a father making axe handles to sell at the markets. She shows the skill of her father hands, and the contributions of her brother who sanded and polished the handles, and how she proudly "held a lighted shaving / to light their way ..." as her brother smoothed the wood. It was

³⁶ "Letter from A. Cameron," 29/11/1899, RG10, Vol. 7762, File 27061-F, LAC, Ottawa, ON, 18.

³⁷ Exchequer, 11.

³⁸ Rita Joe, "When I Was Small," from *Song of Rita Joe: Autobiography of a Mi'kmaw Poet*, (Cape Breton, Nova Scotia: Breton Books, 2011), 10-11.

family collaboration, and the last two lines of Joe's poem show clearly how family incomes depended on access to markets.³⁹

Figures 4.10 and 4.11 were painted by Henry Acland, who accompanied the Prince



FIGURE 4.12. Wigwam on the Shore of Sydney Harbour, painting by Henry Wentworth Acland, 1860.

of Wales as his personal physician during the prince's tour of the Maritimes in 1860. Both sketches attest to the fact that people were living in and around the area of Sydney Harbour. Figure 4.10 *Wigwam on the Shore of Sydney Harbour* shows two *wikoums* with a

³⁹ Rita Joe, poem.

well-worn path connecting them and another path leading to the shore. Around the base of the *wikoum* are some barrels, and other items which are probably lobster traps. There is no way to know if Acland was painting a temporary encampment or a more permanent one, but he has recorded for history the linkages between the occupants, as shown by the connected paths between the two *wikoums*. Acland's painting shows that the paths were established walkways, which probably means that these *wikoums* had been in place for some time.⁴⁰

Figure 4.11 *Indians of Cape Breton - They Stood at the Door of the Tent* was also painted by Henry Wentworth Acland in 1860.⁴¹ It shows a family clustered at the door of their *wikoum* looking out at what is probably Sydney harbour. The 'tent' is a well-constructed *wikoum*, and the entire family has crowded *en masse* at the door of the *wikoum*, and they are all gazing out to sea. What they are seeing remains in the mind of the artist, but this portrait of a well-dressed family, with a dog sitting beside the younger children, all of them focused on something of interest outside their large *wikoum*, is a domestic picture of family life. Both of Acland's paintings show that, for the Mi'kmaq, Sydney harbour was a well-established meeting and gathering place.

⁴⁰ Henry Wentworth Acland, "Wigwam on the Shore of Sydney Harbour," 1860, Box BK-102, Item 2850830, LAC, Ottawa, ON.

⁴¹ Henry Wentworth Acland, "*Indians of Cape Breton - They Stood at the Door of the Tent*," 1860, Box BK-102, Item 2850830, 1860, Library and Archives Canada, Ottawa, ON.



FIGURE 4.13. They Stood at the Door of the Tent, painting by Henry Wentworth Acland, 1860.

When Gillies bought his property in 1877, “there were no Indians living on the reserve, with the exception of one man, one family, called John Isaac who was living in a birchbark camp,”⁴² This would have been a birchbark *wikoum* perhaps similar to the ones Acland painted, and for the Mi’kmaq of Nova Scotia a *wikoum* was the family home.

⁴² Testimony, 14.

Gillies' testimony documents the fact that John Isaac and his family had been living at Kings Road for an unknown number of years before 1877, and that the family had built a small house there in 1881.⁴³ Through his testimony, Gillies has unwittingly begun to leave a historical overview of a transformation from a meeting and gathering place on Sydney harbour into the community of permanence it had become by the turn of the century.

According to Judge Audette's final report of the Exchequer hearing, Joe Christmas, "the present Chief, or Captain ... has lived on the Reserve, back and forth, since 1875."⁴⁴ This contradicts Gillies evidence that only the family of John Isaac lived there in 1877. In 1887 two more Indian families arrived. According to the Exchequer report, by 1889 there were eighty-five people resident at Kings Road, and by February 1915, there were twenty-three houses and one hundred and fifteen people.⁴⁵

In 1916, the judge wrote that there were "between one hundred and twenty and one hundred and twenty-two Indians and twenty seven houses, without counting the schoolhouse, and the brick building with sanitary closets."⁴⁶ The judge's 1915 figure of twenty three houses could not have been accurate, as it is improbable that the number of houses would have increased by five in a single year, given the precarious future of the reserve. The *Membertou* website reports that in 1914 there were twenty-seven homes on the Kings Road reserve, and about one hundred and five people living in them.⁴⁷ Somehow the judge had been misinformed about the number of houses.

⁴³ Testimony, 15.

⁴⁴ Exchequer Court of Canada No. 2787, Judgement, RG10, Vol. 7762, File 27061-F, LAC, ON, 7.

⁴⁵ Exchequer, 7.

⁴⁶ Exchequer, 8.

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In the 1899 letter that Gillies wrote to James Smart, he said that the reserve was used by a few Indian families as a sort of camping ground. Again, Gillies is stretching the truth to create a picture of impermanence. By his own testimony, there are already permanent structures on the reserve. Gillies is showing that the population is increasing, although using the phrase ‘camping ground’ would have been deliberate to convey a picture of impermanence in the mind of the judge. Gillies language acknowledges John Isaac in the singular, one man, one family, one camp. His use of words would leave listeners with the impression John Isaac was a singular entity. Perhaps this use of language was deliberate, or perhaps it was the standard misogynistic language of the day where only the man is acknowledged, but Gillies words deny the existence of John Isaac’s wife and children. Gillies also testified that about 1887, “one or two families more came in. They had birch bark *wikoums*, the same as John Isaac used to have, and at a later date they also built a couple of huts.”⁴⁸ To create a reference point, there were seven people (excluding a male adult) in George Aclands’ sketch of a family gathered at the door of their *wikoum*. Using seven family members as a ‘rule of thumb,’ Gillies has verified that by 1887 there were at least three families living at Kings Road reserve. Three families multiplied by seven family members makes it was possible that there were twenty to twenty-five people already permanently resident at Kings Road.⁴⁹

As a lawyer, Gillies would have been aware when he purchased his land that it was abutting a reserve. The fact that he did not appear to expect that it would increase in size and become a permanent settlement does not change the fact that he should have anticipated this expansion. Over fifteen years, from 1877 when Gillies bought his property

⁴⁸ Testimony, 14.

⁴⁹ Testimony, 14.

to 1911 when amendment 49(a) was passed, the reserve population had continued to increase. Gillies did not build on his King's Road property until about eighteen months before the court hearing.⁵⁰ Some years had passed since he had written the letter to James Smart in 1899, so the Judge asked him if he still felt the same as he had done when he wrote the letter. "I will do anything at all to get rid of them," he replied.⁵¹

Gillies' summation sometimes had 'facts' that were less than accurate, and his testimony occasionally appeared to be deliberate attempts to mislead the court. Judge Audette understood Gillies' bias and continued throughout the hearing to contradict or question his testimony. When Gillies quoted a Mi'kmaw chief as saying that one-half the band was ready to move now, and if that happened, the rest would follow, the judge responded immediately. "He did not say that" to which Gillies replied, "No, but I am saying it."⁵²

The judge asked if there was water at the site Gillies was proposing as a new reserve. "Yes," was the response, "plenty of water." The judge dug deeper, asking if the water was streams or aqueducts, to which Gillies replied "no, but if it is bathing, they have the water in the harbour."⁵³ Again, this shows that Gillies' testimony cannot be trusted and that he was not giving full details to the court unless he was challenged to do so.

Rowlings also challenged the testimony of Gillies' witnesses, saying that the evidence he was presenting came from land dealers, speculators, and people living in the immediate vicinity of the Reserve. Rowlings wanted to know about the opinion of prominent citizens, or the opinion of men connected with industry, where many of the men

⁵⁰ Testimony, 15.

⁵¹ Testimony, 15

⁵² Testimony, 105.

⁵³ Testimony, 24.

from the reserve worked, and it is unfortunate that the court did not hear from these people. Even the judge expressed concern that there was no testimony from people such as the mayor of Sydney. Nearly every witness lived within the vicinity, he told the Court, and they had purchased their properties with the knowledge of the Reserve, which is in much better condition today.⁵⁴ The judge commented that they perhaps they bought land and built houses in the hope that the Reserve might someday be moved.⁵⁵ It was surprising that this comment would be made by such an experienced judge. It showed a pre-formed bias, that the judge had already formed an opinion about the difficulty of having the reserve in the immediate vicinity of white neighbourhoods. This comment was based on racist stereotyping that had accepted Gillies' words as truth, or they were based on a personal bias that the judge failed to put aside.

The court focus then began to discuss possible new lands for relocating Kings Road. The proposed site at Westmount was generally felt to be too far, and water travel would be impossible in spring, when Artic ice would impede crossing. Even during times when water travel was feasible, there are no public landings. The judge agreed, saying that people from the reserve are valued labourers in the town of Sydney and they needed to maintain their access to the town. The difficulties of travelling from Westmount to Sydney would cause their work attendance to be irregular. Perhaps, he said, many would not move for this reason, and this would break up the band, something they do not want.

Rowlings talked about the importance of Kings Road for the people of Eskasoni and of how the two reserves are linked. "It was the Eskasoni tribe of Indians that started this Reserve. They established it away back years ago. In marketing their wares here, they

⁵⁴ Testimony, 109.

⁵⁵ Testimony, 109.

selected it and used it as a lodging place, and that was recognized by the Government shortly after Confederation.”⁵⁶ Kings Road was an adjunct to the main reserve which was about twenty-five miles distant. It was a meeting place and a gathering place, and when people who live at Eskasoni, or North Sydney and Little Bras d’Or, came to Sydney, they “put up at the little reserve.”⁵⁷ According to Rowlings, it appeared that both levels of government understood at some level the reasons behind the creation of this tiny reserve.

Rowlings brought up the fact that fifteen years had passed since “the matter was first agitated” by Gillies, and “with the exception of a letter written by Mr. Crowe, who would not undertake to say that he wrote it under the name of Mayor, not one thing has been done by the city ... no steps have been taken, and no interest taken in these proceedings by any of the city authorities.”⁵⁸ Rowlings finished his statement by saying this. If this situation had been against the public good, the authorities would have taken action. The Mi’kmaq were employed in the city, he said, and the evidence did not warrant disturbing these people in their comfortable homes.⁵⁹ While Rowlings’ statement pointed to Gillies as the primary agitator in the attempts to remove Kings Road to a new location, it also illustrated to the court that people of the reserve lived ordinary lives. They did not live in hovels, or shacks, or filth, as Gillies would have the court believe. This short statement by Rowlings made several points to the court. Although it is unstated, it would have been the Mi’kmaq women who were responsible for the ‘comfortable homes’ Rowlings referred to. The people of the reserve were employed, their homes were comfortable, the city authorities were not aware of problems and had

⁵⁶ Testimony, 111-112.

⁵⁷ Testimony, 141.

⁵⁸ Testimony, 113.

⁵⁹ Testimony, 141.

not shown an interest in the proceedings. Rowlings had shown the court a community living and working in peace and comfort. When Rowlings questioned Gillies about why local authorities had not acted on his complaints, Gillies testified that he had never complained to local authorities.⁶⁰ It is probable that Gillies understood that the city had very little authority over the people of Kings Road and bypassed that avenue of complaint by going straight to Indian Affairs.

Walter Crowe, who was Mayor of Sydney at the time, testified that the possibility of removal “was discussed informally in the City Council and what could be done with regard to extinguishing the Indian title, and the Council, either by formal motion or informally asked me to write to the Indian Department ...”⁶¹ Crowe is perhaps being disingenuous with this statement. As Crowe was mayor of Sydney at the time, he would have been keenly aware of difficulties, particularly from Joseph Gillies. His testimony to the court carefully avoided stating that this was a topic discussed in council, and there is nothing recorded in Sydney town council minutes for several years leading up to his letter that mention the reserve, negatively or positively. My conclusion is that all discussions about the reserve, and there must have been many, were ‘off the record’ or discussed in committees which were also ‘off the record’ and these discussions were not forwarded to the larger council meetings.

The judge questioned Gillies about the problems he was experiencing from his neighbours. It is a roundabout discussion. When Gillies spoke, he did not appear to have a

⁶⁰ Testimony, 30.

⁶¹ Testimony, 84. This is probably the letter that G.A.R. Rowlings had requested from Indian Affairs at the beginning of the hearing that could not be located. It is probable that Gillies wrote to Sydney town council, not Indian Affairs, and that Walter Crowe, who was then the mayor of Sydney, wrote to Indian Affairs. It is Crowe’s letter that begins the RG10 file on Kings Road reserve.

structured framework to identify the problems he was experiencing. Instead, he used stereotyping, hoping to appeal to the racism inherent in most white people in Sydney at that time. He advocated that a new place found so the “Indians would be segregated, living apart from the whites, from white people, with their own schools, and if necessary, their own church built for the purposes of their religion.”⁶²

Rowlings asked Gillies who was still speaking as a witness if he had ever taken steps to protect his property in the local courts? No, replied Gillies. He had not.⁶³ Rowlings told the court the Indians were “amendable to the law” and asked Gillies if he knew that. Yes, replied Gillies, but he did not think it was worthwhile “going to the law with an Indian.”⁶⁴ He did not believe it would restrain them from being a nuisance. He did not want to bring a charge against Indians. Rowlings followed this line of questioning for a time. Gillies said he was aware that he could have taken action or prosecuted against the people of the reserve in the Magistrate’s or Police Court but refused to do so, reasoning that it was the responsibility of the federal government to “see they conducted themselves properly, and that their property was in a sanitary and proper condition. I would not go to law with an Indian. I did not think it was just the thing to bring an action of trespass against Indians. They are not worth anything.”⁶⁵ Gillies statement reflects the basis of his claim to remove the Mi’kmaq from their reserve. Gillies viewed the reserve as an obstacle and his white supremacist politics did not see the Mi’kmaq as people, but as objects to be swept aside. It was an extraordinary statement to make in a court of law. The judge did not respond to Gillies comment and the questioning moved on, but in a few words, Gillies had

⁶² Testimony, 29.

⁶³ Testimony, 29.

⁶⁴ Testimony, 29

⁶⁵ Testimony, 30.

revealed that his antipathy for the people of Kings Road went beyond annoyance and dislike to a true hatred for people of colour.

Rowlings asked if action was ever taken as a result of his complaints, to which Gillies replied that the government had put in a sewer. This was another example of Gillies withholding information. These were sewer lines to the water-closets which were not enclosed for winter. The judge commented that “perhaps that is the origin of the whole trouble. It would freeze.”⁶⁶ This may have been the cause of the defective sewer line noted by Dr. McLeod.

Dr. John Knox McLeod was sworn in and testified that there are still many privies (or outhouses) throughout the city, some of which are in bad condition. These were legal in Sydney if there was no ability to connect to a sewer.⁶⁷ He testified that none of the houses on the reserve could be connected to sewer lines, and that people relied on outhouses. In a report written Feb 15, 1915, he noted that “the government provided a general lavatory for the reservation, but three years ago owing to some defect in the sewer line, it has been closed.” His report also stated that if the reservation remains, there should be a main sewer line installed and the houses connected to it.⁶⁸ This is the first acknowledgement from an official source that the closure of the water closet had been caused by a defective sewer line, rather than misuse by the people of the reserve as was commonly reported to Indian Affairs, and, in his report, Dr. McLeod had provided a simple solution to the problem.

⁶⁶ Testimony, 33.

⁶⁷ Testimony, 56.

⁶⁸ Testimony, 54.

There are two issues that arise from Gillies relentless testimony about the unsanitary condition of the reserve due to outhouses and what was referred to as ‘slops’ (household wastewater thrown outside). The first is that the people on the reserve had no other option. While sewer lines were being installed around the city, the reserve was not within the city’s jurisdiction. Indian Affairs had elected to only put the communal lavatory on a sewer line, which was probably not insulated and had consequently broken in the cold winters. The second is that there were several districts in the city that were not on city sewer lines, and outdoor privies were legal and accepted as ordinary.⁶⁹

The people of Kings Road were not unanimous in their rejection of a new and bigger reserve. In January 1914, Rev. Ronald L. McDonald testified that he visited the reserve accompanied by an official of the Lands Branch of the Department to ask if the Mi’kmaq would surrender their reserve. His report stated that the outcome of the vote was eleven in favour and seven against. Gillies interest in the Rev. McDonald’s testimony, however, was not the vote but in the condition of the reserve and he began a barrage of questioning until he was stopped by the Judge, who asked McDonald if he was there to “inspect the Reserve or ... to get a surrender?”⁷⁰ The judge stopped Gillies’ line of questioning, making it plain that McDonald’s personal observations were not part of the proceedings.⁷¹

Throughout the week, Gilles questions continued to focus on the ‘unsanitary conditions’ of the reserve and he was relentless, ignoring the fact that the city of Sydney and the Department of Indian Affairs had failed to provide sewage connections that could

⁶⁹ Testimony, 55.

⁷⁰ Testimony, 74.

⁷¹ Testimony, 74.

dispose of household wastewater and create an alternative to privies. These conditions were easily solvable, as Dr. McLeod had suggested. He also said that reserve conditions were on a par with a great many other sections of the city where there is no sewer connection. His solution was to rearrange the houses by lot, connect them to a main sewer line, and reopen the lavatory.⁷² This was the first concrete suggestion that was solution-based and forward-thinking made during the hearing.

Gillies questioning of witnesses continued, following the same pattern as he attempted to establish that the reserve was a deterrent for potential land buyers.⁷³ Could you smell the reserve? he asked them. Was it objectionable?⁷⁴ In spite of Justice Audette's efforts to keep hyperbole to a minimum, Gillies' continued his 'courtroom dramatics' as he maligned the Mi'kmaq who had been described by witnesses as "very respectable people."⁷⁵ At times, the hearing deteriorated into a debate between Gillies and the Judge, who continued to sidestep Gillies' agenda. Any decision made must be practical, he said, and he remained firm that the Mi'kmaq needed access their places of employment.

The proceedings took five days. The judge gave his verdict in March 1916, and submitted a report to the Governor in Council, in which he laid out the process he had followed, the evidence given to the Court, and the findings to be submitted to Parliament. The final outcome of the hearing was this: "That it is expedient, having regard to the interest of the public and of the Indians located on the small Sydney reserve in the City of Sydney, in the Province of Nova Scotia, that the said Indians should be removed from

⁷² Testimony, 54.

⁷³ Testimony, 68.

⁷⁴ Testimony, 68.

⁷⁵ Testimony, 47.

such reserve.”⁷⁶ The judgement noted that compensation should be paid to individuals for loss and/or damages with respect to their buildings or improvements, and that they should be,

“... treated with great consideration and kindness, and that such removal should be made quietly, without undue haste, trouble or inconvenience to the Indians after the selection of a new reserve ... and that the new reserve should be procured, and Indians removed thereto so soon as Parliament provides the appropriation for the necessary expenditures.”⁷⁷

The judge’s summary laid out the facts as he had understood them in court. When the Cape Breton Railway was built, he wrote, it severed the reserve, leaving a small piece of land by the water which was valueless and cannot be used, a fact which leaves the reserve smaller than it appears to be.⁷⁸ He reported that the number of residents over the years had been increasing, and described a hardworking community. Men worked as laborers all over Sydney as bricklayers, masons, plasterers and carpenters. Some worked with pick and shovel and some of them were employed by the Cape Breton Electric tramway for snow removal in the winter. They made baskets, pick-handles and tubs while women did cleaning and washing in Sydney. Most of them want to stay, he wrote, and “this state of things carries us thus far and no further.” He did not see that the situation would improve. He made it clear in his report that the coke oven district in the area of Lingan Road, a property owned by Gillies, should be avoided. He then mentioned that the existing site must be sold at public auction, and that Joseph Gillies had offered to purchase it for \$5,000. While the judge believed this was a reasonable price, he did not recommend

⁷⁶ “Judgement of the Court of the Exchequer,” RG10, Vol. 7762, File 27061-F, LAC, Ottawa, ON, 2.

⁷⁷ Judgement, 5.

⁷⁸ Judgement, 7.

this sale. He said that compensation for loss or damages to their buildings should be paid to the reserve residents.

In his final report to parliament, Judge Audette wrote that the “overwhelming evidence is to the effect that the Reserve retards and is a clog in the development of that part of the city. The reserve is congested, [and] removal would make the property in that neighbourhood more valuable for assessment purposes ... The racial inequalities of the Indians as compared with the white men, check to a great extent any move towards social development [which can] only grow worse every day, as the number of Indians is increasing. I do therefore, without hesitation, come to the conclusion, on this branch of the case, that the removal of the Indians from the Reserve is obviously in the interest of the public.”⁷⁹

The judge’s report revealed his commitment to a colonial agenda in which the Mi’kmaq of Kings Road were inconsequential. The report gave no consideration to the historical ties of the Mi’kmaq to Sydney Harbour and the reserve, nor did it examine other options which had been proposed during the court hearing, such as expanding the present reserve by the purchase of adjoining land on the opposite side from Gillies, reorganizing the housing to create a workable infrastructure that would allow reserve land to be more evenly distributed, and installing sewerage lines to individual houses. The judge did not ask for other options, although it may not have been within his purview to do so, and the evidence presented to the court by Rowlings was not enough to overcome the virulence of Gillies’ attacks on the people of Kings Road.

⁷⁹ Testimony, 124.

At the end of the LAC file, there is a report to Duncan Campbell Scott, who was now Deputy Superintendent-General of Indian Affairs, from Charles Parker of the Office of Indian Agencies, which detailed the approximate cost of “removal and transfer” of Kings Road. He noted that the sale of Kings Road would net approximately \$5,000, and that this would not meet the cost of another land purchase. The houses and the schoolhouse presently on the reserve would need to be torn down and replaced, and a water supply would need to be drilled on the new reserve.⁸⁰ These costs may have been considerably higher than the cost of restructuring and laying sewer lines on the present reserve, but this outcome was not considered, except by Dr. McLeod.

What the judge failed to take into account was the history of the reserve. The area had been recognized by the provincial government about one hundred years earlier as a stopping place and a meeting place. It continued to be used as a stopping place throughout the nineteenth century, and, at the same time, was gradually transformed into a place of permanence. Indian Affairs had recognized this and built a school and hired a permanent teacher. They had also attempted to address the problem of toilets, which malfunctioned fairly early after installation. The community was blamed for these problems, but, as Judge Audette astutely pointed out, it is likely that the sewer pipe to the ocean was damaged and/or frozen in a cold Cape Breton winter and never repaired.

Judge Louis Audette was a white man who had been trained in both French and English colonial law within racist, colonial institutions, and throughout his life he would have absorbed the racist ideology of the times: that whites were a superior race, and that the Mi’kmaq were lesser people than whites. While it was true that the reserve was

⁸⁰ Testimony, 119.

overcrowded, the reasons behind these overcrowded conditions were not raised, not by the town of Sydney, nor by the Dominion government, and they were not investigated by the court of the Exchequer. Judge Audette ruled against Kings Road without acknowledging that his verdict was based on tangible problems that had been identified in the hearing, and that these problems had relatively straightforward and simple solutions. The underlying issue which the judge did not tackle was that the reserve land had always been used by the Mi'kmaq. It was the expansion of Sydney that had caused the problem, and, with some forward thinking town planning, any expansion of the town could be designed to accommodate this urban reserve. This pointed to another problem that was not spoken of in the hearing. White men such as Gillies would not allow Indigenous land to occupy prime real estate. The Sydney waterfront had become a highly desirable place to invest or build. As the land on the King's Road increased in value, so did the Mi'kmaq reserve land. White Sydney wanted to protect land prices in an area that was rapidly increasing in value, and it viewed the reserve as an impediment to this goal, and the reserve residents as unsuitable neighbours. The Kings Road reserve and the people who lived on it were swept aside because of racism and white greed.

Chapter 5 Conclusion

Amendment 49(a) had provided a legal mechanism to remove Indigenous people from their land without the need to negotiate terms. The wording was clear and succinct, and Frank Oliver made it clear in the House of Commons that the amendment was precipitated by long, difficult surrenders in the years preceding 1911, particularly the forty-year negotiations with the Songhees in British Columbia. It is probable that these surrenders, as well as Indian Affairs' failure to negotiate a land surrender with the people of the Kings Road reserve in Sydney, Nova Scotia, played a significant role in the passing of this amendment.¹

The Kings Road reserve was the first forced surrender under amendment 49(a). Land usage on the reserve had changed over the years. It had started as a stopping and meeting place on the shores of Sydney harbour and had become a community of permanence. The importance of this land to the Mi'kmaq of Nova Scotia, and particularly for the people of Eskasoni, had been recognized by both the provincial and federal governments. Nova Scotia set land aside for this small reserve in 1847, and, in 1882, the land had moved to federal jurisdiction, becoming Reserve # 28 in the list of reserves in the Dominion. It had remained an adjunct of Eskasoni reserve and was important for people travelling to and from Eskasoni to access the weekend markets.

¹ In 1998, the St. Peter's surrender was ruled illegal, and a settlement was reached with the federal government in 2009 to "compensate Peguis for its loss of land and economic loss as a result of the illegality of this surrender. In 2016, the Fort William First Nation signed a settlement agreement for the land that taken under the expropriation clause of the Indian Act to build a terminus for the Grand Trunk Pacific Railroad, and not returned to them after the company declared bankruptcy.

It is probable that, by the mid-1800s, Sydney was defining land use along the waterfront. What does not seem to have been anticipated is that, within a very few years, the town would grow and encompass this reserve allocation. As Sydney expanded, so had the Kings Road reserve. It was now a settled community that expanded on weekends to accommodate travellers from Eskasoni. The reserve's economy had shifted to a waged economy, and there was a school with a permanent schoolteacher. Indian Affairs had invested in this community, installing a central well and communal brick toilets. These had been originally sewerred to the ocean but had been out of order for many years, which was probably the result of winter damage to the sewer line, as Judge Audette pointed out. Outhouses, which were common and legal in Sydney for areas of the city not yet 'sewerred', had solved the problem for the people of Kings Road reserve, and, by the turn of the century, Kings Road was a community of permanence.

Joseph Gillies' letter to the Minister of the Interior and Superintendent General of Indian Affairs, Frank Oliver, advocating that the Indian Act could be changed to remove the 'consent to surrender' clause and suggesting that such a change might prove useful in the future was a turning point. Oliver clearly saw this as a way forward to deal with 'intransigent' reserves that were in the way of town expansions. The result was amendment 49(a) to the Indian Act, a clause which removed the 'requirement of consent' clause for urban reserves from the Indian Act and put land security for reserves across the country at risk.

Gillies was vituperous in his attacks on the Kings Road reserve, and, while he received some support, it was not universal. Testimonies at the Court of the Exchequer show there was significant citizen support for the Mi'kmaw people, who were seen as valued members of the town workforce. Unfortunately, this support was not enough. A

deeply entrenched white, patriarchal ideology had created an unquestioned belief of ‘white people first’ in colonial Canada. This racist ideology was the foundation of colonial institutions, which showed clearly as members of the House debated the bill, and in the testimonies and judgement of the Court of the Exchequer. Amendment 49(a) was designed by white men, some of whom were white supremacists, and the members of Parliament who opposed it were insufficient in number to defeat it. The debates took place within this white, male, racist framework of a centralized colonial structure. These colonial structures set the decision-makers apart, making it was easy to ignore the fact that the Kings Road reserve was an established community of people, who lived ordinary lives. It was also easy, given the one-sided information Oliver provided the House, to blame this community for the deteriorating conditions at the reserve.

Amendment 49(a) became part of the Indian Act in 1911. It took until 1915 for the Department of Indian Affairs to send the matter to the Court of the Exchequer for a decision, and Judge Audette’s ruling was reported in 1916. It took another six years to force the surrender of Kings Road reserve. During that time, Joseph Gillies convinced Indian Affairs under Duncan Campbell Scott, who was now Deputy Superintendent General of Indian Affairs, to purchase the land he owned on Lingan Road near the coke ovens, which Justice Audette had explicitly mentioned should not happen. The Mi’kmaq refused to move there, choosing to live with the uncertainty of not knowing their fate, and having little ability to influence it.

The Dominion government’s removal of the ‘consent to surrender’ clause through amendment 49(a) was ‘betrayal with intent.’ It deliberately removed land security for urban reserves that were considered a problem, or which could become a problem, and, as Peggy Martin-McGuire wrote, it was in violation of existing treaties. Urban reserves were

created by the continued expansion of colonial towns and cities, and the colonial solution was to take back allocated reserve land. There is no record that other solutions were considered, and it is probable that, for men such as Joseph Gillies who was driven by his deeply embedded, vituperous brand of racism, removal was the only acceptable outcome.

Documents show that Joseph Gillies and Frank Oliver were like-minded in their entrenched, white supremacist beliefs, and Oliver was more than willing to use Gillies' hate as a lever to deal with the broader issues of urban reserves and Indigenous resistance. Gillies' contempt for his Indigenous neighbours is clear in his letter exchanges with Indian Affairs and other members of the Dominion government, and his Exchequer Court testimony was equally venomous. This parallels the contempt for Indigenous peoples shown by the two people whose positions of power gave them the ability to design amendment 49(a) and ensure it passed in the House of Commons, Frank Oliver and Wilfrid Laurier. While Oliver is credited with being the architect of this amendment, he muddled his way through explanations to the House of Commons and it was Prime Minister Wilfrid Laurier who stepped in to clarify matters. Laurier and Oliver also seem to have been joint architects of the legislation to prevent blacks from immigrating to Canada, mentioned in Chapter 3.

It was predictable by the mid-1800s that the town of Sydney was going to encompass the reserve, and some forward-thinking town planning could have impacted how the reserve interacted in the future with the larger community. However, it seems to have taken the town of Sydney and Indian Affairs by surprise. The euro-centred beliefs built into colonial institutions did not allow the system to be at fault. Therefore, the blame was turned on to those whose ability to adapt had been curtailed, by the Indian Act and everyday racism which created the belief of 'white people first'. The process of

amendment 49(a) from when Joseph Gillies wrote his first letter to the mayor, Walter Crowe, to the judgement of Justice Audette of the Court of the Exchequer, through the debates in the House of Commons, was part of a white, colonial belief system based on racist ideology. Chief Denny and his people were powerless to stop Oliver and Gillies. The blame and responsibility for problems on the reserve was turned back onto the people who lived there. However, responsibility for the demise of Kings Road points to Joseph Gillies and Frank Oliver, whose white supremacist brand of racism could not accept that First Nations communities were worthy of consideration. Their ideology created the ‘perfect storm’ and the question that remains unanswerable is this. Would the people of Kings Road reserve have been removed if Gillies had not complained to Oliver about the problem with his neighbours, which set in motion the events that eventually led to the passing of amendment 49(a)?

During my research, it has become clear that amendment 49(a) has not been investigated in detail. While it has received mention in various publications, it is usually informative rather than an in-depth discussion. However, I believe this is a significant amendment to the Indian Act in which its architect, Frank Oliver, supported by Prime Minister Wilfrid Laurier, deliberately contravened treaties and provided the House of Commons with reasoning based on white supremacist ideology, which was perhaps not unusual for the times. In spite of the vigorous opposition in the House of Commons from the conservative minority, particularly from who formed the next government after a federal election that same year, the amendment was kept as part of the Indian Act until 1952. It remains unclear how often this amendment was invoked in the years following 1911. Regardless, it was an extraordinary piece of legislation. It removed land security for Indigenous nations across the country, contravened existing treaties, and did so with the

knowledge and support of Parliament. Members of the House of Commons from coast to coast failed to stop this legislation, and in failing to do so, became complicit in events that followed.

This thesis has focussed on the colonial story that led to the forced surrender of Kings Road reserve. The *Membertou* Heritage Park website expands this to tell the story of *Kun`rewiktuk* and its people.² There are questions that remain unanswered about how and why towns and cities were permitted to expand and push Indigenous people from their reserve lands. This seems to have been a preventable problem, and, while racism played a significant role the passing of amendment 49(a), there were forward-thinking people who understood what was happening and were powerless to influence the outcome. It is my belief that this amendment deserves further examination. I believe that the themes and issues raised here lay the groundwork for further research and I hope that this thesis will be of assistance to future researchers.

² Membertou, "Nestuita'sin Web Project," *Membertou Heritage Park*.
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