

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Manitoba)**

BETWEEN:

**ARTHUR DAVID GABRIEL, PERCY NORBERT GABRIEL,
VERNON CONRAD GABRIEL, GARRY VERNON CATCHEWAY,
WILFRED JOSEPH CATCHEWAY, JUDY ANN CATCHEWAY,
WARREN KENNETH CATCHEWAY, VERNON CORY GABRIEL,
ROBERT JOSEPH HOULE, and GORDON ARNOLD CATCHEWAY**

APPELLANTS,

- and -

HER MAJESTY THE QUEEN,

RESPONDENT,

FACTUM OF THE RESPONDENT

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TABLE OF CONTENTS

I.	Statement of Facts and Schedule of Proceedings	1
II.	Points In Issue	3
III.	Argument	4
IV.	Remedy	6
V.	Table of Authorities	7

**Part I - Statement of Facts
and Schedule of Proceedings**

1 1. Appellants were members of a group of several people charged with
2 interference with property, as a result of a highway blockade.

3 2. Most of them chose not to engage the services of a lawyer. They
4 defended themselves at trial, and were convicted on December 17, 1997.

5 3. Appellants first raised a claim of apprehended bias before the trial
6 judge on August 14, 1997, at a pre-trial meeting.

7 4. The claim of apprehended bias again arose at the sentencing
8 proceedings, on March 5, 1998.

9 5. No material was put before the trial judge to support the claim of
10 apprehended bias.

11 6. On appeal to the Manitoba Court of Appeal, again, most of
12 Appellants did not retain counsel. They filed nothing to support their claims of
13 apprehended bias. It was only on the day of the hearing (January 21, 1999) that
14 they requested an adjournment of the appeal hearing to seek legal advice, to
15 further their claim of bias.

16 7. Without any material before it to substantiate the claim of bias, the
17 Manitoba Court of Appeal declined to grant an adjournment, and dismissed the
18 appeal.

1 8. Appellants then retained counsel, who filed material in this
2 Honourable Court in support of an application to adduce fresh evidence on
3 appeal, in order to show that there was a perceived bias on the part of the trial
4 judge. This is the first time that this material has been before the courts. The
5 application to adduce fresh evidence on appeal was referred to the full Court.

Part II - Points in Issue

1 9. That the Court of Appeal for Manitoba erred in ruling that there was
2 no bias or reasonable apprehension of bias on the part of the trial judge such as
3 to render his hearing of the trial incompatible with the principles of natural justice.

4 10. That the Court of Appeal for Manitoba erred in denying the
5 Appellants an adjournment for the purposes of formally bringing a motion to admit
6 new evidence to the said court to further establish a reasonable apprehension of
7 bias on the part of the trial judge.

Part III - Argument

1 11. Respondent submits that there is no basis for Appellants complaint
2 that the Court of Appeal for Manitoba “erred” in ruling that there was no
3 reasonable apprehension of bias on the part of the trial judge. The claim that the
4 Court of Appeal “erred” in denying an adjournment to bring “fresh evidence”, in
5 Respondent’s submission, is equally without merit. There was nothing before the
6 Court of Appeal which would have required it to consider this issue. This issue
7 arises, for the first time with material in support, before this Court.

8 12. The material now filed by Appellants clearly demonstrates that the
9 trial judge had professional dealings with some of the Appellants while he was
10 still a practicing lawyer.

11 13. Of great concern is the fact that the trial judge, while still a practicing
12 lawyer, acted for a co-accused (who was not tried before him) on a bail
13 application, and apparently had access to the full police report respecting the
14 accused who would eventually appear before him for trial.

15 14. Respondent cannot contest that the information that the trial judge
16 had knowledge of might raise concerns in the mind of a “right minded person”
17 that there was a real apprehension of bias. In this regard, Respondent refers this
18 Honourable Court to:

19 **Szilard v. Szasz**, [1955] S.C.R. 3.

20 **Metropolitan Properties Ltd. v. Lannon**, [1968] 3 All E.R. 304, at
21 309 to 314.

22 **R. v. Laframboise** (1997) 200 A.R. 75 (Alta. C.A.)

23 **R. v. Elliot**, (1998) 123 C.C.C. (3d) 574 (Ont. C.A.) (leave to appeal
24 to S.C.C. dismissed October 8, 1998, case # 26600).
25

1 **R. v. S. (R.D.)** [1997] 3 S.C.R. 484., at paragraphs 33, 36, 49, 94,
2 99, 100, 111 and 113.

3 15. The question then is, can fresh evidence be admitted for the first
4 time before this Honourable Court, when it was not tendered in the courts below.

5 16. Appellants chose not to retain counsel at trial, or on appeal.
6 Although due diligence is a factor in deciding whether to admit "fresh evidence"
7 on appeal, Appellants, apparently through their lack of training in the law, did not
8 tender the material now before this Honourable Court in the courts below.

9 17. Respondent recognizes that the principle of due diligence can be
10 relaxed in criminal cases, in the interest of justice.

11 **R. v. Warsing**, (1988) 130 C.C.C. (3d) 260, at 271 to 273, and 283
12 to 286.

13 18. Respondent submits that this Honourable Court should admit, and
14 consider, the proposed "fresh evidence" in dealing with this appeal.

15 **R. v. Elliott**, (*supra*).

Part IV - Remedy

- 1 19. Respondent leaves the resolution of this appeal to this Honourable
2 Court.

All of which is respectfully submitted,

**Gregg Lawlor
Counsel for the Respondent.**

Part V - Table of Authorities

I.	R. v. Elliot , (1998) 123 C.C.C. (3d) 574 (Ont. C.A.) (leave to appeal to S.C.C. dismissed October 8, 1998, case # 26600)	5
II.	R. v. Laframboise , (May 14, 1997, Alta. C.A., unreported) (see appendix).	5
III.	Metropolitan Properties Ltd. v. Lannon , [1968] 3 All E.R. 304, at 309 to 314.	4
IV.	R. v. S. (R.D.) [1997] 3 S.C.R. 484	5
V.	Szilard v. Szasz , [1955] S.C.R. 3.	4
VI.	R. v. Warsing , (1988) 130 C.C.C. (3d) 260, at 271 to 273, and 283 to 286.	5