CRIMINAL LAW—PRELIMINARY INQUIRY—SECTION 452A AMENDMENT TO *CRIMINAL CODE* OF CANADA.

The recent passage of section 452A of the *Criminal Code* of Canada was Parliament's answer to the conflict between the legal and journalistic professions over what has been popularly called the "trial by newspaper" phenomenon. It is the intent of this note to examine the various criticisms of this controversial section.

Section 452A deals with the issue of what degree of restriction should be placed on the publication and broadcast by the news media of reports of preliminary inquiries. It provides that prior to the taking of evidence, the judge holding the preliminary inquiry must, upon application by an accused, order that evidence taken at the inquiry shall not be published in any newspaper or broadcast. This section resulted at least partially from the recommendations of the Tucker Committee in England,[1] which was appointed in 1957 following the celebrated case of Dr. John Bodkin Adams.[2] At that time England had no restriction on the publication of details of committal (preliminary) proceedings. The accused was charged with murder, and during the preliminary, evidence was given that other of his patients had died in mysterious circumstances under his care. The evidence was inadmissible at his trial. But although he was acquitted at the trial, Dean Cowen observed that ". . . the blaze of publicity given to the details of the prosecution evidence at the commital proceedings made the burden of the defence counsel and of the trial judge truly formidable. . . ."[3]

The Tucker Committee, after exhaustive study, recommended that unless the accused was discharged, reporting of the committal proceedings be restricted to the identity of the court and the names of the examining justices; the name, address, occupation and age of the accused; the name, address and occupation of the prosecutor; the offence or offences with which the accused is charged; the name, address, occupation and age of witnesses; the name of counsel and solicitors engaged; the decision to commit for trial, the charge or charges on which the accused is committed and the court to which he is committed: where the proceedings are adjourned, the date to which they are adjourned; and on committal or adjournment, whether or not the accused is admitted to bail, and if admitted to bail, the terms of his bail.[4] After several years of inaction, England passed legislation based on these recommendations shortly before enactment of section 452A of the Canadian *Criminal Code*.

Criticism of section 452A is based on three grounds: (1) it is unnecessary; (2) it infringes the common law principle that a court of law should be open and public; (3) enforcement of the section is an extra burden on magistrates, who are already overworked. The first argument is based on the contention that the *Code* already contained several sections which, if enforced by the courts, would provide ample protection for an accused. Section 455, which was also partially a result of the Tucker Committee report, prohibits the publication or broadcast of any admission or confession made by the accused and tendered in evidence

1 Report of the Departmental Committee on Proceedings before Examining Justices, Cmnd. 479.
2 (1957) Crim. L.R. 365.
3 Cowen, *Prejudicial Publicity and the Fair Trial: A Comparative Examination of American, English and Commonwealth Law*, (1965) 41 Indiana L.J. 69 at 80.
4 Report of the Departmental Committee, *supra*, n. 1 at 21-22.

at a preliminary inquiry, unless the accused has been discharged or, if he has been committed for trial, the trial has ended. Section 451(j) provides for the exclusion of news media and the public where it appears to a presiding justice that it is in the best interest to do so. Section 426 gives every judge or magistrate the same power to preserve order in his court as a superior court of criminal jurisdiction in that province, in effect giving the judge or magistrate power to ensure that news comment on a pending case is not detrimental to the accused getting a fair trial.

It is also argued that the Canadian judiciary has an extensive common law contempt power to control what the news media disseminates, and that this is sufficient to control any abuse not covered by specific *Code* provisions. This power is greater than in the United States, where the Supreme Court must consider the First Amendment right of a free press and has often voided convictions for contempt by publication. In Canada it is contempt of court, and summarily punishable as such, for anyone to do anything that tends to interfere with the chance of a fair trail before the court. It is unnecessary to show that the course of justice has actually been interferred with, but merely that the report has a tendency to do so, provided that it would probably amount to substantial interference with a fair trial and is not merely "reprehensible."[5]

However persuasive this argument against section 452A, it is open to attack. Despite the previous *Code* provisions, there still remained, before passage of 452A, a definite risk of prejudice to the fair trial of an accused as a result of publicity from the preliminary inquiry. Section 455 merely prohibited publication or broadcast of confessions or admissions; there still existed the risk of prejudice from the reporting of other evidence. Since only the prosecution generally puts forward its case at the preliminary, the public are informed of only one side of the case. And since many of the public do not distinguish clearly between a preliminary hearing and a trial, they tend to judge the accused on the basis of the preliminary.

As for the contempt power, it is of questionable value in preventing prejudicial publicity. Contempt proceedings are not instigated until the prejudicial report is published or broadcast, and by that time the damage is already done. Thus the contempt procedure is only useful in preventing a further miscarriage of justice in the case. Also, Canadian judges have been accused of being wary of employing the contempt remedies at their disposal.[6] Part of the reason may be the summary procedure employed, which allows a person to be fined and or imprisoned by a judge who decides he is guilty of contempt, without the right to a jury trial or to adduce testimony or witnesses on his own behalf.[7]

The second major criticism of 452A is that in our common law system, and in proceedings under the Canadian *Criminal Code*, it has always been regarded as essential that a court of justice should be open and public. This principle has been applied to the preliminary hearing as well as the trial itself in the common law system, in contrast to the general rule in European criminal proceedings, where generally only

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5 *In The Matter of the "Finance Union"* (1895) 11 T.L.R. 167.
6 MacLatchy, *Contempt of Court by Newspapers in England and Canada*, (1938) 16 Can. Bar Rev. 273 at 285.
7 Laski, *Procedure for Constructive Contempt in England*, (1928) 41 Harv. L. Rev. 1031 at 1033.

trials are public, and even then, with restrictions.[8] Of course, section 452A is not intended to exclude the public. It follows the recommendation of the Tucker Committee, which concluded that, where possible, preliminary proceedings should not be held *in camera* because of the suspicions that may be aroused if the accused is discharged as a result of the hearing, and because of the dislike for the idea of justice being dispensed in private.[9] However, critics argue that the inevitable effect of 452A is to exclude the public; since the news media represents the general public who cannot be in court when proceedings are taking place, and since no courtroom could hold the general public, any bar to the media reporting the preliminary is actually a bar to the public.

However, the principle of an open and public court depends on there being no special reason why the proceedings should not be conducted *in camera*. In the case of a preliminary inquiry, there may be such a reason, *viz.*, the risk of prejudice since the prosecution's evidence is usually the only evidence before the public in the period between the preliminary inquiry and the trial. Even if the accused is acquitted at trial, if the acquittal receives little or no publicity, his reputation may be permanently damaged by the full reporting of the preliminary hearing. No private citizen, including a member of the news media, may claim to have a vested right to a place in court, a view which has both judicial and legislative foundation.[10]

Critics of section 452A also point to the United States, where in most of the states the news media are free to report proceedings at the preliminary hearing in their entirety. However, it is submitted that the American position would be intolerable except that, in practice, the courts have been favourably disposed towards reversing convictions where prejudicial publicity at a preliminary hearing has resulted in a perverted trial. Also, some states now grant the accused power to insist upon a closed preliminary hearing.

The third objection to 452A concerns magistrates, who handle ninety-five per cent of the work load in Canada's criminal courts. A breach of section 452A is a summary conviction offence, to be dealt with in magistrate's court, thereby allegedly placing the already overworked magistrate in the position of policing the press. However, in practice this criticism lacks merit. In Alberta, at least, section 452A has rarely been invoked since its enactment, let alone breached.

Perhaps the most valid criticism of the section is that it anticipates a situation that may never arise. Canadian news media have usually demonstrated restraint when opportunities for sensationalism have appeared.[11] The problems that led to the passage of 452A are largely problems of the United States and England, where the press have a reputation for lack of discipline in reporting the proceedings of *causes célèbres*. Nevertheless, the risk of possible prejudice in Canada was sufficient to justify its passage. Still, Canada is a long way from the

[8] Auld, *The Comparative Jurisprudence of Criminal Process*, (1935) 1 U. of Tor. L.J. 82 at 99.
[9] Report of the Departmental Committee, *supra*, n. 1 at 9.
[10] See *Daubney* v. *Cooper*, 10 B. & C. 237; also the *Criminal Code* of Canada, sec. 428.
[11] See the views expressed by Dean Wright of the University of Toronto Law School in *Contempt of Court—Newspapers Publishing Photographs of Accused*, (1935) 13 Can. Bar Rev. 513 at 513. Dean Wright, then Editor of the Can. Bar Rev., wrote: "A hasty survey of the Canadian case-law reveals a surprisingly small number of cases in which newspapers have been held in contempt. Credit for this no doubt must be given to the Canadian press for the fair manner in which news is presented to the public." The same is true today.

position where restrictions on reporting are too severe to be acceptable to citizens who cherish freedom of the press.

—G. ALEX HARDY*

* B.A., LL.B. (Alta.) of the Alberta Bar. Mr. Hardy is a former news reporter for the Canadian Broadcasting Corporation and The Edmonton Journal.

BAILMENT—LOSS OF CHATTEL BAILED—ONUS OF PROOF—WHETHER *RES IPSA LOQUITUR* APPLIES — FRUSTRATION — PLEADINGS

The Supreme Court of Canada has considered and disagreed with the assertion by Laskin, J.A., in the Ontario Court of Appeal in *National Trust Co. Ltd.* v. *Wong Aviation, Ltd. et al.*, that *res ipsa loquitur* has no place in our law of bailment.[1]

That case involved the bailment of an aircraft. The pilot who had rented the aircraft failed to return with it from a flight in marginal weather conditions, was never found, and was presumed dead. The bailor's action against the deceased pilot's estate was framed in tort on the ground of negligence, for the proof of which the bailor relied upon the doctrine expressed in the maxim *res ipsa loquitur*, and in contract on the ground of breach of the common law duty of a bailee to take reasonable care of the bailed goods while in his possession and to return them to the bailor.

As his above assertion suggests, Mr. Justice Laskin regarded only the pleading in contract to be relevant. He held that once a bailor proves bailment and loss of the bailed goods the burden of disproving negligence shifts to the bailee as a principle of law, in contrast to the ordinary case in which the onus of proof remains on the plaintiff throughout. This principle, or "rule of evidence" as Ritchie, J., who delivered the judgment of the Supreme Court of Canada, preferred to call it,was expressed by Lord Justice Atkin in *The "Ruapehu."*[2]

> The bailee knows all about it: he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take care, result in the obligation on the bailee to show that the duty has been discharged.

In finding for the bailor the Ontario Court of Appeal had declared that the principles of proof do not vary merely because the bailee and the bailed chattel disappear together. The Supreme Court found, however, that none of the authorities cited by the Court below supported that view and emphatically refused to enlarge the application of *The "Ruapehu"* principle to include cases in which the bailee is not available to explain the loss. Mr. Justice Ritchie said of the principle:[3]

> . . . as it is one which has the practical effect of placing on the bailee the heavy onus of proving a negative (i.e., that he was not negligent) it should, in my opinion, only be invoked in cases where *all* the considerations stipulated by Lord Atkin can be found to be present.

He further said:[4]

> In a case such as this where the bailee is dead, it seems to me to be quite unrealistic to apply a rule, one of the basic considerations for which is that

1 (1969) 3 D.L.R. (3d) 55, *reversing* 56 D.L.R. (2d) 228, *affirming* 51 D.L.R. (2d) 97. See also 4 Alta. Law Rev. 504.
2 (1925) 21 Ll. Law Rep. 310 at 315.
3 *National Trust Co. Ltd.* v. *Wong Aviation Ltd. et al.*, *supra* n. 1 at 62.
4 *Id.*, at 63.