r. *v.* stolar, [1988] 1 S.C.R. 480

Jerry Carl Stolar *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. *v.* STOLAR

File No.: 19068.

1987: May 15; 1988: March 24.

Present: Dickson C.J. and Beetz, McIntyre, Wilson and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Courts -- Procedure -- Application to admit new evidence on appeal -- Whether or not Court erred in not ordering new trial after admitting introduction of new evidence -- Whether or not Court of Appeal erred in applying proviso that no substantial miscarriage of justice had taken place -- Criminal Code, R.S.C. 1970, c. C-34, ss. 610, 613(1)(b)(iii).

Appellant appealed his murder conviction to the Court of Appeal where an application for leave to adduce fresh evidence was made pursuant to s. 610 of the *Criminal Code*. This motion was heard before the appeal commenced and was granted by a majority of the court on the basis that it could have reasonably affected the result.

The court then heard the appeal and later dismissed it by a differently constituted majority who concluded that the fresh evidence was of little consequence. At issue here are: (1) whether or not the Court of Appeal erred in law in not ordering a new trial once it had permitted the introduction of the fresh evidence on appeal and (2) whether or not the Court of Appeal erred in applying the provisions of s. 613(1)(*b*)(iii) of the *Criminal Code* in these circumstances.

Held: The appeal should be allowed.

The condition for the application of s. 613(1)(*b*)(iii) did not arise here because no error was shown in the trial.

The law relating to the bringing of fresh evidence when an appeal is taken is settled: that evidence must reasonably have been able to affect the result. When an application is made to the Court of Appeal for the admission of fresh evidence, the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. The Court can then consider the question of the fresh evidence in light of the background of the case and of the other evidence. The following alternatives are then available: (1) dismiss the application and dispose of the appeal; (2) admit the evidence as conclusive of the issues and dispose of the matter immediately; (3) admit evidence that may have sufficient probative force, if accepted by the trier of fact, to alter the result at trial and direct a new trial. The third alternative should be adopted here: the Court cannot admit the evidence on the basis that it might reasonably affect the result and then conclude that the evidence did not have that effect.

Cases Cited

Applied: *McMartin v. The Queen*, [1964] S.C.R. 484; *Palmer and Palmer v. The Queen*, [1980] 1 S.C.R. 759; **considered:** *R. v. Buckle* (1949), 94 C.C.C. 84; *R. v. Feeny* (1946), 86 C.C.C. 429; *R. v. Kissick* (1951), 100 C.C.C. 130, aff'd *Kissick v. The King*, [1952] 1 S.C.R. 343; *R. v. Huluszkiw* (1962), 37 C.R. 386; **referred to:** *R. v. Lakatos* (1961), 129 C.C.C. 387; *R. v. Boles* (1984), 57 A.R. 232; *R. v. Flower*, [1966] 1 Q.B. 146.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 610, 613(1)(*b*)(iii).
Opium and Narcotic Drug Act, 1929, S.C. 1929, c. 49.

APPEAL from a judgment of the Manitoba Court of Appeal (1984), 30 Man. R. (2d) 81, dismissing an appeal from a conviction by Scollin J. sitting with jury. Appeal allowed.

G. Greg Brodsky, *Q.C.*, for the appellant.

Wayne Myshkowsky and *Robert Gosman*, for the respondent.

The judgment of the Court was delivered by

1. MCINTYRE J.--The appellant, a police officer in the city of Winnipeg, was convicted of murder on July 13, l983. An appeal was taken to the Court of Appeal of Manitoba. An application, undated but returnable on September 7, 1983, for leave to adduce fresh evidence was made pursuant to s. 610 of the *Criminal Code*, R.S.C. 1970, c. C-34. The evidence which the appellant sought to introduce consisted of a

series of documents described as traffic offence notices. These notices are given by police officers to traffic offenders and are left in the files of the Magistrates' Court. They would provide, it was argued, evidence of the whereabouts of the appellant at certain times which would be relevant evidence in his defence.

2. The appellant's appeal came on for hearing on March 28, 1984. Before the appeal commenced, the motion for fresh evidence was heard and the court (Hall, O'Sullivan and Huband JJ.A.), with Hall J.A. dissenting, granted the motion for leave to adduce the evidence. The court then proceeded to hear the appeal and after three days' hearing reserved judgment. On October 11, l984, some six months later, judgment was given dismissing the appeal with O'Sullivan J.A. dissenting. Huband J.A., for the majority in the Court of Appeal (reported at (1984), 30 Man. R. (2d) 81), reached the conclusion that the fresh evidence was of little consequence, stating, at p. 110:

> The new evidence does not affect the matter. Even if it had been presented to the jury, the case against Stolar is so strong that in spite of the additional evidence the jury, properly instructed, would have inevitably arrived at the same decision.

He concluded his judgment by saying: "I would dismiss the appeal of Stolar as well, relying again upon the provisions of s. 613(1)(b)(i) [*sic*]". (The printed case in this concluding paragraph refers to s. 613(1)(*b*)(i), which I take to be a misprint. The judge had earlier applied s. 613(1)(*b*)(iii) in respect of Stolar's co-accused and the notice of appeal, as well as the factums of both Crown and appellant, refer to s. 613(1)(*b*)(iii).)

3. O'Sullivan J.A. in his dissent expressed the view that the court had granted the motion for the admission of fresh evidence on the basis that it might affect

the result and it could not hold some six months later that it could not have such an effect. He said, at p. 117:

> We did not reserve on the motion. We granted it by majority. It is res judicata. I do not see how we can say in March that the evidence might reasonably affect the jury but in October we say it cannot.
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> So I would allow the appeal of Stolar on three grounds:
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> (1) that this is not a case for the proviso to be applied;
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> (2) that the proviso cannot, in law, apply to new evidence admitted;
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> (3) that in this case we have already decided that the new evidence might reasonably affect the verdict.
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> I would therefore allow the appeal and order a new trial.

4. It is evident that the Court of Appeal considered the motion for the introduction of new evidence and the appeal itself in two separate stages. It first heard the motion to adduce new evidence and although no formal order was entered in the Registry, it is clear that they granted the motion and admitted the evidence. The reasons for judgment on the fresh evidence motion bear the notation, "application decided: March 28, 1984", and in concluding the reasons, Hall J.A., who presided at the hearing, said: "In the result the motion is granted with myself dissenting". On April 2, 1984, some five days later, on a motion on behalf of the appellant, an order was made in the Court of Appeal Chambers directing a magistrate who had their custody to produce eleven of the traffic offence notices for filing in the Court of Appeal. The Court of Appeal, having admitted the evidence, then proceeded to hear the appeal and, by a different majority, decided that the fresh evidence could not have affected the

result of the trial. In so doing, they did not purport to revoke their earlier order admitting the evidence.

5. There are only two grounds of appeal raised in this Court. They are set out hereunder:

> 1. Did the Manitoba Court of Appeal err in law in not ordering a new trial once it had permitted the introduction of the fresh evidence on appeal?
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> 2. Did the Manitoba Court of Appeal err in applying the provisions of section 613(1)(*b*)(iii) of the *Criminal Code* in the circumstances of this case?

The appellant supports the dissenting judgment of O'Sullivan J.A. The Crown argues that the evidence was not new evidence at all and contends that the majority in the Court of Appeal was in error in making the order for its admission. It was argued that the fresh evidence was of little, if any, weight and that the Court of Appeal was justified in applying the proviso in s. 613(1)(*b*)(iii). It was also contended that, in fact, the motion for the new evidence and the appeal itself were one proceeding and that the motion was, in reality, dismissed by the Court of Appeal at the conclusion of the main appeal. There was simply a time interval between the making of the motion and its disposition. This last argument I would reject on the basis of the facts recited above. I would also dispose of the argument raised with respect to the application of the proviso in s. 613(1)(*b*)(iii) of the *Criminal Code*. The proviso may be applied, even though an error in law has been made at trial which might have justified a determination of the appeal in the appellant's favour, when the Court of Appeal is of the view that no substantial wrong or miscarriage of justice has occurred. No error has been shown in the trial in the case at bar. The appellant seeks only to adduce new evidence which was not heard by the trial judge. The condition then for the application

of the proviso does not arise here and it was error on the part of the majority in the Court of Appeal to seek to apply it.

6. The law relating to the bringing of fresh evidence when an appeal is taken is settled. This Court has dealt with the matter in *McMartin v. The Queen*, [1964] S.C.R. 484, and more recently in *Palmer and Palmer v. The Queen*, [1980] 1 S.C.R. 759. *McMartin* was a case where the appellant after a conviction for murder sought leave to adduce evidence of his mental condition. The Court of Appeal, having heard the tendered evidence, rejected it on the basis that it did not have the weight to establish the mental condition of the appellant at the relevant time. Ritchie J., speaking for the full Court on this issue, said, at p. 493:

> With the greatest respect, it appears to me that the evidence tendered by the appellant on such an application as this is not to be judged and rejected on the ground that it "does not disprove the verdict as found by the jury" or that it fails to discharge the burden of proving that the appellant was incapable of planning and deliberation, or that it does not rebut inferences which appear to have been drawn by the jury. It is enough, in my view, if the proposed evidence is of sufficient strength that it might reasonably affect the verdict of a jury.

He adopted, as well, the words of Sloan C.J.B.C. in *R. v. Buckle* (1949), 94 C.C.C. 84, at pp. 85-86 where, speaking for himself and Sidney Smith J.A. (Robertson J.A. dissenting), he said:

> In my opinion the rule to be applied in criminal cases in relation to the introduction of fresh evidence and consequential relief which may be granted by the Court, is wider in its discretionary scope than that applied by the Court in civil appeals. If the newly-discovered evidence is in its nature conclusive, then the Court of Appeal, in both civil and criminal cases, may itself finally deal with the matter. See, *e.g.*, O'Halloran J.A. in *R.* v. *Feeny* [1947] 1 D.L.R. 392 at pp. 396 *et seq.*, 86 Can. C.C. 429 at pp. 434 *et seq.*, 63 B.C.R. 131 at pp. 136 *et seq.* If, on the other hand, in a criminal case, the new evidence does not exert such a compelling influence, but is however of sufficient strength that it might reasonably

> affect the verdict of a jury, then, in my opinion, the Court may admit that evidence and direct a new trial, so that such evidence might be added to the scale and weighed by the trial tribunal in the light of all the facts.

And see, as well, *R. v. Lakatos* (1961), 129 C.C.C. 387, at p. 391, *per* Bird J.A., speaking for the court (DesBrisay C.J.B.C., Bird and Coady JJ.A.)

7. In *Palmer*, *supra*, I reviewed some of the authorities on the topic. Writing for the Court, I said, at p. 775:

> Parliament has given the Court of Appeal a broad discretion in s. 610(1)(*d*). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them--see for example *Regina v. Stewart*; *Regina v. Foster*; *Regina v. McDonald*; *Regina v. Demeter*. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
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> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
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> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
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> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

8. Given that the test for the admission of fresh evidence is so well settled, the source of the confusion in this case is at once apparent. The Court of

Appeal by a majority decision admitted the evidence on a preliminary application but, by a differently constituted majority, dismissed the appeal on the basis that the fresh evidence was not such that it could reasonably have affected the jury's verdict. This was done, despite the fact that the very act of admitting the evidence, according to the required test, is based upon a finding that the evidence could reasonably have affected the result. This inconsistency was recognized in the dissent by O'Sullivan J.A.

9. A similar application was considered by O'Halloran J.A., dissenting, in *R. v. Feeny* (1946), 86 C.C.C. 429, but referred to with approval by Sloan C.J.B.C. in *Buckle*, *supra*. He said, at pp. 436-37:

> Whether an order is to be made that the evidence be actually admitted, or that it be allowed to be heard for the purpose of determining if it is to be admitted, must depend on the circumstances of each case. In the present case as in this Court's decision in *R. v. Shumarin*, [1928] 1 W.W.R. 300 I saw no difficulty in admitting it at once. In another case the circumstances might be such that a conclusion could not be reached without first hearing the evidence. That would of course concern the admissibility of the evidence as fresh evidence.
>
> But once it is acceptable as fresh evidence and admitted as such it does not follow that the case must be sent back for a new trial. There are no doubt cases in which the circumstances may be such that the Court of Appeal would conclude that the interests of justice would be better served by directing a new trial, than by exercising its powers under *Cr. Code*, s. 1021(1), and Civil Appeal Rule 5. But the Court's jurisdiction under that *Cr. Code* section and Civil Appeal Rule is not to be overlooked, and in a case like the present where the fresh evidence was inconsistent with and contradictory to the evidence it was advanced to support, in my opinion a proper case was disclosed in which to exercise that jurisdiction and substitute a conviction of attempted theft.
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> I think the difficulty vanishes if *R. v. Martin*, *supra*, is read in the light of the jurisdiction given by *Cr. Code*, s. 1021(1), and Civil Appeal Rule 5 to which there was no occasion for that decision to refer. One of the tests of the admissibility of fresh evidence in a criminal case, that "it might reasonably have induced the jury or the tribunal of fact to change its view regarding the guilt of the accused" ([1945] 1 D.L.R. at p. 130, 82 Can. C.C. at p. 313, 60 B.C.R. at pp. 556-7), visualizes a condition existing if

> the fresh evidence had been in fact adduced in the Court below. It is not to be read as if that test cannot be complied with unless the fresh evidence is sent back with the case for a new trial, for that would deny the jurisdiction conferred by *Cr. Code*, ss. 1015 and 1021(1).

I agree with O'Halloran J.A. that there is a distinction between an order which actually admits the proffered evidence and one which allows consideration of the evidence for the purpose of determining whether it will be admitted. I also agree that a new trial will not be required in every case, for there will be cases where the new evidence may be so conclusive that the Court of Appeal can determine the proceedings on its own. O'Halloran J.A.'s words in *Feeny* would appear to be the first direct assertion of such a power in a court of appeal in the Canadian cases. His view, however, has received support in later authority: see *Buckle* and *McMartin*, *supra*. In *R. v. Kissick* (1951), 100 C.C.C. 130 (Man. C.A.), affirmed in this Court [1952] 1 S.C.R. 343, convictions for conspiracy to possess and sell narcotics, contrary to *The Opium and Narcotic Drug Act, 1929*, S.C. 1929, c. 49, were recorded at trial. The nature of the substance found in possession was proved by the certificates of analysts who were not called at trial. These certificates were receivable under *The Opium and Narcotic Drug Act, 1929*, but a question arose on the appeal as to whether they were admissible in a prosecution under the *Criminal Code*. The Crown was allowed to adduce fresh evidence by calling the analysts who gave evidence *viva voce* in the Court of Appeal. On this basis, the convictions were affirmed over the defence submission that there should have been a new trial upon the admission of the new evidence. Dysart J.A. stated for the Court, at p. 135:

> If fresh evidence is receivable under s. 1021(1) "for the purposes of an appeal", surely it must be available for any and all of those "purposes", one of which is to confirm a conviction if justice so demands. And s. 1014 directs that an appeal which cannot be otherwise disposed of shall be dismissed. <u>These two sections give this Court a jurisdiction which must be allowed to prevail.</u> [Emphasis added.]

He referred to *Feeny* and said that if the evidence is inconclusive or indefinite, it should go to the jury. He then said, at p. 136:

> But where the evidence is in its nature conclusive, the Court can deal with it with equal safety and greater efficiency than a jury can. Such evidence ought not to be the only ground for ordering a new trial; it should be dealt with by the Court with finality.

And further, after admitting there was a paucity of authority and citing *Buckle*, he said, at pp. 136-37:

> First principles may be invoked. They require that in the interests of justice, a case that becomes perfectly clear in this Court and can have but one ending, ought to be disposed of by this Court, and should not be sent back, through a long, expensive and difficult trial, to be disposed of by the jury in necessarily the same way.

10. In this Court, the Court of Appeal was confirmed by a majority. Taschereau J. said, at p. 356, that as "The fresh evidence was in its nature conclusive and did not reveal new facts that might influence a jury in coming to a conclusion", it would be appropriate to confirm the convictions. He emphasized that the accuracy of the facts contained in the improperly admitted certificates was not in issue. The Court of Appeal in acting on the evidence of the analysts was merely correcting an error upon which the jury acted and it "put the case in exactly the position in which the jury believed it to be, when they convicted the accused" (p. 356). Estey J., concurring, said, at p. 361:

> On the contrary, the relevant provisions of the Criminal Code rather contemplate that the evidence so received shall form a part of the record and be considered along with the evidence taken at the trial. If the court of appeal finds that there are reasons within s. 1014(1)(*a*), (*b*) and (*c*) to

> allow the appeal, it will do so, but, if not, then under s. 1014(1)(*d*) it will dismiss the appeal.

He added that calling the analysts placed on the record facts which had erroneously been treated as admissible evidence at trial, stating, at p. 362, that: "In effect, it was, therefore, a change in form rather than substance upon an issue in respect of which contentions were not raised at the trial. No reason is suggested why a jury, acting judicially, would not have come to the same conclusion". Locke J. said, at pp. 369-70:

> Section 1021 permits the taking of further evidence "for the purposes of an appeal under this part." I see no ambiguity in this language nor anything in the section or elsewhere in the sections relating to criminal appeals restricting, or indicating any intention of restricting the effect to be given by the court to the further evidence in exercising its powers under section 1014. I respectfully agree with Mr. Justice Dysart that the evidence given before the Court of Appeal in this matter is as nearly conclusive as oral testimony can be and that it was within the powers of the Court to affirm the conviction and dismiss the appeals.

11. The same problem arose in *R. v. Huluszkiw* (1962), 37 C.R. 386 (Ont. C.A.) Corroboration was required of the testimony of a witness. The corroborating witness died after giving evidence at the preliminary hearing, but before trial. At trial, it was not shown that the accused was present when the deceased witness gave evidence. The trial judge refused to reopen the case to permit evidence which would have cured the defect and acquitted the accused. On appeal, the Court of Appeal admitted the evidence, set aside the acquittals, and substituted convictions. McLennan J.A., speaking for the Court, said, at p. 390:

> ...the presentation of the defence could not be and was not prejudiced by the absence of formal proof that the accused was present at the preliminary inquiry when the deceased witness gave her evidence.

He added:

> It would be unfortunate if the ends of justice were defeated by the inadvertence of counsel in failing to prove what is essentially a matter of form in relation to procedure and provided always that the calling of further evidence, whatever its character, is for an honest purpose and that there are no unfair consequences to the opposite party so far as the presentation of that case is concerned.

12. A similar problem arising in unusual circumstances was considered in *R. v. Boles* (1984), 57 A.R. 232 (C.A.) In a *per curiam* judgment, the Court followed *Kissick* and expressed the view that in acting under the powers given in s. 610 of the *Criminal Code* the Court could sustain a conviction as well as quash a conviction.

13. It would appear from the foregoing authorities then, that cases where the Court of Appeal has proceeded to deal conclusively with fresh evidence, without directing a new trial, have been those where the proffered evidence has gone to what may be termed technical and procedural defects, or where it has disclosed errors in the admission of evidence, and then only when the evidence itself was clearly conclusive of the issues on appeal. However, where it is not in itself so conclusive but, nevertheless, has such probative force that it could reasonably--when considered along with the other evidence adduced at trial--alter the trial verdict, it would be for the Court to order a new trial at which the trier of fact could hear and determine the issue. For an English case on this point, see *R. v. Flower*, [1966] 1 Q.B. 146 (C.C.A.)

14. The procedure which should be followed when an application is made to the Court of Appeal for the admission of fresh evidence is that the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered

evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to a disposition of the appeal. On the other hand, if it should be of the view that the fresh evidence is of such nature and effect that, taken with the other evidence, it would be conclusive of the issues in the case, the Court of Appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with the other evidence in the case, it might have altered the result at trial, the Court of Appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier of fact. This approach is consistent with that taken in *Palmer*, *supra*, where it was said, at pp. 776-77:

> Because the evidence was not available at trial and because it bears on a decisive issue, the inquiry in this case is limited to two questions. Firstly, is the evidence possessed of sufficient credibility that it might reasonably have been believed by the trier of fact? If the answer is no that ends the matter but if yes the second question presents itself in this form. If presented to the trier of fact and believed, would the evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result? If the answer to the second question is yes, the motion to adduce new evidence would have to succeed and a new trial be directed at which the evidence could be introduced.

This statement must be read, however, subject to the power of the Court of Appeal to deal with the matter when the proffered evidence is clear and conclusive of the result.

15. After this appeal had been heard, the Court invited submissions from counsel on the question of whether the Court of Appeal, having admitted the evidence

without reserving judgment on the preliminary motion, could on further consideration and on its own motion amend its order and reject the evidence. I do not consider it necessary, however, to consider the limits of power of a court to so amend its orders. Nobody sought to have the court reconsider its position on the matter and it did not purport to do so. I am in agreement with the written submission of counsel for the appellant that the issue, therefore, is not before us.

16. In considering the case now before us, I would make no comment on the weight of the new evidence which was admitted in the Court of Appeal. I would say that the Court of Appeal, having admitted the fresh evidence--and it must be assumed they did so on the basis that it could reasonably have affected the result--could not later conclude that it had no such effect, for to do so would have been to encroach upon the jury's role and weigh the evidence themselves. The evidence, once admitted, could have been relied upon to dispose of the appeal only if it were clearly decisive. It is clear that the Court did not regard it in that light. In such circumstances, then, a new trial was required where the evidence could be weighed and dealt with by a jury. I would add that the questioned evidence is not, in my view, of such nature as to permit the Court of Appeal to dispose of the matter without a new trial. It is not in itself conclusive. It does not go to any formal or procedural defect; it is simply documentary evidence which is said to support the evidence of the wife of the appellant which, in turn, goes to the movements and whereabouts of the appellant at certain times and was thus relevant to the question of his participation in the crime and his guilt or innocence. I would allow the appeal and direct a new trial.

Appeal allowed.

Solicitors for the appellant: Walsh, Micay & Company, Winnipeg.

Solicitor for the respondent: The Department of the Attorney General, Winnipeg.