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IN THE MATTER OF A REFERENCE AS TO WHETHER THE TERM "INDIANS" IN HEAD 24 OF SECTION 91 OF THE BRITISH NORTH AMERICA ACT, 1867, INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Constitutional law—Statute—"Indians"—"Eskimo"—Whether Eskimo are Indians within head no. 24 of s. 91 of the B.N.A. Act.

Eskimo inhabitants of the province of Quebec are "Indians" within the contemplation of head no. 24 ("Indians and Lands Reserved for Indians") of section 91 of the *British North America Act.*

REFERENCE by Order of His Excellency the Governor General in Council (P.C. 867, dated April 2, 1935) of the following question hereinafter set out to the Supreme Court of Canada for hearing and consideration pursuant to section 55 of the *Supreme Court Act,* R.S.C., 1927, c. 35.

The order of reference recited:

The Committee of the Privy Council have had before them a report, dated April 1, 1935, from the Minister of Justice, representing that under the terms of the *British North America Act,* 1867, section 91 "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated," and that among these subjects is number "24. Indians, and Lands reserved for the Indians."

The Minister states that in parts of the province of Quebec there are Eskimo inhabitants, and

That a controversy has arisen between the Dominion Government and the Government of the province of Quebec in relation to the question whether the legislative and executive power of the Dominion Government under the above provision of the *British North America Act,* 1867, extends to the Eskimo inhabitants of the province of Quebec.

The Committee, on the recommendation of the Minister of Justice, advise that Your Excellency may be pleased, in the exercise of the powers

*PRESENT:—Duff C.J. and Cannon, Crocket, Davis, Kerwin and Hudson JJ.

1939 CanLII 22 (SCC)

conferred by section 55 of the *Supreme Court Act*, to refer to the Supreme Court of Canada for hearing and consideration the following question:

Does the term "Indians," as used in head 24 of section 91 of the *British North America Act*, 1867, include Eskimo inhabitants of the Province of Quebec?

The answer of the Court to the question was in the affirmative.

J. McGregor Stewart K.C. and *C. P. Plaxton K.C.* for the Attorney-General of Canada.

Auguste Désilets K.C. and *C. A. Séguin K.C.* for the Attorney-General of Quebec.

The judgment of the Chief Justice and Davis and Hudson JJ. (Crocket J. concurring) was delivered by

THE CHIEF JUSTICE.—The reference with which we are concerned arises out of a controversy between the Dominion and the province of Quebec touching the question whether the Eskimo inhabitants of that province are "Indians" within the contemplation of head no. 24 of section 91 of the *British North America Act* which is in these words, "Indians and Lands Reserved for Indians"; and under the reference we are to pronounce upon that question.

Among the inhabitants of the three provinces, Nova Scotia, New Brunswick and Canada that, by the immediate operation of the *British North America Act*, became subject to the constitutional enactments of that statute there were few, if any, Eskimo. But the *British North America Act* contemplated the eventual admission into the Union of other parts of British North America as is explicitly declared in the preamble and for which provision is made by section 146 thereof.

The Eskimo population of Quebec inhabits (in the northern part of the province) a territory that in 1867 formed part of Rupert's Land and the question we have to determine is whether these Eskimo, whose ancestors were aborigines of Rupert's Land in 1867 and at the time of its annexation to Canada, are Indians in the sense mentioned.

In 1867 the Eskimo population of what is now Canada, then between four and five thousand in number, occupied, as at the present time, the northern littoral of the continent from Alaska to, and including part of, the Labrador

1939 CanLII 22 (SCC)

1939

REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Duff C.J.

coast, within the territories under the control of the Hudson's Bay Company, that is to say, in Rupert's Land and the North-Western Territory which, under the authority given by section 146 of the *British North America Act,* were acquired by Canada in 1871. In addition to these Eskimo in Rupert's Land and the North-Western Territory, there were some hundreds of them on that part of the coast of Labrador (east of Hudson Strait) which formed part of, and was subject to the Government of, Newfoundland.

The *British North America Act* is a statute dealing with British North America and, in determining the meaning of the words "Indians" in the statute, we have to consider the meaning of that term as applied to the inhabitants of British North America. In 1867 more than half of the Indian population of British North America were within the boundaries of Rupert's Land and the North-Western Territory; and of the Eskimo population nearly ninety per cent. were within those boundaries. It is, therefore, important to consult the reliable sources of information as to the use of the term "Indian" in relation to the Eskimo in those territories. Fortunately, there is evidence of the most authoritative character furnished by the Hudson's Bay Company itself.

It will be recalled that the Hudson's Bay Company, besides being a trading company, possessed considerable powers of government and administration. Some years before the passing of the *British North America Act,* complaints having been made as to the manner in which these responsibilities had been discharged, a committee of the House of Commons in 1856 and 1857 investigated the affairs of the Company. Among the matters which naturally engaged the attention of the Committee was the Company's relations with and conduct towards the aborigines; and for the information of the Committee a census was prepared and produced before it by the officers of the Company showing the Indian populations under its rule throughout the whole of the North American continent. This census was accompanied by a map showing the "locations" of the various tribes and was included in the Report of the Committee; and was made an appendix to the Committee's Report which was printed and published by the order of the House of Commons. It is indisputable that in the census and in the map

1939 CanLII 22 (SCC)

the "esquimaux" fall under the general designation "Indians" and that, indeed, in these documents, "Indians" is used as synonymous with "aborigines." The map bears this description:

An Aboriginal Map of North America denoting the boundaries and locations of various Indian Tribes.

Among these "Indian Tribes" the Eskimo are shown inhabiting the northern littoral of the continent from Labrador to Russian America. In the margin of the map are tables. Two are of great significance. The first of these is headed "Statement of the Indian Tribes of the Hudsons Bay Territories." The tribes "East of the Rocky Mountains" are given as "Blackfeet and Sioux groups comprising eight tribes, Algonquins comprising twelve tribes" and "Esquimaux."

The second is headed "Indian Nations once dwelling East of the Mississippi." The list is as follows:

Algonquin	
Dahcotah or Sioux	
Huron Iroquois	
Catawba	(extinct)
Cherokee	
Uchee	(extinct)
Natches	(extinct)
Mobilian	
Esquimaux	
Kolooch	
Athabascan	
Sioux	
Algonquin	
Iroquois	

The census concludes with a summary which is in these words:

The Indian Races shown in detail in the foregoing census may be classified as follows:

Thickwood Indians on the east side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet, etc.)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the North West Coast	80,000
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000

As already observed, the appointment of the Committee was due in part at all events to representations made to

1939 CanLII 22 (SCC)

1939

REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Duff C.J.

the Imperial Government respecting the conduct of the Hudson's Bay Company towards the Indians and the condition of the Indian population was one of the subjects with which the Committee was principally concerned. They were also concerned with representations made by the Government of Canada urging the desirability of transferring to Canada all the territories of the Company, at least as far west as the Rocky Mountains. Chief Justice Draper was present at the sittings of the Committee representing the Government of Canada. The Committee, as is well known, reported in favour of the cession to Canada of the districts of the Red River and the Saskatchewan River.

Seven years later, the scheme of Confederation, propounded in the Quebec Resolutions of October 10th, 1864, included a declaration that provision should be made

> for the admission into the Union on equitable terms of Newfoundland, the North-West Territory, British Columbia, and Vancouver.

This declaration, was renewed in the Resolutions of the London Conference in December, 1866, and in the *British North America Act* specific provision was made, as we have seen, in section 146 for the acquisition of Rupert's Land as well as the North-West Territory and, in 1868, a statute of the Imperial Parliament conferred upon the Queen the necessary powers as respects Rupert's Land.

The *British North America Act* came into force on the 1st of July, 1867, and, in December of that year, a joint address to Her Majesty was voted by the Senate and House of Commons of Canada praying that authority might be granted to the Parliament of Canada to legislate for the future welfare and good government of these regions and expressing the willingness of that Parliament to assume the duties and obligations of government and legislation as regards those territories. In the Resolution of the Senate expressing the willingness of that body to concur in the joint address is this paragraph:

> Resolved that upon the transference of the Territories in question to the Canadian Government, it will be the duty of the Government to make adequate provisions for the protection of the Indian Tribes, whose interest and well being are involved in the transfer.

By Order in Council of the 23rd of June, 1870, it was ordered that from and after the 15th of July, 1870, the North West Territory and Rupert's Land should be admitted into, and become part of, the Dominion of Canada and that, from that date, the Parliament of Canada should

1939 CanLII 22 (SCC)

have full power and authority to legislate for the future welfare and good government of the territory. As regards Rupert's Land, such authority had already been conferred upon the Parliament of Canada by section 5 of the *Rupert's Land Act* of 1868.

The vast territories which by these transactions became part of the Dominion of Canada and were brought under the jurisdiction of the Parliament of Canada were inhabited largely, indeed almost entirely, by aborigines. It appears to me to be a consideration of great weight in determining the meaning of the word "Indians" in the *British North America Act* that, as we have seen, the Eskimo were recognized as an Indian tribe by the officials of the Hudson's Bay Company which, in 1867, as already observed, exercised powers of government and administration over this great tract; and that, moreover, this employment of the term "Indians" is evidenced in a most unequivocal way by documents prepared by those officials and produced before the Select Committee of the House of Commons which were included in the Report of that Committee which, again, as already mentioned, was printed and published by the order of the House. It is quite clear from the material before us that this Report was the principal source of information as regards the aborigines in those territories until some years after Confederation.

I turn now to the Eskimo inhabiting the coast of Labrador beyond the confines of the Hudson's Bay territories and within the boundaries and under the government of Newfoundland. As regards these, the evidence appears to be conclusive that, for a period beginning about 1760 and extending down to a time subsequent to the passing of the *British North America Act,* they were, by governors, commanders-in-chief of the navy and other naval officers, ecclesiastics, missionaries and traders who came into contact with them, known and classified as Indians.

First, of the official documents. In 1762, General Murray, then Governor of Quebec, who afterwards became first Governor of Canada, in an official report of the state of the government of Quebec, deals under the sixth heading with "Indian nations residing within the government." He introduces discussion with this sentence:

> In order to discuss this point more clearly I shall first take notice of the Savages on the North shore of the River St. Laurence from the

1939 CanLII 22 (SCC)

1939

REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Duff C.J.

Ocean upwards, and then of such as inhabit the South side of the same River, as far as the present limits of the Government extend on either side of it.

In the first and second paragraphs he deals with "Savages" on the North Shore and he says: "The first to be met with on this side are the Esquimaux." In the second paragraph he deals with the Montagnais who inhabited a "vast tract" of country from Labrador to the Saguenay.

It is clear that here the Eskimo are classified under the generic term Indian. They are called "Savages," it is true, but so are the Montagnais and so also the Hurons settled at Jeune Lorette. It is useful to note that he speaks in the first paragraph of the Esquimaux as "the wildest and most untamable of any" and mentions that they are "emphatically styled by the other Nations, Savages."

Then there are two reports to His Majesty by the Lords of Trade. The first, dated June 8th, 1763, discusses the trade carried on by the French on the coast of Labrador. It is said that they carried on

an extensive trade with the Esquimaux Indians in Oyl, Furs, & ca. (in which they allowed Your Majesty's Subjects no Share).

In the second, dated the 16th of April, 1765, in dealing with complaints on the part of the Court of France respecting the French fishery on the coast of Newfoundland and in the Gulf of St. Lawrence, their observations on these complaints are based upon information furnished by Commodore Palliser who had been entrusted with the superintendency of the Newfoundland fishery and the government of the island. In this report, this sentence occurs:

The sixth and last head of complaint contained in the French Ambassador's letter is, that a captain of a certain French vessel was forbid by your Majesty's Governor from having commerce with the Eskimaux Indians;

and upon that it is observed that the Governor "is to be commended for having forbid the subjects of France to trade or treat with these Indians." "These Indians" are spoken of as "inhabitants * * * who are under the protection of and dependent upon your Majesty."

Then there is a series of proclamations by successive Governors and Commanders-in-Chief in Newfoundland, the first of which was that of Sir Hugh Palliser of the 1st of July, 1964. The Proclamation recites,

*** * * Advantages would arise to His Majesty's Trading Subjects if a Friendly Intercourse could be Established with the Esquemeaux**

1939 CanLII 22 (SCC)

Indians, Inhabiting the Coast of Labrador * * *
and that the Government
has taken measures for bringing about a friendly communication between the said Indians and His Majesty's subjects.
All His Majesty's subjects are strictly enjoined "to treat them in the most civil and friendly manner."

The next is a Proclamation by the same Governor dated the 8th of April, 1765, which recites the desirability of
friendly intercourse with the Indians on the Coast of Labrador
and that
attempts hitherto made for that purpose have proved ineffectual, especially with the Esquimaux in the Northern Ports without the Straits of Belle Isle
and strictly enjoins and requires
all His Majesty's subjects who meet with any of the said Indians to treat them in a most civil and friendly manner.

On the 10th of April, 1772, Governor Shuldham in a Proclamation of that date requires
all His Majesty's subjects coming upon the coast of Labrador to act towards the Esquimaux Indians in a manner agreeable to the Proclamation issued at St. John's the 8th day of July 1769 respecting the savages inhabiting the coast of Labrador.
In this Proclamation it should be noted that "Esquimaux savages" and "Esquimaux Indians" are used as convertible expressions.

In 1774, the boundaries of Quebec were extended, and the northeastern coast of Labrador and the Eskimo population therein came under the jurisdiction of the Governor of Quebec and remained so until 1809. Nevertheless, the Governor and Commander-in-Chief of Newfoundland, who at the date was Admiral Edwards, acting under the authority of that Order in Council of the 9th of March, 1774, took measures to protect the missionaries of the Unitas Fratrum and their settlements on the coast of Labrador from molestation or disturbance and, on May 14th, 1779, Admiral Edwards issued a Proclamation requiring
all His Majesty's subjects coming upon the Coast of Labrador to act towards the Esquimaux Indians justly, humanely and agreeably to these laws, by which His Majesty's subjects are bound.
Here again it is to be observed that the words "savages" and "Indians" are used as equivalents.

A further Proclamation by Admiral Edwards on January 30th, 1781, employs the same phrases, the Eskimo being described as "Esquimaux savages" and as "Esquimaux Indians."

1939 CanLII 22 (SCC)

1939

REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Duff C.J.

On May 15th, 1774, Governor Campbell, as Governor and Commander-in-Chief, issued a Proclamation in terms identical with that of 1781.

On the 3rd of December, 1821, a Proclamation was issued by Governor Hamilton as Governor and Commander-in-Chief of Newfoundland (now again including the Labrador coast) relating to a "fourth settlement" by the Moravian missionaries requiring all His Majesty's subjects "to act towards the missionaries and the Esquimaux Indians justly and humanely."

There are other official documents. In a report in 1798 by Captain Crofton, addressed to Admiral Waldegrave, Governor and Commander-in-Chief of Newfoundland, the phrase "Esquimaux Indians" occurs several times and the Eskimo are plainly treated as coming under the designation "Indians."

A report to Lord Dorchester, Governor and Commander-in-Chief of Quebec, Nova Scotia, New Brunswick and their dependencies, in 1788, upon an application by George Cartwright for a grant of land at Touktoke Bay on the coast of Labrador by a special Committee of the Council appointed to consider the same refers to the applicant's exertions in

> securing friendly intercourse with the Eskimaux Indians and his success in bringing about a friendly intercourse between that nation and the Mountaineers.

Evidence as to subsequent official usage is adduced in a letter of 1824 from the Advocate General of Canada to the Assistant Civil Secretary on some matter of a criminal prosecution in which "Esquimaux Indians" are concerned; and in a report of 1869 by Judge Pinsent of the Court of Labrador to the Governor of Newfoundland in which this sentence occurs:

> In this number about 300 Indians and half-breeds of the Esquimaux and Mountaineer races are included.

Reports from missionaries and clergymen are significant. I refer particularly to two. There is a communication in 1821 by the Unitas Fratrum sent to Admiral Hamilton, Governor and Commander-in-Chief of Newfoundland and Labrador, on a visit by H.M.S. *Clinker* to their settlements. In this the Eskimo are mentioned as "Esquimaux Indians" and "Esquimaux Tribes" and the report concludes with a table giving the numbers of "Esquimaux Indians who have embraced the Christian religion" at the various stations.

1939 CanLII 22 (SCC)

In 1849, a report from the Bishop of Newfoundland was printed and published in London for the Society for the Propagation of the Gospel by the Bishop of London with a prefatory letter and seems to have been put into circulation through Rivingtons and other booksellers. Extracts from this report, which describes a visit to Labrador, are produced in the Quebec case, and as these passages exemplify in a remarkable way the use of the term Indian, as designating the Eskimo inhabitants of Labrador as well as other classes of Indians there, it is right, I think, to reproduce them in full:

p.17.—At St. Francis Harbour, where we next stopped, we celebrated the Lord's Supper, as there were several members of the Church from Newfoundland fishing in the neighbourhood; and the agent and his lady also communicated, (Mr. and Mrs. Saunders). Several Esquimaux Indians were here admitted into the Church, and married. One of them afterwards accompanied us as pilot to Sandwich Bay.

I was obliged very reluctantly to leave the Church ship at St. Francis Harbour (the wind blowing in), and proceeded in a boat twenty-five miles to the Venison Islands, where I remained three days on shore, before the *Hank* could join us, and, with Mr. Hoyles, was very kindly entertained by Mr. Howe, Messrs. Slade's agent. Here all the females are either Esquimaux or mountaineer Indians, or descended from them. With the exception of Mrs. Saunders, there is not an Englishwoman on the coast, from Battle Harbour to Sandwich Bay; all, or nearly all, are Indians (Esquimaux or mountaineer), or half Indians, and of course the children are the same mixed race.

p. 40.—Wednesday, August 2.—The wind blew so strong last night, with heavy rain, that our captain, who was on shore, could not return to the ship. I had intended to proceed this morning, but, partly on account of the high sea, and partly because there was yet work to be done here, I was persuaded to delay my departure. I went on shore with my Chaplains after breakfast; and while I remained at the house of Mr. Ellis, the merchant of Newfoundland, they visited an Englishman, who was married, or united, to a poor Indian woman, an Esquimaux, and who we understood, had children to be baptized.

p. 49.—Mr. Bendle also informed us of the character &c., of the Indians who dwell in or resort to his neighbourhood. There are three distinct tribes—the Micmacs, Mountaineers and Esquimaux. The first two are generally Roman Catholics, but the Esquimaux owe their instruction and conversion to the Moravian Missionaries. These Missionaries (on the Labrador coast) have four stations and establishments, the nearest about 400 miles to the north of Battle Harbour, and the most distant nearly 400 miles farther, or 800 from this place. There are three families of the Moravians at each of their stations, who live together in a stone house, and have large trading concerns in fish, &c., with the Esquimaux.

p. 63.—Tuesday, August 15.—The wind came round again to the westward this morning, but was very light. We got under way at ten o'clock, and did not reach the Seal Islands till five. Mr. Howe kindly furnished a pilot. Here, as in every other harbour, are several vessels from Newfoundland. Messrs. Hunt also keep a small "crew" here;

1939 CanLII 22 (SCC)

1939

REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Duff C.J.

that is, a few men dwelling together to prosecute the fishery in the summer and kill seals in the winter. Five Englishmen remained together here last winter, who killed 500 seals. In the first three months of the year they are in the woods, to cut timber and firewood. Besides this crew, the only residents are Indians (Esquimaux) and half Indians, who live together, crowded in two huts, with an Englishman who has taken one of the half Indian women as his wife. Guided by the skipper of Mr. Hunt's crew, we visited these Indians. Nearly all (twenty out of twenty-three) crowded together in one small hut, with our two guides, Messrs. Harvey and Hoyles, and myself. A strange group, or crowd, we were. Indians will compress into the smallest possible compass; but still we were brought into painfully close proximity.

p. 68.—A few years ago the Esquimaux women, generaly wore a cloak, or cope, of seal-skin, with the hair outwards, the tail hanging down behind, and the flippers on their arms; but now all rejoice in European dresses, shawls and gowns of many colours. The only remains of Indian dress is the sealskin boot, which even the smallest children wear; it is of great use in the snow, being quite impervious to wet. In the race of mixed blood, or Anglo-Esquimaux, the Indian characteristics very much disappear, and the children are both lively and comely.

p. 69.—The afternoon service commenced soon after three o'clock, and was not concluded till seven o'clock, in consequence of the numbers to be christened and added to the Church. I admitted six adults myself, who were able to answer for themselves; three were Esquimaux. All made the proper answers correctly and seriously, and not the least so the poor Indians.

Having regard to the well established usage of designating the Esquimaux of Labrador as Indians or Esquimaux Indians, evidenced by the Proclamations of the Governors of Newfoundland, and other official and unofficial documents, one finds little difficulty in appreciating the significance of the phraseology of the correspondence, in 1879, between Sir John A. Macdonald and Sir Hector Langevin on the subject of the Eskimo on the north shore of the St. Lawrence. The phrase "Esquimaux Indians" is employed in this correspondence as it had been employed for a hundred years in official and other documents to designate the Labrador Esquimaux. In 1882, three years after the date of this correspondence, the sale of intoxicating liquors to "Esquimaux Indians" was prohibited by an Act of the Legislature of Newfoundland.

Newfoundland, including the territory inhabited by these Labrador Eskimo was, as already pointed out, one of the British North American colonies the union of which with Canada was contemplated by the *British North America Act*. Thus it appears that, through all the territories of British North America in which there were Eskimo, the term "Indian" was employed by well established usage as including these as well as the other aborigines; and I

1939 CanLII 22 (SCC)

repeat the *British North America Act,* in so far as it deals with the subject of Indians, must, in my opinion, be taken to contemplate the Indians of British North America as a whole.

As against this evidence, the Dominion appeals to the Royal Proclamation of 1763 as furnishing the clue to the true meaning and application of the term "Indians" in section 91. The Indians therein referred to are said to be the same type of aborigines as are described in that Proclamation as "the several nations or tribes of Indian with whom We are connected and who live under Our protection."

First, it is said that the terms "nation" and "tribe" are not employed in relation to the Eskimo. That is a proposition which finds no support in the documents produced dealing with the Labrador Eskimo; and, as regards the Eskimo inhabiting the Hudson's Bay Company's territories, they, as already pointed out, are (in the tables in the margin of the Hudson's Bay Company's aboriginal map) included in the statement of "Indian tribes" in those territories and they are in the list of "Indian nations" once dwelling east of the Mississippi.

Then it is said they were never "connected" with the British Crown or "under the protection" of the Crown. I find some difficulty in affirming that the Eskimo and other Indians ruled by the Hudson's Bay Company, under either charter or licence from the Crown, were never under the protection of the Crown, and in understanding how, especially in view of the Proclamations cited, that can be affirmed of the Esquimaux of northeastern Labrador. I cannot give my adherence to the principle of interpretation of the *British North America Act* which, in face of the ample evidence of the broad denotation of the term "Indian" as employed to designate the aborigines of Labrador and the Hudson's Bay territories as evidenced by the documents referred to, would impose upon that term in the *British North America Act* a narrower interpretation by reference to the recitals of and the events leading up to the Proclamation of 1763. For analogous reasons I am unable to accept the list of Indian tribes attached to the instructions to Sir Guy Carleton as controlling the scope of the term "Indians" in the *British North America Act.* Here it may be observed parenthetically that if this list of tribes does not include Eskimo, as

1939 CanLII 22 (SCC)

1939

REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Duff C.J.

apparently it does not, neither does it appear to include the Montagnais Indians inhabiting the north shore of the St. Lawrence east of the Saguenay or the Blackfeet or the Cree or the Indians of the Pacific Coast.

Another argument advanced by counsel for the Crown is based upon the supposed contrast between the language used in Articles 31 and 32 of the Instructions to Sir Guy Carleton and that used in relation to the Eskimo in Article 37. It has already been pointed out that, in the official documents relating to the Labrador Eskimo, the words "savages" and "Indians" are used convertibly; that in General Murray's Report in 1762 the Montagnais, the Hurons and the Eskimo are all spoken of as "savages"; and in Article 31 of Sir Guy Carleton's Instructions, the term "savages" is applied to the Indians of Illinois, the straits of Detroit, Michilimackinac and Gaspe; and, in Article 32, the term "savages" is applied to the Indians affected by the Royal Proclamation in 1763 and within the scope of the plan of 1764. I can find nothing in the language of these instructions which militates against the inference which, as already explained, seems to me to arise from the documents mentioned above having relation to the Labrador Eskimo.

Nor do I think that the fact that British policy in relation to the Indians, as evidenced in the Instructions to Sir Guy Carleton and the Royal Proclamation of 1763, did not contemplate the Eskimo (along with many other tribes and nations of British North American aborigines) as within the scope of that policy is either conclusive or very useful in determining the question before us. For that purpose, for construing the term "Indians" in the *British North America Act* in order to ascertain the scope of the provisions of that Act defining the powers of the Parliament of Canada, the Report of the Select Committee of the House of Commons in 1857 and the documents relating to the Labrador Eskimo are, in my opinion, far more trustworthy guides.

Nor can I agree that the context (in head no. 24) has the effect of restricting the term "Indians." If "Indians" standing alone in its application to British North America denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems

1939 CanLII 22 (SCC)

to afford no good reason for limiting the scope of the term "Indians" itself.

For these reasons I think the question referred to us should be answered in the affirmative.

CANNON, J. (Crocket J. concurring).—The question referred to us for hearing and consideration pursuant to section 55 of the *Supreme Court Act* is:

Does the term "Indians" as used in head 24 of section 91 of the *British North America Act*, 1867, include Eskimo inhabitants of the province of Quebec?

I answer the question in the affirmative.

In the evidence given by Sir George Simpson before the Select Committee of the Hudson Bay Company, it appears that in 1857, the Eskimos were included amongst the so-called Indian races classified in the census prepared by the Company and the report of the Committee must have been known to the legislature at Westminster in 1867.

The correspondence between Sir John Macdonald and Sir Hector Langevin with reference to the relief to be given to the Montagnais and Eskimo Indians of the Lower St. Lawrence would show that these two Fathers of the Confederation always understood that the English word "Indians" was to be construed and translated as "sauvages" which admittedly did include *all* the aborigines living within the territories in North America under British authority, whether Imperial, Colonial, or subject to the administrative powers of the Hudson Bay Company.

I do not insist on these two points which have been well treated by my brother Kerwin with whom I agree. I would like to add the following considerations.

As to the exact meaning of the word "Indians" at the time of Confederation, I believe that we have in the official documents "respecting the Proposed Union of the British North American Provinces" presented to both Houses of Parliament of the United Kingdom, on the 8th of February, 1867, all we need to form an opinion of the significance of this word and its scope.

In the English Text of the Report of the Resolutions adopted at a Conference of Delegates from the provinces of Canada, Nova Scotia and New Brunswick, and the Colonies of Newfoundland and Prince Edward Island, held

1939 CanLII 22 (SCC)

1939

REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Cannon J.

at the City of Quebec, October 10, 1864, as the Basis of a proposed Confederation of those Provinces and Colonies, Resolution 29 reads as follows:

> The General Parliament shall have power to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England), and especially Laws respecting the following subjects:
>
> 1.
> 2.
> 3.
> * * * *
> 29. Indians and Lands Reserved for the Indians.

The official French translation of this resolution, as I find it in "Débats Parlementaires sur la Question de la Confédération des Provinces de l'Amérique Britannique du Nord, imprimés par Ordre de la Législature par Hunter, Rose et Lemieux, Imprimeurs, Parlementaires, 1865," follows:

> 29. Le parlement général aura le pouvoir de faire des lois pour la paix, le bien-être et le bon gouvernement des provinces fédérées (sans toutefois, pouvoir porter atteinte à la souveraineté de l'Angleterre), et en particulier sur les sujets suivants:
>
> 1.
> 2.
> 3.
> * * * *
> 29. Les *Sauvages* et les terres réservées pour les Sauvages.

The petition to the Queen passed on the 13th of March, 1865, by the Legislature reproduces, as to this sub-paragraph, word for word the Quebec resolutions, and the French translation also gives to the General Parliament under Section 29,—"Les Sauvages et les terres réservées pour les Sauvages."

This, I think, disposes of the very able argument on behalf of the Dominion that the word "Indians" in the *British North America Act* must be taken in a restricted sense. The Upper and Lower Houses of Upper and Lower Canada petitioners to the Queen, understood that the English word "Indians" was equivalent to or equated the French word "Sauvages" and included all the present and future aborigines native subjects of the proposed Confederation of British North America, which at the time was intended to include Newfoundland.

The official French version of the *British North America Act* also translates "Indians" by "Sauvages." See Statut du Canada, 1er Parlement, 31 Victoria, 1867-1868, Imprimé

1939 CanLII 22 (SCC)

par Malcolm Cameron, Imprimeur de Sa Très Excellente Majesté la Reine—Ottawa, 1867, page 24, section 91, sous-paragraphe 24.

CROCKET, J.—I am of opinion that the question referred to us should be answered in the affirmative for the reasons stated by my Lord the Chief Justice and my brothers Cannon and Kerwin.

KERWIN, J. (Cannon and Crocket JJ. concurring)—The question should be answered in the affirmative. In my opinion, when the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with "Indians and lands reserved for the Indians," the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation. The fact that there were no Eskimos within the boundaries of the provinces that first constituted the Dominion is beside the point as provision was made by the *British North America Act* to include the greater part, if not all, of the territory belonging to the Hudson's Bay Company. And whether the Eskimos as now known emigrated directly from Asia or inhabited the interior of America (originally coming from Asia) and subsequently migrated north, matters not, however interesting it may be to follow the opinions of those who have devoted time and study to that question.

From the date of the visit of Champlain to this country in 1625 when he discovered "une nation de sauvages qui habitent ces pays, qui s'appellent Exquimaux," and of Radisson who in an account of his travels and experiences refers to "Indians called Esquimos"; through the reports of the missionaries and the correspondence between France and New France, the Indians are referred to as "sauvages" and the Eskimos as "sauvages esquimaux." Later we find by referring to such books as might be expected to be known to the Fathers of Confederation and to the British Parliament statements indicating that the Eskimo was considered as one of the Indian tribes. The following is a partial list of such books:—

1855.—Webster's American Dictionary of the English language defines the Esquimaux: "A nation of Indians inhabiting the northwestern parts of North America."

1939 CanLII 22 (SCC)

1939

REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Kerwin J.

1855.—Adrien Guibert in his Geographical Dictionary, classifies the Eskimos among the Indians of America.

1856.—In "The Indian Races of North and South America," Charles de Wolf Brownell, an American author, speaks of the Esquimaux Indians and devotes a chapter to the study of their manners and personal appearance.

1857.—In the "Gazetteer of the world," published in London by A. Fullerton & Co., the Eskimos are dealt with as Indians, who are the aboriginal people of the New Continent; mentions are made of Eskimos in opposition to "common Indian" and to "other Indians."

1857.—In an Imperial Blue Book is a Report from the Select Committee on the Hudson's Bay Company in which the Eskimos are enumerated among the Indians, are classified with the Indian races and are shown on a map denoting the boundaries and locations of various Indian tribes.

1857.—In the evidence given before a Select Committee of the House of Commons (Imperial), appointed to consider the state of the British Possessions in North America, Sir George Simpson, Governor of the territories of the Hudson's Bay Company, includes the Eskimos in the Indian population.

1869.—In an "Esquisse sur le Nord-Ouest de l'Amérique" by Mgr. Taché, Bishop of St. Boniface, Manitoba, reference is made to the aboriginal tribes being called Indians (Sauvages) and the Esquimaux are dealt with at length as one of the five linguistic Indian families.

A word should be added as to Webster's Dictionary. Counsel for the Dominion pointed out that in the 1913 edition of Webster's New International Dictionary, as well as the 1923, 1925, and 1927 editions, "Indian" is defined as being "a member of any of the aboriginal American stocks excepting the Eskimauan." However, in the earlier 1855 edition, then known as The American Dictionary of the English Language, appears the following:—

"Indian", A. General name of any native of the Indies;; as an East Indian or West Indian. It is particularly applied to any native of the American continent.

1939 CanLII 22 (SCC)

In the 1865 edition of what had then become the Dictionary of the English Language, "Indians" were defined as

Indians are the aboriginal inhabitants of America so called originally from the idea on the part of Columbus and the early navigators of the identity of America with India.

It was only in the 1913, 1923 and 1927 editions that the earlier definition was departed from while in the 1934 edition of Webster's International Dictionary, "Indian" is defined as follows:—

Indian. 5. A member of the aboriginal American race; an American, or Red, Indian; an Amerind * * * About 75 linguistic families or stocks are recognized in North America, and about 75 more in South America and the West Indies. Some stocks comprise many tribes speaking distinct, but related, languages. The 16 stocks listed below occupied more than half the area of the continent and comprised a large majority of the Indians at the time of the discovery of North America, Algonquian, Athapascan, *Eskimauan,* Iroquoian, Mayan, Muskhegean, Siouian, and Uto-Aztocan.

It is true that in the New English (Oxford) Dictionary, volume 5, under the heading "Indian" appears the following:—

A. * * *

2. Belonging or relating to the race of original inhabitants of America and the West Indies.

B. * * *

2. A member of any of the aboriginal races of America or the West Indies; an American Indian.

The Eskimos, in the extreme north, are usually excluded from the term; as are sometimes the Patagonians and Fuegians in the extreme south.

There are also a few other publications to which our attention has been called where "Indians" and "Esquimaux" are differentiated but the majority of authoritative publications, and particularly those that one would expect to be in common use in 1867, adopt the interpretation that the term "Indians" includes all the aborigines of the territory subsequently included in the Dominion.

As pointed out in a memorandum of November 1st, 1918, by the Deputy Superintendent General of Indian Affairs to the Minister, the Eskimos had never been mentioned in any legislation up to that time but by chapter 47 of 14-15 George V, assented to July, 1924, section 4 of *The Indian Act,* Chapter 81, R.S.C., 1906, was amended by adding thereto the following subsection:—

(2) The Superintendent General of Indian Affairs shall have charge of Eskimo affairs.

1939 CanLII 22 (SCC)

1939

REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Kerwin J.

This was afterwards repealed and even if the repeal had never occurred perhaps no argument could be adduced from the provisions of the amending statute but it is significant that in 1879 a letter from the Very Reverend Edmond Langevin to the Postmaster General of Canada, referring to the necessitous condition of "the Montagnais and Esquimaux Indians on the north coast of the St. Lawrence below the Saguenay" was sent by the addressee to Sir John A. Macdonald as Superintendent General of Indian Affairs with the following covering letter:—

Ottawa, 20 January, 1879.

My dear Sir John,

The enclosed letter from the Very Reverend Edmond Langevin, Vicar General of Rimouski, calls my attention to the position of the Montagnais and Esquimaux Indians on the north coast of the St. Lawrence, below the Saguenay. He says that the amount that used to be given to these Indians was seventy eight cents a head, and that now it is only thirty eight cents. These poor people are starving they can't cultivate the land, which in that region is hardly cultivable, and have had no provision made for them by the Government, and he requires on their behalf that we should come to their help. Will you kindly see that they are treated as well as we treat the Indians of our new territories. Of course I leave the whole matter in yours hands.

Yours truly,
Hector L. Langevin.

Right Honble Sir John A. Macdonald, K.C.B., Ottawa.

The matter referred to was commented upon by the Deputy Superintendent General of Indian Affairs in the following report:—

To the Right Hon. Sir John A. Macdonald, K.C.B.
Supt. General of Indian Affairs

Ottawa, 24 jany, 1879.

With reference to the letter of the 20th Instant (placed herewith) from the Honourable Hector Langevin, enclosing a letter of the 13th Instant, from the Very Reverend Edmond Langevin, of Rimouski, in the province of Quebec, relative to the insufficient relief given to the Montagnais and Esquimaux Indians of the Lower St. Lawrence, the undersigned has the honor to report that frequent representations to the same effect have been made to the Department and that last year he endeavoured to induce the then Superintendent General of Indian Affairs to ask Parliament for a larger grant, but that when the proposed estimates for the year 1878-79 were submitted to Council for revision, the proposed increase of $2,000 to the Parliamentary Grant for these Indians was struck out.

The present Government has however sanctioned the Supplementary Estimates for 1878-9 which will be submitted to Parliament at the approaching Session being anticipated by granting the said sum of $2,000.00, and the undersigned has moreover increased the grant for those Indians by that amount in the proposed estimates for the year 1879-80,

1939 CanLII 22 (SCC)

with the hope that the Government will sanction and Parliament confirm the same.

All respectfully submitted,

L. Van Koughnet,
Deputy Supt. General of Indian Affairs.

That so soon after Confederation the position of Eskimos should be treated in this manner is significant. It not only more than counter-balances any reference made later as to the Department's attitude but, to my mind, is conclusive as to what was in the minds of those responsible for the drafting of the Resolutions leading to the passing of the *British North America Act*, at that time and shortly thereafter.

Special attention should also be paid to the report of the Select Committee on the Hudson's Bay Company to the Houses of Parliament of Great Britain and Ireland, presented in 1857. As appears from the Imperial Blue Books on Affairs Relating to Canada, the Committee reported:—

> It is a matter of great difficulty to obtain reliable information respecting the Indian population, their migratory habits, and the vast extent of country over which they are spread, misleading the calculations, and rendering it almost impracticable to prepare a satisfactory census. The following estimates have been compiled with great care, from a mass of documents and the actual personal knowledge of several of the Company's officers, tested by comparison with published statements, especially those presented to Government in 1846 by Messrs. Warre and Vavasour, and those of Colonel Lefroy, R.A., contained in a paper read before the Canadian Institute.

The estimates referred to are headed "Establishments of the Hudson's Bay Company in 1856 and number of Indians frequenting them." After a long list of the names of the posts and localities and of the number of Indians frequenting each post is appended the following:

Add Whites and half breeds in Hudson's Bay Territory, not included	6,000
Add Esquimaux not enumerated	4,000
Total	158,960

The *Indian Races* shown in detail in the foregoing Census may be classified as follows:—

Thickwood Indians on the east side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet, &c)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the Northwest Coast..	80,000
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000

1939 CanLII 22 (SCC)

1939

REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Kerwin J.

The Esquimaux, it will be seen, are included among the Indian races and this is based apparently upon the evidence of Sir George Simpson, which had been taken before the Committee. Questions 1062 and 1472, together with the answers, are as follows:—

1062. Mr. GREGSON: What mode have you of ascertaining of the population of the Indians? We have lists of the Indians belonging to various posts; we have compared and checked them with the report of the Government officers who went to Vancouver's Island some years ago, as regards the tribes to the west of the mountains, and with Colonel Lefroy's lists, as regards those on the east side, and we have arrived at this estimate of the population.

1472. Mr. ROEBUCK: Will you state the total?—The Indians, east of the mountains, 55,000; West of the mountains, 80,000; Esquimaux, 4,000.

While counsel for the Dominion sought to draw from the answer to Question 1472 the inference that Sir George Simpson had not treated the Esquimaux as one of the Indian tribes, I think the answer is not susceptible of that interpretation and it is certainly not the one that the Committee adopted.

After considering the reports of missionaries, explorers, agents, cartographers and geographers, included in the cases submitted on behalf of the Dominion and province of Quebec, I do not believe anything further may be usefully added. The weight of opinion favours the construction which I have indicated is the proper one of head 24 of section 91 of the *British North America Act* but the deciding factor, in my view, is the manner in which the subject was considered in Canada and in England at or about the date of the passing of the Act.

The question referred was answered in the affirmative.

1939 CanLII 22 (SCC)