REGINA v. BIERNACKI[1]

Indictment — Motion to quash a "preferred indictment" without a preliminary hearing under Part XV of the Criminal Code having been held prior thereto.

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The Attorney General's powers of preferring an indictment are more than a little complex. There are several sections in the Criminal Code dealing with the powers of the Attorney General in regard to indictments, and the decision in *Regina v. Biernacki* gives them a sense of particular immediacy.

In the present case, the accused was charged with violating the Official Secrets Act.[2] The charges against him were dismissed at a preliminary hearing and the Attorney General then preferred an indictment before the Court of Queen's Bench without any further proceeding against the accused. Although the Attorney General pressed for a trial by judge and jury, the accused was permitted to elect a speedy trial and was brought before the Court of Sessions of the Peace. Counsel for the accused then presented a motion to quash the indictment.

The "motion to quash" was based on five grounds, four of which were not examined by the judge, as his decision on one of the arguments was sufficient to free the accused and make unnecessary a consideration of the remaining grounds of the motion. The judge had to decide whether the freeing of the accused following a preliminary inquiry constituted an exception to the power of the Attorney General to proceed against him by way of a "preferred indictment".

Before attempting to examine the arguments of the learned judge, it might be best to discuss briefly the general powers of the Attorney General in regard to indictments, so that we may better appreciate the unique problem of the immediate case.

The applicable sections of the Criminal Code are ss. 487 and 489. Section 487(1) states:

> A bill of indictment may be preferred
> (a) by the Attorney General or anyone by his direction, before the grand jury of any court constituted with a grand jury,
> (b) by anyone who has the written consent of the Attorney General, or the written consent of a judge of a court constituted with a grand jury, before the grand jury of the court specified in the consent, or
> (c) by order of a court constituted with a grand jury, before the grand jury of that court.

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[1]37 C.R. 226.

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[2]R.S.C. 1952, c. 198.

Section 489 states:

> (1) In the provinces of Quebec, Manitoba, Saskatchewan, Alberta and British Columbia and in the Yukon Territory and Northwest Territories it is not necessary to prefer a bill of indictment before a grand jury, but it is sufficient if the trial of an accused is commenced by an indictment in writing setting forth the offence with which he is charged.
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> (2) An indictment under subsection (1) may be preferred by the Attorney General or his agent, by the Deputy Attorney General, or by any person with the written consent of a judge of the court or of the Attorney General or, in any province to which this section applies, by order of the court.

A "preferred indictment" is a special indictment under the hand of the Attorney General which brings an accused to trial without a preliminary hearing. The policy that no person be improperly placed on trial is so firmly embedded in our law that the "preferred indictment" must be regarded as a very unusual and unique power.

The "preferred indictment" could, conceivably, be exercised in three situations. The first would be where the office of the Attorney General felt it best that the accused be brought directly to trial without a preliminary hearing. That the Attorney General may proceed against an accused either by way of preliminary hearing or "preferred indictment" is a principle that has been frequently confirmed by the courts.[3]

The second situation in which the "preferred indictment" might be exercised would be one in which the Attorney General wished to abandon a preliminary hearing before its conclusion in order to cure certain defects in the original charge. Or the Attorney General might wish to abandon a proceeding by way of summary conviction, because new information shows the gravity of the offence, and commence proceedings by way of indictment. Once the Crown has elected the mode of procedure, can there be a re-election? There is much conflicting jurisprudence on this point, some of which will be dealt with in the discussion of the *Biernacki* case.

The third situation is that which arises from the present case. Granting the power of the Attorney General to prefer an indictment without a preliminary hearing having been held prior thereto, can there be a "preferred indictment" against an accused who has already been liberated at a preliminary hearing on the same charges? If the Attorney General can proceed in the absence of a preliminary hearing, can he do so where the magistrate at a preliminary inquiry has refused to commit the accused for trial? He may, doubtless, order a new preliminary inquiry on the strength of new evidence; the liberation is not an *autrefois acquit*. But can he prefer an indictment?

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[3]*R. v. Court* 4 C.R. 183; *R. v. Houle* 17 C.C.C. 407; *R. v. Drew* 60 C.C.C. 223; *Re Criminal Code* 16 C.C.C. 459; *R. v. McGavin Bakeries Ltd. (no. 1)* 10 C.R. 251; *Bureau v. Regem* (1931) 51 B.R. 207; *R. v. Wilson* 22 C.C.C. 161; *Re Ecclestone and Dalton* 102 C.C.C. 305; *R. v. Mooney* [1960] O.W.N. 401; *R. v. German* 89 C.C.C. 90; *R. v. Smith et al* 128 C.C.C. 4[illegible]7; *Regina v. McKnight, Kondia and Maynard* 30 C.R. 65.

Trottier, J. quashed the "preferred indictment" taking support from five decisions. We will consider his reasoning after an examination of the relevant jurisprudence.

Welch v. The King[4] and *Regina v. Viau*[5] were cited to support the proposition that the powers of the Attorney General must be interpreted restrictively. In the *Welch* case, Fauteux, J., noted that:

> . . . the powers under s. 873[6] are not absolute and cannot obtain in all circumstances. Like many others in the Code, they remain subject to qualifications and restrictions implicitly and necessarily flowing from other provisions.[7]

In *Regina v. Viau*,[8] Prevost, J. quashed a "preferred indictment" laid by the Attorney General independent of the preliminary inquiry proceedings, the purpose of which was to take advantage of certain amendments made to the Criminal Code respecting murder. The learned judge said, in part:

> Je crois devoir se ranger parmi ceux qui sont d'opinion que les pouvoirs du Procureur général en matière de "preferred indictment" ne sont pas absolu mais restreints par l'esprit qui a présidé à notre législation en matière criminelle, par le principe que le pouvoir exécutif ne peut s'ingérer dans le pouvoir judiciaire, et que ce droit ne peut être exercé par le Procureur général d'une façon arbitraire.[9]

The judge also took support from the decision of Prendergast, J. in *Rex v. Russell*[10] that while the Attorney General has his choice, he must, however, proceed in one way or the other, that is, he must choose between a preliminary inquiry or a "preferred indictment", and cannot, by resorting to the latter mode of procedure, make up for irregularities at the preliminary inquiry.

It may be noted, however, that this decision has been the subject of some dispute. In *Re Ecclestone and Dalton*[11] it was held that although a magistrate on preliminary inquiry dismisses certain charges against an accused, the Crown is entitled to prefer an indictment against him on the same charges. Le Bel, J. here took issue with the decision of Prendergast, J. in the *Russell* case:

> In the *Russell* case, Prendergast J. as he then was, holds that the Attorney-General . . . having proceeded in the ordinary way . . . to the end of the preliminary inquiry . . . cannot afterwards lay an indictment. I cannot find any authority for this proposition, and I think it is significant that while an appeal from the order of Prendergast, J. was dismissed, his comments . . . were not mentioned by the Court of Appeal.[12]

In the *Biernacki* case, the learned judge did not discuss *Re Ecclestone and Dalton*, but he did cite, to support his decision, the case of *Regina v. Sednyk*[13]

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[4]97 C.C.C. 117.

[5]37 C.R. 41.

[6]now ss. 487, 488, 489.

[7]97 C.C.C. 191.

[8]*Supra.*

[9]*Supra*, 46.

[10][1920] 1 W.W.R. 164.

[11]102 C.C.C. 305.

[12]*Ibid.*, at p. 306.

[13]23 C.R. 340.

where a motion on behalf of the accused for a writ of *habeas corpus* with *certiorari* in aid was granted, despite the argument that a "preferred indictment" signed by the Attorney General constituted a formal obstacle to the presentation of the procedure submitted by the accused.

In this case, Freedman, J. points out that the view of the law which obtained in *Rex v. Russell* was rejected in the later case of *Re Ecclestone and Dalton*. He then goes on to say that he is not obliged to express any views with respect to these conflicting cases since he is dealing with the accused's motion for a writ of *habeas corpus*. It may be, however, that *Re Ecclestone* loses some of its force in the light of *Regina v. Sednyk*. If a court will ignore a "preferred indictment" to send a case back to preliminary inquiry in order that it be properly terminated, (as was the case in *Sednyk*), then so much less, argued counsel for Biernacki, is the Crown entitled to rely upon a "preferred indictment" when the accused has been discharged at the preliminary inquiry.

The fifth and last case cited by Trottier, J. is *Rex v. Newton*.[14] In that case, the Attorney General of Alberta, through his agent, preferred an indictment against the accused, in an attempt to cure certain defects and irregularities at the preliminary hearing. A motion to quash the indictment was upheld by the Alberta Supreme Court.

C. Ford, J. said, in part:

> It was argued that the indictment preferred by the agent of the Attorney-General, on his behalf, cures such defects and irregularities and that it is the right of the Attorney-General to prefer such an indictment as he has here. However that may be, the Crown proceeded by way of preliminary hearing and obtained a committal for trial, which as I have held was obtained without jurisdiction, and as is pointed out in some of the cases, that method of procedure cannot now be changed so as to put the matter on a different footing for the purposes of this application.[15]

Such are the cases cited by the learned judge. Perhaps the best defence of the proposition that a preliminary inquiry must be an essential element of any prosecution is the dissenting opinion of Idington, J. in *Re the Criminal Code*:[16]

> The policy of the law that there should be a preliminary examination was thus clearly settled and so settled in order that on grounds of humanity and justice that examination might, as so often happens, enable one accused without perhaps the slightest foundation, by cross-examination of his accusers or by his own explanations to dispel the false appearances against him and save him the pain and indignity of being improperly placed on his trial.
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> The difference between that and the system of placing a man on his trial without giving him such opportunity is most radical. The tendency in the one method is towards a humane administration of justice and in the other towards the vicious reverse thereof.[17]

Notwithstanding the obvious rightness of the sentiment that the unusual power of the "preferred indictment" be very restrictively exercised, there is much jurisprudence to the effect that the powers of the Attorney General in

[14]94 C.C.C. 180.

[15]*Ibid.*, at p. 184.

[16]16 C.C.C. 459.

[17]*Ibid.*, at p. 473.

this area are quite unlimited. In *R. v. Court*[18] it was held that the Attorney General is untrammelled in his discretion to prefer a bill of indictment for any charge *whether or not the accused has been committed for trial on that charge*, and in *R. v. Mooney*,[19] Porter, C. J. O. held that the Crown was not precluded from abandoning the preliminary inquiry proceedings before the magistrate and proceeding in accordance with s. 487 (1) (b) of the Criminal Code.

Two other cases lend support to the view that s. 487 be interpreted in its widest sense. In *R. v. German*[20] Robertson, C. J. O. states:

> . . . I am not aware of anything that prevents the Attorney General, after proceedings have been commenced under Part XV of the *Cr. Code*, and before a trial has been had, from abandoning a proceeding by way of summary conviction and commencing proceedings by way of indictment. It may well be that after proceedings have been so commenced matters will come to the knowledge of the Crown authorities indicating that proceedings by way of indictment are more suited to the gravity of the offence.[21]

Further, in *R. v. Smith et al*[22] Spence, J. said:

> When the Attorney General has preferred an indictment before the Grand Jury, then no proceedings prior to that indictment can affect the validity of the indictment or the committal thereon.[23]

However, in this and the other cases cited, the accused had not been freed at a preliminary inquiry and the question of whether or not the Attorney General can then proceed by way of "preferred indictment" was not explicitly settled.

On the other hand, *Re Ecclestone*, (*supra*), did in fact say that the Attorney General may prefer an indictment against a person on the same charges from which he has just been released at preliminary inquiry. But the case may perhaps be distinguished in that the accused were here committed for trial on three charges of receiving but liberated from three charges of theft. That the Attorney General was allowed to prefer an indictment on all charges need not necessarily suggest that the situation would have been the same had the accused been completely freed, that is, if all six charges had been dismissed at a preliminary inquiry.

In *Regina v. McKnight, Kondia and Maynard*[24] the Supreme Court of British Columbia held that the discharge of an accused at the end of a preliminary inquiry does not prevent the Attorney General from later preferring an indictment for the same offence. It is to be noted that the learned judge in the *Biernacki* case did not distinguish, nor even mention those several cases which would suggest that the Attorney General has full power to prefer an indictment before, during, or after a preliminary inquiry, regardless of its result.

[18] 88 C.C.C. 27.

[19] [1960] O.W.N. 401.

[20] 89 C.C.C. 90.

[21] *Ibid.*, at p. 93.

[22] 128 C.C.C. 407.

[23] *Ibid.*, at p. 409.

[24] 30 C.R. 65.

It is further suggested that the jurisprudence is of such a conflicting nature that no decision can be based entirely on it and that resort must be had to other argument.

Trottier, J. presents two arguments to support his decision, in addition to the five cases already discussed. The first was that s. 487 must be read in the light of the other sections of the Criminal Code and that the provisions of s. 480 would be redundant were the argument of the prosecution to be accepted. Referring to s. 480 and the preliminary inquiry which it prescribes, he says of the Attorney General:

> . . . si le résultat lui était défavorable, ou mieux, ne rencontrait pas ses vues et ses désirs, il n'aurait qu'à intervenir à nouveau, cette fois par voie du "preferred indictment" et ainsi astreindre l'accusé à subir le procès de son choix.
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> Si ceci avait été l'intention du législateur, il faut inférer que les dispositions dudit art. 480 sont superflues, n'ont aucune place dans le code criminel.[25]

Section 480 states:

> The Attorney General may, notwithstanding that an accused elects under section 450, 468 or 475 to be tried by a judge or magistrate, as the case may be, require the accused to be tried by a court composed of a judge and jury, unless the alleged offence is one that is punishable with imprisonment for five years or less, and where the Attorney General so requires, a judge has no jurisdiction to try the accused under this Part and a magistrate shall hold a preliminary inquiry.

It is respectfully submitted that the argument of the learned judge in regard to this section is less than conclusive insofar as the accused was permitted to elect a speedy trial. When the indictment was preferred, it is true that the Attorney General pressed for a trial by judge and jury, but the Court of Queen's Bench granted the right of option to the accused. Thus, although section 480 requires a preliminary inquiry where the accused is deprived of his option to elect the mode of trial, the section is not made redundant through the preferring of an indictment by the Attorney General against an accused liberated at preliminary inquiry when such accused is *not* deprived of his option to elect the mode of trial. That such a situation may offend one's sense of justice does not make the provisions of section 480 redundant.

The second argument of the learned judge in this case was that the Crown must realize that the accused is bound to be acquitted at the trial for the same lack of evidence that brought him his freedom at the preliminary inquiry.

> Et si l'accusé est libéré au terme final de cette enquête préliminaire, le Procureur général ne peut pas plus l'amener à subir, par la suite, un procès devant un jury . . . pour la simple raison qu'il anticipe là et alors et réalise que l'accusé est destiné, au procès, à obtenir un verdict d'acquittement, vu la même absence de preuves inculpatives.[26]

However, if the Attorney General realized that the accused was bound to be acquitted, there would be no reason for him to pursue the case. It is hard to accept the view that the sole motive of the Crown was to inflict pain on the accused. Whether the fact of new evidence or information, may we not assume

[25]at p. 232.

[26]at p. 233.

that the motive behind the decision to prefer an indictment was neither frivolous nor callous?

It has been suggested that the arguments supporting the judgment in the present case, and the cases cited by the learned judge, do not conclusively demonstrate the illegality of a "preferred indictment" against an accused freed at preliminary inquiry. On the other hand, it may well be that the judgments which obtained in those cases supporting the powers of the Attorney General, however well constructed, were inimical to an equitable legal order. It may be that a situation in which an accused, freed at a preliminary hearing, be not immune from a "preferred indictment" is essentially unjust. But it is certain that neither the Criminal Code nor the leading cases provide a clear definition of the powers of the Attorney General where charges against an accused have been dismissed at a preliminary inquiry.

If it is true that there here exists, in the provisions of sections 487 and 489, an unresolved conflict between the judicial and executive powers, it may not be improper to suggest that legislation be enacted to relieve this confused situation. It would be desirable were such legislation to limit the powers of the Attorney General in matters of "preferred indictment". For the present, one hopes that the courts will view the "preferred indictment" as an unusual and dangerous power, the use of which is to be governed by just and humane considerations.