Suit No. 27161

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

BETWEEN:

HER MAJESTY THE QUEEN,

Respondent,

- and -

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.

FACTUM OF THE APPELLANTS

PULLAN GULD KAMMERLOCH
Barristers and Solicitors
600 - 330 Portage Avenue
Winnipeg, Manitoba
R3C 0C4

Mr. Paul E. Kammerloch
Mr. Harvey J. Slobodzian
Ph: (204) 956-0490
Fax: (204) 947-3747
Solicitors for the
Appellants

GOWLING, STRATHY & HENDERSON
Barristers and Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3

Ph: (613) 232-1781
Fax: (613) 563-9869
Ottawa Agent

DEPARTMENT OF JUSTICE
Criminal Justice Division
Prosecutions Branch
5th Floor - 405 Broadway
Winnipeg, Manitoba
R3C 3L6

Ph: (204) 622-2082
Fax: (204) 638-4004
Solicitors for the Respondent

GOWLING, STRATHY & HENDERSON
Barristers and Solicitors
160 Elgin Street
Ottawa Ontario
K1N 8S3

Henry S. Brown
Ph: (613) 232-1781
Fax: (613) 563-9869
Ottawa Agents

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FACTUM OF THE APPELLANTS

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PART I - STATEMENT OF FACTS AND SCHEDULE OF PROCEEDINGS

1. On April 22, 1996, a barricade was erected on a road at the south end of the Waterhen Indian First Nation's Reserve, Waterhen, Manitoba. (Appellants' Record, page 87).

2. This barricade interfered with the free movement of people onto the reserve until it was occupied by the police and dismantled on or about May 19, 1996. (Appellants' Record, page 87-90).

3. While it was erected, the barricade was the scene of an armed standoff between several dozen police officers and certain individuals manning the barricade.

4. After the barricade was removed, and the free flow of traffic to the Waterhen Reserve restored, charges were laid against several individuals including the Appellants on the basis that they had allegedly manned the barricades and interfered with the road access to the reserve. The Appellants were charged with diverse charges involving willful obstruction and interference with persons in the lawful use of a Provincial road; possession of a weapon for a purpose dangerous to public peace; wearing a disguise with intent to commit an indictable offense; and mischief.

5. The Appellants were subsequently convicted after trial before newly appointed Manitoba Court of Queen's Bench Justice Menzies in November 1997. None of the Appellants were represented by counsel at trial. They were sentenced in March 1998.

6. The Appellants then appealed to the Manitoba Court of Appeal, again without legal representation. On or about February 1, 1999 the appeal was dismissed, although Huband J. A. dissented on the issue of sentence and would have reduced the sentences that certain Appellants had received.

7. In their Notices of Appeal before the Manitoba Court of Appeal the Appellants raised the issue of bias on the part of the Trial Judge. The Appellants listed in the appendices to their Factums several documents they intended to use to prove that a reasonable apprehension of bias existed on the part of the Trial Judge, however, they did not file the proper materials before the hearing of the appeal to enable the Court of Appeal to entertain the admission of this evidence. Consequently, at the hearing the Appellants requested an adjournment of their appeal in order to permit them to file and to present a formal motion to adduce fresh or further evidence on the bias issue. The Manitoba Court of Appeal dismissed their request. (Appellants' Record, page 106).

8. The Appellants sought leave to appeal to this Honourable Court on or about March 27, 1999, filing in support of their Application for leave to appeal the Affidavit of Appellant, Garry Vernon Catcheway, sworn March 26, 1999 which Affidavit contained the substance of the Appellants' further or "fresh" evidence on the reasonable apprehension of bias issue. This Honourable Court granted the Appellants' leave to appeal by a Judgment delivered June 17, 1999.

9. On or about November 12, 1999, the Appellants filed a Notice of Motion in this Honourable Court pursuant to section 683(1) of the *Criminal Code* and sections 45 and 62(3) of the *Supreme Court Act* seeking leave to adduce further or "fresh" evidence in the cause of their

appeal to this Honourable Court. The substance of the further evidence the Appellants sought to adduce was contained in the Affidavit of Arthur David Gabriel (fresh evidence) sworn November 10, 1999.

10. On or about December 14, 1999 Madam Justice Arbour ordered that the Appellants' motion to adduce fresh evidence be adjourned to the panel of this Honourable Court hearing the within appeal.

11. The barricade that gave rise to the Appellants' charges was the final stage in a long struggle by a large part of the Waterhen First Nation to reform the political system that ran the reserve, and to obtain accountability from the Chief and his supporters. This reform movement became known as the "quorum" of council, as in 1993 it succeeded in electing a majority (or "quorum") of the representatives on the band council.

12. In the immediate aftermath of the May 1996 barricade incident, the supporters of the "quorum", which included the Appellants, and their families, some three hundred members of the Waterhen First Nation, had to leave the reserve as a result of the ensuing court proceedings and the violence and harassment directed against them by the supporters of the Chief. The quorum supporters lost their homes, their jobs (if they had one) and most of their possessions, not to mention the right to live in the community in which they had spent their lives. Many had their houses burned and their possession seized.

13. Late in the summer of 1996, John Menzies a practicing lawyer and member of the firm of Johnston & Co. located in Dauphin, Manitoba was elevated to the Manitoba Court of Queen's Bench. Prior to his appointment to the bench, Mr. Justice Menzies had an active legal

practice involving clients residing in and around the Dauphin, Manitoba area. Further or "fresh" evidence which the Appellants seek to adduce in the cause of their appeal is set out in the Affidavit of Arthur David Gabriel (fresh evidence) sworn November 10, 1999 and contained in the Appellants' Notice of Motion booklet previously filed herein. The said Affidavit details the Learned Trial Judge's involvement with the Appellants and the Waterhen First Nations prior to his appointment to the Bench.

14. On or about August 14, 1997 at the hearing of a pre-trial motion to withdraw made by the original lawyer for the Appellants an unrepresented accused advised the Learned Trial Judge that he had acted for them before to which he responded: "I don't remember that but...why--what has that got to do with a fair trial?" (Appellants' Record, page 74).

15. At the sentencing stage of the trial on March 5, 1998, the Appellant, Wilfred Catcheway, asked the Learned Trial Judge to withdraw from the case on the grounds that he was in a conflict situation because of his prior dealings with the band. This application was peremptorily refused, although Mr. Justice Menzies acknowledged at that time that "As a civil lawyer, quite a while ago, I may have had dealings with the band." (Appellants' Record, page 75-78)

PART II - POINTS AT ISSUE

16. That the Court of Appeal for Manitoba erred in ruling that there was no bias or reasonable apprehension of bias on the part of the Trial Judge such as to render his hearing of the trial incompatible with the principles of natural or fundamental justice.

17. That the Court of Appeal for Manitoba erred in denying the Appellants an adjournment for the purposes of formally bringing a motion to admit new evidence to the said court to further establish a reasonable apprehension of bias on the part of the Trial Judge.

PART III - ARGUMENT

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

18. The Appellants concede that it is very difficult to impugn the ruling of the Court of Appeal on this issue based solely upon the evidence laid before it.

19. Only two of the accused (H.D. Catcheway and J.A. Catcheway) were represented by legal counsel before the Court of Appeal. The evidence supporting the Appellants' claim of bias on the part of the Trial Judge was not placed before that court notwithstanding the Appellants' request for an adjournment to bring a formal motion to adduce that evidence. Consequently, in refusing the adjournment the Court of Appeal had none of the proposed "fresh" evidence before it when it proceeded to hear the within appeal and render judgment. It is the position of the Appellants that without this fresh evidence the Court of Appeal was not in a position to rule on the true merits of the case.

20. Thus the Appellants in seeking leave to appeal to this Honourable Court brought the existence of this "fresh" evidence to the Court's attention. The Appellants have also brought a formal motion to adduce this "fresh" evidence in the cause of the within appeal. The substance of

this fresh evidence is contained in the Affidavit of Appellant Arthur David Gabriel sworn November 10, 1999 and labeled "fresh evidence". The Appellants' motion to adduce this fresh evidence has been adjourned to the panel of this Honourable Court hearing the within appeal. (Appellants' Record, page 72)

21. Consequently, the Appellants propose to deal with this issue by reference to the "fresh" evidence which forms the substance of their claim that a reasonable apprehension of bias existed on the part of the Learned Trial Judge.

22. It is submitted that based on this evidence the Learned Trial Judge's conduct prior to and during the trial did give rise to a reasonable apprehension of bias on his part. Furthermore, the Appellants contend that there is compelling evidence to prove this apprehension of bias.

23. In order to appreciate the basis for such an apprehension it is vital that one understands the broader context in which the charges against the Appellants were laid.

24. The barricade's origins as noted by the Learned Trial Judge, were eminently political. As the Learned Trial Judge concluded in his Reasons for Decision, "There is no doubt in my mind, the result of the election of November 1993 is what has led to the incident for which we are in court today." (Appellants' Record, page 85)

25. As detailed in the Learned Trial Judge's Reasons, the barricade was a measure taken in a political struggle between two factions of the Waterhen First Nation: the supporters of the Chief vs. the supporters of the "quorum".

26. This conflict revolved around control of the band's resources. The quorum sought accountability and sought to force the Chief to answer to the democratically elected majority of the council for the way he used the band's financial resources.

27. The Chief, his brother-in-law, and the one other council member who supported him wanted to carry on business as usual and to retain the strangle-hold their family had had on band resources for many years.

28. The conflict came to permeate every aspect of life on the reserve. After the 1993 band election returned a reformist majority to council and the Chief refused to cooperate with a court-ordered audit of band finances, the quorum moved to assert the council's control over a number of band-owned institutions, including the Waterhen Band Development Corporation, which up until that point had been controlled by the Chief, his brother-in-law, and their supporters.

29. The battle between the two factions gave rise to several lawsuits and legal proceedings, some of which involved the Waterhen Band Development Corporation. In the course of this struggle, several quorum supporters were fired from positions they held with band-controlled employers, such as the school. One such employee was Mary Gabriel, the wife of Appellant Percy Norbert Gabriel, who launched an action against the band for unjust dismissal which was subsequently adjudicated upon by the Trial Judge while he was still a practicing lawyer. His involvement as a federally appointed arbitrator under the *Canada Labour Code* placed him directly in a position to hear extensive sworn evidence of the political dispute taking

place on the Waterhen First Nation Reserve between the two factions. The arbitration adjudication was delivered on April 23, 1996, one day after the erection of the barricade which gave rise to these proceedings. The dispute between the two rival political factions on the reserve led directly to the barricade incident. The adjudication made specific reference to the political circumstances facing the said Mary Gabriel and her husband as a result of this conflict.

30. Most compelling above all is the transcript of the bail application before his Honour Judge K. Peters of the Provincial Court of Manitoba, held on May 16, 1996 which confirms that the Trial Judge, while still a practicing lawyer acted for one of the original accused, Melford Catcheway in this very proceeding. Charges were later stayed against this accused prior to the Queen's Bench trial.

31. As an experienced defence counsel acting for one of several accused, the Learned Trial Judge would have been expected to receive all sorts of information directly from his client, the police reports and the Crown dealing with the entire incident and the relationship of all co-accused to each other and the offenses as charged.

32. In fact, a review of the May 16, 1996 transcript itself concerning this bail hearing identifies the direct involvement of other individuals also Appellants herein, including: Gordon Catcheway and Arthur Gabriel. Mr. Menzies as defence counsel even stated to the court at page 8 of the transcript:

> He's [Melford Catcheway] a sympathizer of Gordon Catcheway. He doesn't deny that. He is in no way a directing mind of what's going on there.
>
> [emphasis added]

33. By his comments, it is very evident that the Trial Judge must have received confidential information through his role as defence counsel regarding the involvement and level of participation of the various accused.

34. Also, the Crown at that bail hearing asserted that members of a notorious outlaw gang (The Manitoba Warriors) were also in some way connected with the barricade incident.

35. In his reasons for sentence (Appellants' Record, page 98) the Trial Judge had little difficulty identifying whom he considered to be three active leaders; Gordon Catcheway, Judy Ann Catcheway and Wilfred Joseph Catcheway. All of these individuals are Appellants herein.

36. In addition, Appellant Gordon Arnold Catcheway, who regularly acted as a spokesperson for the group of accused, had at least two telephone consultations concerning the Waterhen barricade with the Learned Trial Judge while the latter was still a practicing lawyer on or about May 15, 1996.

37. In addition to the above mentioned involvement of the Learned Trial Judge as a practicing lawyer, he was also a member of the law firm Johnston & Co. of Dauphin, Manitoba which law firm acted as corporate counsel for the Waterhen Band Development Corporation up to the end of 1992 during a period of time that the Corporation was controlled by the same faction that controls it today.

38. With respect to the appropriate test to be applied in determining whether a reasonable apprehension of bias existed on the part of the Learned Trial Judge, the Appellants refer this Honourable Court to the following authorities.

39. In *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*, [1968] 3 All E.R. 304 (CA) at 310, Lord Denning M.R. discussed the test in the following manner:

> ...in considering whether there was a reasonable likelihood of bias the court does not look at the mind of the Justice himself...It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people even if he was as impartial as he could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand....

40. In *The Committee for Justice and Liberty et al v. The National Energy Board et al*, [1978] 1 S.C.R. 369 (1976) at 391, and again at *Newfoundland Telephone Company Limited v. The Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623 at 637, this Honourable Court cited with approval the test of reasonable apprehension of bias set out in *Szilard v. Szasz*, [1955] S.C.R. 3 (1954). In that case, Mr. Justice Rand, writing for the Court, stated at page 6 and 7:

> It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

In *The Committee for Justice and Liberty (supra)*, Mr. Justice de Grandpre set out the test as follows at page 394:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information...[T]hat test is 'what would an informed person, viewing the matter realistically and practically and having thought the matter through - conclude' .

41. Mr. Justice de Grandpre's formulation of the test was more recently cited with approval by this Honourable in *R. v. S (R.D.)*, [1997] 3 S.C.R. 484 and *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537.

42. On the meaning of "bias" the Appellants contend that an instructive passage is contained in *Liteky v. U.S.*, 114 S.Ct 1147 (1994) at page 1155 where Scalia J. stated:

> The words [bias or prejudice] cannote a favourable or unfavourable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities.)...

43. Another insightful statement of these principles is found in *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.) in which Watt J. stated at pages 51 to 52:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

44. In addition to the Learned Trial Judge's professional involvement with the Waterhen First Nations people prior to his appointment to the Bench, his conduct during the trial itself would tend to raise concern on the part of a right minded and reasonable person particularly when the various accused raised the possibility of bias before him.

45. The Learned Trial Judge's peremptory dismissal of the unrepresented Appellants' motion to recuse himself from the case shows no indication that the Learned Trial Judge made the necessary, or any, inquiry as to whether his previous involvement with the Waterhen First Nations people and with matters closely linked to the matter he was hearing would raise a reasonable apprehension of bias to a reasonable right minded person in full possession of the facts of the situation. In light of a trial judge's duty not only to be but to appear to be impartial throughout, it is submitted that the Learned Trial Judge misdirected himself in failing to make that inquiry in a proper fashion. In this respect, it remains totally enigmatic to the Appellants as to how the Learned Trial Judge with his extensive prior involvement with the Waterhen First Nations people and matters closely linked to the case at bar itself would not have readily perceived an apprehension of bias from the perspective of the reasonable right minded person.

46. Equally enigmatic is the fact that the Respondent's representative, Crown attorney Mr. H. N. Peterson, was the attending Crown attorney at every stage of the proceeding including the bail applications, the trial and in the Court of Appeal. At no time does the record disclose that Mr. Peterson acknowledged the Learned Trial Judge's prior involvement in this proceeding. A prosecutor also has a legal duty to insure the fairness of the trial process. See:

R. v. Modern Organics Inc. and Mayer (1993), 113 Sask. R. 151 (Sask. C.A.)

R. v. Tucker (1980), 27 Nfld. & P.E.I.R. 167 (Nfld. S.C. Trial)

47. At the pre-trial motion of August 14, 1997 when the accused Harold Catcheway indicated to the Learned Trial Judge that; "You were my lawyer at one time" his response was, "What has that got to do with a fair trial?". It is respectfully submitted that the Learned Trial Judge's failure to make a more detailed inquiry at this point as to the nature of his previous representation of this accused also would tend to give rise to a reasonable apprehension of bias insofar as it suggests that the Learned Trial Judge did not fully appreciate the importance of avoiding any appearance of potential bias.

48. As has been held repeatedly by this Honourable Court, more recently in *R. v. S.(R.D.) supra* the Court must be held to the highest standards of impartiality. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. A judge must not only be fair, but must also appear to all reasonable observers to be fair.

49. A reasonable apprehension of bias, if it arises, taints the entire trial proceeding and cannot be cured by the correctness of any subsequent decision. All decisions and orders made during the trial are rendered void. The mere fact that a trial judge may appear to make proper findings of credibility on certain issues or that he may have come to a correct result cannot alleviate the effects of a reasonable apprehension of bias arising from the judge's conduct. See:

R. v. S (R.D.) supra

R. v. Curragh Inc. supra

50. Although allegations of reasonable apprehension of bias are entirely fact-specific, the Appellants allude this Honourable Court to three recent authorities (two of them being Appellant level) where a trial judge's involvement with an accused person or party litigant prior to his elevation to the Bench gave rise to a reasonable apprehension of bias:

R. v. LaFramboise, May 14, 1997 Alta. C.A. (unreported)

R. v. Elliot (1998), 123 C.C.C. (3d) 574 (Ont. C.A.) (leave to appeal to S.C.C. refused October 8, 1998, case no. 26600)

Best Value Ltd. v. Subway Sandwiches and Salads (1998), 21 C.P.C. (4th) 14 (Ont. C.J., Gen. Div.)

51. Additional instructive illustrations are contained in the following cases:

A.G. Quebec v. Cochrane (1984) 41 C.R. (3d) 389 (Que. C.A.)

R. v. Ewen (C.E.) (1994), 98 Man. R. (2d) 1 (Q.B.)

Re: Sommervill (1962), C.R. Vol 37 400 (Sask. Q.B.)

52. Based upon the nature and extent of the Learned Trial Judge's prior involvement with the Waterhen First Nations people in matters closely linked to the matter he heard, it is difficult to comprehend how a reasonable right minded person could not perceive a reasonable apprehension of bias on his part with respect to the trial proceedings.

53. Consequently, it is submitted that the Court of Appeal for Manitoba ultimately erred in its determination on this issue even though it may not have had the evidence before it to make the proper finding on the merits.

That the Court of Appeal for Manitoba erred in denying the Appellants an adjournment for the purposes of formally bringing a Motion to admit new evidence to the said court to further establish a reasonable apprehension of bias on the part of the Trial Judge.

54. During the Court of Appeal hearing the unrepresented Appellants requested an adjournment in order to seek legal advice concerning the possibility of bringing motion to admit new or additional evidence. This request was denied by the Court of Appeal without reasons. The Appellants in making this request were attempting to adduce the fresh evidence that they now seek to have admitted in the cause of the appeal to this Honourable Court. A reference to this evidence was contained in the Appendix attached to their factum but the actual documentation had not been properly filed in court.

55. It is not at all clear on what basis the Court of Appeal forbade the Appellants' request. It may have related to the Court of Appeal's view that there was overwhelming evidence to support the conviction of each of the Appellants. (Appellants' Record, page 106) The effect, however, of a reasonable apprehension of bias is to nullify the entire proceeding.

56. In *Barrette v. The Queen* (1976), 68 D.L.R. (3d) 260 this Honourable Court ruled that although a decision on an application for an adjournment is in the judge's discretion it must be made judicially and may be reviewed on appeal if it is based on reasons that are not

well-founded in law, and this review is particularly wide where the exercise of the discretion has resulting in depriving the accused of his rights. Furthermore, Pigeon J. stated at page 264:

> This being so in civil proceedings, there is all the more reason to so regard a discretionary decision in criminal proceedings, the effect whereof is to deprive the accused of his right to obtain the assistance of counsel and to summon witnesses in his defence.

57. The effect of the Court of Appeal's denial was to deprive the Appellants' of a basic right to counsel to assist them in properly submitting compelling evidence of bias before the Court. It is submitted that the Appellants' right to make full answer and defence and the overriding interests of justice would have mandated granting the small indulgence requested. It is not as if the Appellants were requesting an adjournment of the trial which may have occasioned a tremendous inconvenience. Their request was simple and was made in order to rectify a procedural deficiency caused by their lack of legal sophistication and the fact that they were confronted with quite an unusual legal issue.

58. In *R. v. Adams* (1989), 68 Alta. L.R. (2d) 193 this Honourable Court summarily overturned a conviction and directed a new trial where an accused was refused an adjournment at trial after his counsel withdrew leaving him to represent himself.

59. A refusal of an adjournment although discretionary and within the jurisdiction of a court, may, in particular circumstances amount to a denial of an accused's right to make full answer and defence. See:

R. v. Dow (1972), C.R.N.S. Vol 19 148 (B.C.S.C.)

R. v. Scott (1983), 33 C.R. (3d) 64 (B.C.Co.Ct.)

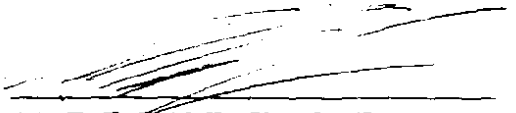
60. It is respectfully submitted that the Court of Appeal for Manitoba erred in its refusal to grant the Appellants request for an adjournment at the hearing of the appeal. The reasons for same were not well-founded in law and amounted to a denial of the Appellants' right to make full answer and defence.

PART IV - REMEDY

61. The Appellants respectfully request this Honourable Court to overturn the decisions of the Court of Appeal for Manitoba and the Court of Queen's Bench for Manitoba setting aside their convictions and directing a new trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

PULLAN GULD KAMMERLOCH
Per:



PAUL E. KAMMERLOCH
HARVEY J. SLOBODZIAN
Counsel for the Appellants

PART V - TABLE OF AUTHORITIES