

1945
 *May 21
 *June 20

ATTORNEY GENERAL OF QUEBEC } APPELLANT;
 (PLAINTIFF)

AND

ATTORNEY GENERAL OF CANADA } RESPONDENT.
 (INTERVENANT)

Constitutional law—Criminal law—Fees on proceedings before Justices under Part XV of the Criminal Code—Tariff enacted by section 770 Cr. C.—Validity—Intra vires—Ancillary power of the Dominion—Fees also payable under tariff enacted by provincial Act—B.N.A. Act, sections 91 (27), 92 (2) (14), 101.—Criminal Code, sections 735, 736, 770, 1134.—Officers of Justice Salary Act, R.S.Q., 1941, c. 24, s. 10.

Section 770 of the Criminal Code (Part XV) enacts that "The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices under this Part." There exists also a provincial tariff providing for payment by litigants, before the inferior courts of criminal jurisdiction, for services by officers of justice, which is higher than the tariff provided for in the above section. The Superior Court declared section 770 to be in certain respects *ultra vires*. The appellate court reversed that decision; but gave leave to the Attorney General of Quebec to appeal to this Court.

Held that the appeal should be dismissed.

Per the Chief Justice and Taschereau JJ.:—Section 770 Cr. C., although not being strictly legislation in relation to criminal law and procedure (section 92 (27) B.N.A. Act), is nevertheless within the competence of the Dominion of Canada, on account of its incidence upon criminal law and procedure; and, in such a case, the field being occupied, the provincial legislation becomes inoperative.

Per Kerwin, Hudson and Estey JJ.:—The provisions enacted by section 770 Cr. C. are necessarily incidental to the power to legislate upon criminal law and procedure under section 91 (27) of the B.N.A. Act.—Even if the fixing of the fees to be taken by officers of provincial courts, constituted and organized under section 92 (14) of the B.N.A. Act, may be said to be "Constitution, Maintenance and Organization", criminal law and procedure in criminal matters would be affected very seriously if the Dominion did not have the power to provide the maximum fees that could be taken in criminal matters by provincially appointed officers and by witnesses.

Held, also, that the terms of section 770 Cr. C. are of general application. The section is an imperative direction that no other fees shall be demanded or accepted; and its terms should not be restricted to the case where the unsuccessful party has to pay costs to the other, as the result of an acquittal or conviction (sections 735 and 736 Cr. C.)

Judgment of the appellate court (Q.R. [1945] K.B. 77) affirmed.

PRESENT.—Rinfret C.J. and Kerwin, Hudson, Taschereau and Estey JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Tyndale J. and declaring section 770 of the Criminal Code to be within the powers of the Dominion Parliament.

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Aimé Geoffrion K.C. for the appellant.

F. P. Brais K.C., Adélarde Lachapelle K.C. and *D. W. Mundell* for the respondent.

Taschereau J.
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The judgment of the Chief Justice and of Taschereau J. was delivered by

TASCHEREAU J.:—I cannot agree to the proposition that the tariff of fees determined by the Parliament of Canada, and embodied in section 770 of the Criminal Code, is applicable only when a complainant or accused is condemned to pay costs under section 735 or 736 of the Code. This section 770 is as follows:—

770. Fees.—The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices under this Part.

I find it impossible to give to this section the restrictive meaning which has been suggested, and the terms which the legislators have used lead me to the conclusion that this text is of general application, and cannot be limited to the case where the unsuccessful party has to pay costs to the other, as the result of an acquittal or conviction. The words "no others shall be and constitute the fees to be taken" appear to be quite imperative and sufficiently clear, to convey the conviction that it was the intention of Parliament, that justices of the peace, constables, witnesses and interpreters, may in no case, even if no order is made as to costs, exact a higher amount than the one mentioned in the various items of the tariff. This view is confirmed, I think, by section 1134 of the Criminal Code which makes an offence for a justice of the peace who wilfully receives a larger amount of fees than by law he is authorized to receive, and also by the history of section 770 Criminal Code which my brother Kerwin has carefully reviewed.

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It has been submitted on behalf of the appellant that there exists also a provincial tariff providing for payment by litigants, before the inferior courts of criminal jurisdiction, for services by officers of justice, which is higher than the tariff provided for in section 770 Criminal Code, and that this last section is unconstitutional. It would be so on the ground that the provincial authority being entrusted by the B.N.A. Act with the administration of justice, including the constitution, maintenance and organization of provincial courts, both of criminal and civil jurisdiction, and with the power to raise a revenue for provincial purposes, by direct taxation, is the sole authority which can determine whence will come the moneys necessary to meet the expenditure caused by the maintenance of these courts.

It is now settled law since *Valin v. Langlois* (1) that, although it is incumbent upon the provincial authorities to organize and maintain provincial courts, these latter courts have the constitutional obligation to hear cases referred to them by the federal authorities, without the necessity of making these courts federal courts, which power the Parliament of Canada derives from section 101 of the B.N.A. Act.

It is also well established that, although a court may be provincially organized and maintained, its jurisdiction and the procedure to be followed for the application of laws enacted by the Parliament of Canada, in relation to matters confided to that Parliament, are within its exclusive jurisdiction. That applies to criminal law and procedure in criminal matters which by subsection 27 of section 91 of the B.N.A. Act are subject to the legislative powers of the Dominion.

It would follow that the determination of the fees before a court of criminal jurisdiction, as provided in section 770 of the Criminal Code, would be within the sole jurisdiction of the federal power, if this matter may be considered as a part of criminal law or of criminal procedure, and it would be *ultra vires* of the provinces to attempt to impose their own tariff of fees.

(1) (1879) 3 Can. S.C.R. 1.

But I find it quite impossible to reach the conclusion that the fixing of fees payable to justices of the peace, to constables, witnesses and to interpreters, is legislation strictly in relation to criminal law or procedure.

The power given to the federal parliament to legislate in criminal law and criminal procedure, is the power to determine what shall or what shall not be "criminal", and to determine the steps to be taken in prosecutions and other criminal proceedings before the courts. The fixing of fees is neither criminal law or a step in a prosecution. The issuing of a warrant or of a writ of summons is clearly procedural, but not the payment of a fee to a provincial justice of the peace, who issues it, or to a constable in charge of its execution. Criminal law in itself is unaffected by such an imposition, and the proceedings before or at the trial are in no way modified by the amount that the employees of the province will receive for their services.

The most I think that can be said is that the determination of the fees that are payable, may incidentally affect criminal law or procedure, but is not a substantive part of these laws. The right of a person to institute legal proceedings cannot be denied by excessive fees or taxes that a province may decide to charge or impose.

Not being a matter assigned to the Dominion of Canada, it remains that it is within the legislative competence of the provinces to determine the amount of these fees and to collect them from the litigants as a tax or a compensation for services rendered. This would be within their powers in virtue of subsections 2 and 14 of section 92 of the B.N.A. Act.

But it does not follow that the provinces may always exercise this right. In certain cases, the legislative enactments of the provinces, "in order to prevent the scheme of the B.N.A. Act from being defeated" have to remain inoperative; this is so when the Dominion of Canada, acting within its competence, enacts legislation affecting matters otherwise within the legislative powers of the provincial legislature, but which is necessarily incidental to subjects enumerated in section 91.

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In *Attorney General for Ontario v. Attorney General for Canada* (1), Lord Halsbury said at page 200:—

In their Lordship's opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the *British North America Act*. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislation competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

This statement of the law has since been many times reaffirmed and particularly in *Grand Trunk Railway Company of Canada v. Attorney General of Canada* (2), and *Attorney General for Canada v. Attorney General for British Columbia* (3).

It follows as a result of this jurisprudence which is applicable to the present case, that section 770 of the Criminal Code, although not being strictly legislation in relation to criminal law and procedure, is nevertheless within the competence of the Dominion of Canada, on account of its incidence upon criminal law and procedure. And in such a case, the field being occupied, the provincial legislation becomes inoperative.

It is useless to emphasize further the point that all other provincial legislation concerning fees payable to provincial employees in criminal courts, is entirely valid and competent legislation, when the Dominion, although not precluded from legislating, has refrained from taking any action.

The appeal should be dismissed without costs.

(1) [1894] A.C. 189.

(3) [1930] A.C. 111.

(2) [1907] A.C. 65.

The judgment of Kerwin, Hudson and Estey JJ. was delivered by

KERWIN J:—This appeal reaches us in a peculiar manner. One Bérubé having laid two complaints, under Part 15 of the Criminal Code dealing with summary convictions, before a judge of the Sessions of the Peace for the district of Montreal, and these complaints having been dismissed without the magistrate making any ruling as to the costs, the appellant herein, the Attorney General of Quebec, sued Bérubé in the Superior Court of Quebec to recover the sum of \$121.60 (less \$13.60 already paid) as being the fees payable under Quebec tariffs for the services of provincial officers that had been rendered to the complainant in consequence of his complaints. Bérubé contested the action relying *inter alia* on section 770 of the Criminal Code. The appellant attacked that section as unconstitutional and the Attorney General of Canada intervened to support the legislation.

The trial judge in the Superior Court declared the section to be unconstitutional and maintained the action for \$36.20, based upon what he considered were the applicable provisions of the provincial tariffs. Bérubé did not appeal but the Attorney General of Canada appealed on the question of the constitutionality of section 770 of the Criminal Code. The Court of King's Bench, Appeal Side, considered that this was permissible under the Quebec Code of Civil Procedure and, by a majority, held the section to be constitutional but gave leave to the Attorney General of Quebec to appeal to this Court. Assuming that we have jurisdiction, it is apparent that the matter is presented to us in a manner somewhat similar to references by the Governor General in Council under the *Supreme Court Act*.

This consideration is important because, at the hearing, the main argument of counsel for the respondent was that section 770 Cr. C. means merely that Parliament had fixed the maximum amount to which a complainant or accused could be condemned under section 735 or 736 of the Criminal Code. An alternative construction was suggested rather than argued but it is developed in the respondent's factum. It is quite evident that, if the

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former were the construction originally advocated by the respondent, the Attorney General of Quebec would not have been interested. As a matter of fact, counsel for the appellant stated that he had no quarrel with such a construction and, furthermore, it is unlikely that on any such basis the Court of King's Bench would have given leave to appeal. That is, in this appeal no admissions as to the construction of section 770 of the Criminal Code may be accepted and, therefore, irrespective of the main submission on behalf of the respondent, it is necessary for the Court to reach its own conclusion

Section 770 Cr. C. provides:—

The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices under this Part.

and then follows the fees under these headings:—

- (A) Fees to be taken by Justices of the Peace or their Clerks.
- (B) Constables' Fees.
- (C) Witnesses' Fees.
- (D) Interpreters' Fees.

This section is in Part 15 of the Criminal Code dealing with summary convictions. When *The Summary Convictions Act* was first enacted in 1869, by 32-33 Victoria, c 31, Parliament intended, as the recital indicates, to assimilate, amend and consolidate the statute law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders, and to extend the same as so amended to all Canada;

Sections 53 and 54 of this Act provides:—

53. In all cases of Summary Conviction, or of Orders made by a Justice or Justices of the Peace, the Justice or Justices making the same, may in his or their discretion, award and order in and by the conviction or order, that the Defendant shall pay to the Prosecutor or Complainant such costs as to the said Justice or Justices seem reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before Justices of the Peace.

54. In cases where the Justice or Justices, instead of convicting or making an order, dismiss the information or complaint, he or they, in his or their discretion, may, in and by his or their order of dismissal, award and order that the Prosecutor or Complainant shall pay to the Defendant such costs as to the said Justice or Justices seem reasonable and consistent with law.

That is, if a conviction were recorded, such costs could be awarded as to the justice or justices seemed reasonable

in that behalf and not inconsistent with the fees established by law to be taken or proceedings had by and before justices of the peace. If the information or complaint were dismissed, such costs as to the said justice or justices seemed reasonable and consistent with law could be ordered to be paid by the complainant. This means that reference would be had to the various provincial laws then in force authorizing the fees or costs "to be taken" or to the costs consistent therewith. Section 78 provided a penalty for justices of the peace who not only neglected to comply with certain other provisions therein contained as to making returns, but who also wilfully received a larger amount of fees than by law they were authorized "to receive." Corresponding provisions appear in *The Summary Convictions Act*, R.S.C. 1886, chapter 178.

In 1889, by chapter 45, *The Summary Convictions Act* was amended by adding thereto section 61A, reading as follows—

The fees mentioned in the tariff (W) in the schedule to this Act and no others shall be and constitute the fees to be taken on proceedings before justices under this Act.

The tariff itemized fees under "Fees to be taken by justices of the peace or their clerks" and "Constables' fees". I think it plain that, in dealing with summary conviction matters, Parliament intended, by this amendment, to insure not only that the fees mentioned in the tariff and no others could be directed to be paid by a complainant or accused but also that no other fees for the itemized services could be taken or accepted by the parties mentioned, and that in summary conviction proceedings the tariffs of fees or costs which up to that time Parliament had been willing should be fixed by the provinces should thereafter be uniform.

This provision is now section 770 of the Criminal Code and the tariff has been extended to include witnesses' fees and interpreters' fees and the naming of the former strengthens the view that I would have adopted even without their inclusion. There is also a general section 1134 Cr. C., providing for a penalty in the case of every justice who, among other things, "wilfully receives a larger amount of fees than by law he is authorized to receive."

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My opinion is that section 770 Cr. C. is not confined to providing for the maximum amount that may be imposed upon a person convicted of an offence, or upon the complainant in the event of the dismissal of the charge, but is an imperative direction to all concerned that, for the services to be rendered by the officials named, and for witnesses, no other fees shall be demanded or accepted.

It is sufficient to say that this enactment is necessarily incidental to the power to legislate upon criminal law and procedure as allotted to Parliament by head 27 of section 91 of *The British North America Act*,

The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

It is true that, under head 14 of section 92,

The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts,

the provinces must maintain any courts they decide to constitute and organize, that is that the financial burden thereof falls upon the provinces. However, even if the fixing of the fees to be taken by provincial officers of such courts may be said to be "Constitution, Maintenance, and Organization", criminal law and procedure in criminal matters would be affected very seriously if the Dominion did not have the power to provide the maximum fees that could be taken in criminal matters by provincially appointed officers and by witnesses. And it matters not whether those officers are paid by fees or salaries, or whether the permissible fees go to the province direct or to its own appointees.

The appeal should be dismissed but, as is usual in disputes of this nature, without costs.

Appeal dismissed without costs.

Aimé Geoffrion K.C. and Edouard Asselin K.C.

Solicitors for the appellant.

Adélard Lachapelle K.C.

Solicitor for the respondent.