

**DALE GIBSON: SCHOLAR, TEACHER, LAWYER,
AND MAN OF PRINCIPLE**

THE HONOURABLE JUSTICE RITU KHULLAR*

When I was invited to speak at the March 2020 Alberta Law Review Annual Reception, I decided to talk about Dale Gibson, my friend, mentor, and former colleague. I wanted to do so because I believe his contributions to the law have sometimes been overlooked. I was delighted that Dale and his spouse, Sandra Anderson, would be able to attend the Reception so that I could celebrate Dale in person. Then, the event was cancelled because of the COVID-19 pandemic.

So everything was rescheduled for March 2021. This gave me time to further develop my remarks and turn them into this article. Then the 2021 Reception was also cancelled because of the pandemic. Dale's health was deteriorating so I gave him a draft of the article for review and comment. This resulted in a lovely visit with me, my spouse Robert, and Dale and Sandra where we shared many memories. And, of course with Dale, to still receive some insightful comments on the draft despite his health.

Dale passed away at the age of 88 in January 2022. So, while he never got to hear me pay tribute to him, he did get to read a draft of the article.

In this article I have attempted to provide an overview of some the qualities that infused Dale's work, and in that way introduce readers to some the areas of his legal scholarship and practice. In the two appendices I also include two selected lists: his professional contributions and his publications. However, I realized in writing this abstract after Dale's death that the article does not introduce you to the decent, kind, humble, generous, curious, and joyful person that was Dale. To learn more you will have to attend the Alberta Law Review Annual Reception in 2023 (since the 2022 one was also cancelled because of the COVID-19 pandemic).

I am so grateful that I got to know Dale. I met him while an articling student at a large private law firm in Edmonton, and worked with him there. After he left to start his own boutique constitutional law firm, he asked me to join him. Joining Dale was the hardest and best decision of my career. I would not be where I am today, had I not done so.

The following does not do Dale justice, but it is a beginning.

I. INTRODUCTION

Restrictive interpretations of constitutional rights are *risky*; they create the risk that, because of the difficulty of achieving constitutional amendments, the rights in question will remain truncated for the foreseeable future.

– Dale Gibson¹

* Justice, Court of Appeal of Alberta; with the invaluable assistance of Joanne Cave, Student-at-Law, Court of Appeal of Alberta. Thank you to Dale Gibson, Sandra Anderson, and Robert Reynolds, QC for reviewing an earlier draft of this article.

¹ Dale Gibson, "Equality for Some" (1991) 40 UNBLJ 2 at 22 [emphasis in original].

Dale Gibson's expansive interpretations of the Canadian Constitution, legal history, equality rights, Aboriginal rights, and private law have sometimes been perceived to be contrarian, provocative, or radical for their time. However, it is precisely this type of intellectual courage that defined Gibson as one of the leading constitutional scholars, legal historians, and law school educators in Canada.

After completing a B.A. and an LL.B. at the University of Manitoba Faculty and an LL.M. from Harvard University, Gibson returned to the University of Manitoba as a faculty member. He made enormous contributions to the University of Manitoba Faculty of Law during his tenure as faculty member from 1959–1991, becoming a Distinguished Professor in 1984, a Fellow of the Royal Society of Canada in 1985, and a Distinguished Professor Emeritus in 2005. In 1988, Gibson joined the University of Alberta Faculty of Law as the Belzberg Professor of Constitutional Studies and continued to teach constitutional law in Edmonton until 2001. Throughout his academic career, Gibson maintained a legal practice focusing on Aboriginal and constitutional law, played a key leadership role in various law reform organizations across Canada, and advised federal and provincial governments on constitutional issues. In this last context, he was a constitutional consultant at various times to the Governments of Canada, Manitoba, and the Yukon.

I had the pleasure of working with Gibson early in my career as a litigator in Edmonton, first at a large downtown law firm where we met, then for three years at Dale Gibson Associates — a boutique constitutional litigation firm where I was the “Associate.” In my mind, the words that best describe him are prescient and principled. Gibson thought deeply about the law in both the present and future tense — not only what the law is but what it could and should be in the future. He was invested in building a more just and equitable world and demonstrated this commitment through his scholarship, advocacy, and public service. Gibson was also a prolific writer, bringing a distinctive Prairie perspective to Canadian constitutional scholarship at a time when lawyers, judges, and academics from Central Canada dominated the legal discourse. For this reason, his significant role in Canada's legal landscape since the 1960s has largely been overlooked. In this article, I explore Gibson's legacy in the law through several key “virtues” he demonstrated throughout his life and career: courage, creativity, dissent, conviction, failure, and foresight.

I have wanted to write this article for some time, to reflect on Gibson's many contributions, because the lessons I have learned from him inform my own understanding of what it means to be a principled advocate, lawyer, and jurist.

II. COURAGE

Intellectual courage was one of Gibson's defining characteristics — he was never afraid of challenging dominant ideas, asking questions, or taking risks in his teaching, scholarship, or litigation. While at Manitoba Law School in the mid-1950s, Gibson was often frustrated at how his legal education overemphasized the *practice* of law to the detriment of the purpose and the benefit of the law. At the time, the Faculty structured its law curriculum as a four-year program with half of the day in the classroom and half of the day articling with

a local law firm.² The program was jointly led by the Law Society of Manitoba and the University of Manitoba, with classes taught by practising lawyers and judges on the third floor of Winnipeg's old courthouse. Gibson described the approach to teaching in law school in the early 1950s as "highly didactic."³ Whenever Gibson attempted to stimulate debate as a student in the classroom, his professors told him that he was "here to learn what the law is, not what it ought to be."⁴ He noted that the law school lacked "openness to studying legal norms and institutions critically" and the curriculum provided few opportunities to discuss concepts like fairness or equity.⁵ Gibson's objection to the pedagogical approach of the law school did not hold him back, however. He graduated in 1958 as the gold medalist of his graduating class. Gibson built on this foundation to adopt a more critical, principles-based conception of the law in his own teaching and scholarship.

Gibson found an intellectual home for himself in the theory of legal realism, which he studied as a LL.M. student at Harvard Law School in the late 1950s. One of Gibson's favourite courses at Harvard was a course on legal realism called "The Legal Process," in which students were asked to compare the theory and practical application of law in courtrooms and administrative contexts. This course informed Gibson's teaching and writing in a significant way; he observed that "[the law] isn't so much about formal rules as it is about the people who administer them and the factors that influence those people."⁶ This course piqued Gibson's curiosity about the relationship between law, politics, culture, and public opinion — specifically, how those "non-doctrinal" factors play a role in shaping how the law develops. He viewed the law as a fundamentally human endeavour, responsive to changing social issues, norms, and perceptions. In a paper on legal realism in Canadian constitutional law, Gibson argued that "the time has come for Canadian constitutional scholarship to give serious attention to the realist hypothesis," citing examples of constitutional cases where world wars, political shifts, and economic pressures had a likely impact on the Supreme Court's final decisions.⁷ Gibson also applied a legal realist perspective to the role of judges arguing that judges often function as lawmakers and play a pivotal, but subtle, role in "amending" the Constitution through their judicial decision-making.⁸ Gibson continued to use the philosophical framework of legal realism to inform his research and scholarship throughout his career.

Graduate school clearly proved to be a very influential learning environment for Gibson, who quickly applied Harvard's more academic, theoretical approach to law teaching and scholarship when he returned as a University of Manitoba faculty member in 1959. He sought to cultivate a more academic culture at University of Manitoba's law school in the early 1960s by starting the *Manitoba Law Journal* in 1962 as its founding editor. He reflected on his experiences at Harvard, where student-led legal journals were well-established and mainstream, and opted to start the publication as a faculty editor until a formalized student

² Bryan P Schwartz & Cameron Harvey, "Interview with Dale Gibson: The Metamorphosis of Legal Education in Manitoba: An Eyewitness Account" (2016) 39:1 Man LJ 25 at 27.

³ *Ibid* at 35.

⁴ *Ibid* [footnotes omitted].

⁵ *Ibid* at 42.

⁶ *Ibid* at 53.

⁷ Dale Gibson, "The Real Laws of the Constitution" (1990) 28:2 Alta L Rev 358 at 359.

⁸ Dale Gibson, "Founding Fathers-in-Law: Judicial Amendment of the Canadian Constitution" (1992) 55:1 Law & Contemp Probs 261; Dale Gibson, "Judges as Legislators: Not Whether But How" (1987) 25:2 Alta L Rev 249.

recruitment process could be developed.⁹ The *Manitoba Law Journal* emerged at a time when university-based law journals were increasing in popularity. It was one of the first law journals on the Prairies, second only to the *Alberta Law Quarterly* (now *Alberta Law Review*) that was founded in 1934.¹⁰ Gibson demonstrated this commitment to Prairie scholarship in the introductory issue, where he stated:

[The Journal] should be devoted chiefly, though certainly not exclusively, to the work of Manitoba writers, and to material having a peculiar significance within the province. To do otherwise would be to engage in fruitless competition with the already too numerous periodicals whose chief appeal is national or international. It is hoped that the Journal can be regional without being provincial.¹¹

The *Manitoba Law Journal* later broadened its scope from Manitoba-specific legal commentary and has been cited by the Supreme Court of Canada 46 times since its inception.¹²

III. CREATIVITY

Gibson is the definition of a generalist and a lateral, interdisciplinary thinker. Over the course of his career, he published on an extraordinary range of legal topics, including torts, constitutional law, Aboriginal law, privacy law, jurisprudence, legal philosophy, legal history, human rights, administrative law, environmental law, and legal education. Gibson often approached the law laterally, drawing on principles and precedents from one area of law to inform another. He also frequently incorporated interdisciplinary scholarship from history, sociology, philosophy, and political science in his legal research and writing. Gibson had been intent on stimulating interdisciplinary discussion about the law, long before the discipline of sociological studies was mainstream in Canadian legal circles. One of the clearest examples of Gibson's passion for interdisciplinarity is a volume on the relationship between law and public opinion that he co-edited in 1980. The volume was a consolidation of papers and presentations from a conference hosted by the Legal Research Institute at the University of Manitoba, featuring sociologists, political scientists, psychologists, and government representatives alongside lawyers, judges, and law professors.¹³ With his co-editor Janet Baldwin, Gibson commented:

"Every opinion," said Holmes J., "tends to become a law." Many other observers have also found linkages between public opinion and the legal system. If these alleged linkages are real and important, we must understand them before we can fully understand the legal system.¹⁴

⁹ Schwartz & Harvey, *supra* note 2 at 62.

¹⁰ Bruce Ryder, "The Past and Future of Canadian Generalist Law Journals" (2001) 39:3 *Alta L Rev* 625 at 638.

¹¹ *Ibid* at 637.

¹² Yan Campagnolo & Kyle Kirkup, "Assessing the Influence of the *Ottawa Law Review* at the Supreme Court of Canada (1966–2017)" (2019) 50:3 *Ottawa L Rev* 55 at 78. There are an additional nine citations from 2018–2022, for a total of 46.

¹³ Dale Gibson & Janet K Baldwin, "Preface" in Dale Gibson & Janet K Baldwin, eds, *Law in a Cynical Society? Opinion and Law in the 1980s* (Calgary: Carswell Legal Publications Western Division, 1985) xi at xv.

¹⁴ *Ibid* at xi [footnotes omitted].

Gibson argued in later publications that public opinion polls could be used to inform the concept of bringing the administration of justice into disrepute when considering whether to exclude evidence under section 24(2) of the *Charter*.¹⁵ While the Supreme Court of Canada rejected this idea in *R. v. Therens* (dissent of Justice LeDain) and *R. v. Collins*, Gibson's thinking in this area still contributed to the development of the law.¹⁶

Gibson also demonstrated this creativity and interdisciplinarity in his litigation practice. In 1998–1999, he was the original lawyer that drafted the pleadings that later resulted in the ultimately successful outcome of *Daniels v. Canada (Indian Affairs and Northern Development)*.¹⁷ *Daniels* is one of the most significant Supreme Court of Canada decisions in Aboriginal law, deciding that Métis and other non-status Indians fell within the purview of section 91(24) of the *Constitution Act, 1867* as a matter of federal jurisdiction.¹⁸ Gibson believed that the constitutional doctrine of interjurisdictional immunity was a promising and overlooked path to enshrining constitutional rights and protections for the Métis because they share aspects of Aboriginal culture and identity that are protected by section 91(24) of the *Constitution Act, 1867*.¹⁹ In an earlier essay on the choice of constitutional provision to use when litigating Métis rights claims, Gibson wrote:

[Section 35 and Section 91(24)] can and should be used *together*, and in conjunction with section 15 where appropriate, to fashion the strongest *combined* legal arguments possible to advance Métis constitutional rights.... [I]t is clear that when the Métis go to court to vindicate their historic rights they should be armed with *every* constitutional argument available.²⁰

In *Daniels*, Gibson argued that the interjurisdictional immunity route would afford Métis communities more substantive constitutional protections than section 35 of the *Constitution Act, 1982*.²¹ While this line of analysis was not overtly adopted by the Supreme Court in *Daniels*, Justice Abella alluded to the doctrine of interjurisdictional immunity in her discussion of how provincial governments could legislate on issues affecting Métis communities without impairing “the core of the ‘Indian’ power.”²²

Gibson was also interested in tackling Aboriginal rights issues from another perspective: Inuit communities who were also excluded from federal legislation. While the Inuit were explicitly named within the definition of “aboriginal peoples of Canada” in section 35 of the *Constitution Act, 1982*,²³ they were not included in the *Indian Act* after an amendment in

¹⁵ Dale Gibson, “Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms” (1983) 61:1 Can Bar Rev 377 [Gibson, “Determining Disrepute”]; Dale Gibson, “Shocking the Public: Early Indications of the Meaning of ‘Disrepute’ in Section 24(2) of the Charter” (1983) 13:4 Man LJ 495 [Gibson, “Shocking the Public”]; *Canadian Charter of Rights and Freedoms*, s 24(2), Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

¹⁶ *R v Therens*, [1985] 1 SCR 613 at 653–54; *R v Collins*, [1987] 1 SCR 265 at 281–82.

¹⁷ 2016 SCC 12 [Daniels].

¹⁸ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985 Appendix II, No 5.

¹⁹ Dale Gibson, “Métis Interjurisdictional Immunity: A Third Way to Protect Métis Constitutional Rights?” in Frederica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Law, 2008) 207 at 229.

²⁰ Dale Gibson, “When Is a Métis an Indian? Some Consequences of Federal Constitutional Jurisdiction over Métis” in Paul LAH Chartrand, ed, *Who Are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction* (Saskatoon: Purich, 2002) 258 at 265 [emphasis in original].

²¹ *Ibid*.

²² *Daniels*, *supra* note 17 at para 51.

²³ *Constitution Act, 1982*, s 35(2), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

1959.²⁴ In 2000, Gibson agreed to represent the Edmonton-based Inuit lawyer and public figure Kiviaq (also known as David Ward) in a lawsuit against the federal government about this discrepancy in the *Indian Act*.²⁵ Kiviaq argued that the Inuit were not “defined in law” in Canada because no *Inuit Act* exists in federal law to supplement the rights and guarantees afforded to First Nations communities under the *Indian Act*.²⁶ This legal vacuum has left the Inuit without many of the benefits (for example, housing or education benefits) that are available to First Nations communities.²⁷ Kiviaq’s lawsuit was framed as a \$150,000 claim for reimbursement of his law school expenses — an entitlement that would have been available for First Nations students under the *Indian Act*.²⁸ Unfortunately, Kiviaq passed away of cancer in 2016 before his claim was resolved in Federal Court.²⁹

IV. DISSENT

Gibson tended to feel most comfortable in environments of dissent and debate. In his law school valedictorian speech, he levied a scathing criticism of the law school and the structure of coursework and articling.³⁰ Gibson’s peers were reluctant to endorse his speech, requesting an opportunity to vet the speech before it was presented publicly. Gibson expressed concern that the University of Manitoba’s approach to law teaching was too practical and functional; it did not encourage students to think critically about the law and their role within the profession. Former Supreme Court of Canada Chief Justice Brian Dickson, who was at the time a member of the law school’s Board of Trustees, approached Gibson after his speech to discuss his concerns.³¹ Over 60 years later, this debate about the underlying purpose of legal education remains an ongoing topic of conversation in law faculties across Canada.

As an academic, Gibson was often a proponent of constitutional theories that were quite controversial at the time. In his 1967 paper “Constitutional Amendment and the Implied Bill of Rights,” he defended the theory of an “implied bill of rights” embedded in the Preamble of the *Constitution Act, 1867*.³² The implied bill of rights theory was first started by the 1938 Supreme Court of Canada decision *Re Alberta Statutes*, which alluded to the idea of an implicit bill of rights that constrained provincial legislatures and federal Parliament from restricting various fundamental freedoms, including freedom of expression.³³ At the time, the concept of an implied bill of rights had not yet been adopted by a majority of the Supreme Court of Canada and was widely criticized for being inconsistent with the principle of

²⁴ CBC News, “Inuit Treated Unfairly, Lawyer Claims,” *CBC News* (21 November 2000), online: <www.cbc.ca/news/canada/inuit-treated-unfairly-lawyer-claims-1.225427> [CBC News, “Inuit Treated Unfairly”]; *Indian Act*, RSC 1985, c 1-5.

²⁵ CBC News, “Inuit Treated Unfairly,” *ibid*.

²⁶ Denise Rideout, “Edmonton Inuk to Sue Ottawa Over Inuit Rights,” *Nunatsiak News* (16 March 2001), online: <nunatsiak.com/stories/article/edmonton_inuk_to_sue_ottawa_over_inuit_rights/>.

²⁷ CBC News, “Inuit Treated Unfairly,” *supra* note 24.

²⁸ The Canadian Press, “‘I Am What I Am’: Inuit Kiviaq Was Pioneer in Sport, Law and Politics,” *CBC News* (4 May 2016), online: <www.cbc.ca/news/canada/edmonton/inuit-kiviaq-edmonton-1.3564991>.

²⁹ Trevor Robb, “Kiviaq, Former Edmonton Athlete and Canada’s First Inuit Lawyer, Dies at Age 80” *Edmonton Journal* (2 May 2016), online: <edmontonjournal.com/news/local-news/kiviaq-former-edmonton-athlete-and-lawyer-dies-at-age-80>.

³⁰ Schwartz & Harvey, *supra* note 2 at 51.

³¹ *Ibid*.

³² Dale Gibson, “Constitutional Amendment and the Implied Bill of Rights” (1967) 12:4 McGill LJ 497 [Gibson, “Implied Bill of Rights”]; *Constitution Act, 1867*, *supra* note 18.

³³ *Reference re Alberta Statutes*, [1938] SCR 100; Peter W Hogg, *Constitutional Law of Canada: 2020 Student Edition*, 5th ed supplemented (Toronto: Thomson Reuters Canada, 2020) at 15-56.

parliamentary sovereignty.³⁴ Gibson later wrote that the implied bill of rights theory “involved a degree of judicial activism that some thought excessive, and it required an uncommon level of creative imagination on the part of the courts.”³⁵ When the *Charter* came into force in 1982, the implied bill of rights theory became largely obsolete; however, it is often cited as an example of an early unwritten constitutional principle.³⁶ Gibson’s interest in the idea is just one example of his willingness to adopt and defend contentious legal perspectives that would, decades later, shape the direction of Canadian constitutional theory and scholarship in very meaningful ways.

Gibson was equally unafraid to criticize political or judicial decisions — even those of Canada’s highest court — at a time when the culture of legal scholarship in Canada was much more conservative. In a 1978 *Canadian Bar Review* case comment on the 1977 Supreme Court of Canada decision *Wade v. Canadian National Railway*,³⁷ Gibson started with the following assessment of the Court’s performance:

Either the law of torts must be legislatively simplified, or someone who understands its present complexities must explain it to the Supreme Court of Canada. The Supreme Court’s reasons for judgment in *Wade v. Canadian National Railway Company* came to the writer’s attention while grading torts examinations written by first year law students. Few of the students performed as poorly as the court.³⁸

Similarly, when Justice Jack Major was appointed to the Supreme Court of Canada in 1992, Gibson was quoted by *Maclean’s*: “It seems to me that the court has taken another step, if not to the right, at least to the middle. But I suspect to the right.”³⁹ In a 1993 *Edmonton Journal* op-ed, Gibson criticized statements made by Chief Justice Lamer that it was a violation of judicial independence to apply a federal wage freeze to judicial salaries. Gibson made a very pointed comment on the issue: “Judges require the respect of others if they are to do their job effectively. But self-exaggeration of their importance and of their need for immunity from the social and economic realities to which the rest of us must submit is more likely to produce resentment and derision than to engender respect.”⁴⁰ These types of comments were very unusual in Alberta’s and Manitoba’s small, conservative legal circles and further cemented Gibson’s reputation as provocative and contrarian.

Gibson’s irreverent sense of humour also filtered into his public commentary and academic scholarship. At a national conference on Senate reform in 1988, Gibson unabashedly advocated for Senate abolition, suggesting that the Senate could instead be filled with water and used as a “splendid swimming pool for the House of Commons.”⁴¹ At an Indigenous Bar Association meeting in 2000, Indigenous scholar James (Sákéj) Youngblood

³⁴ Gibson, “Implied Bill of Rights,” *supra* note 32 at 498.

³⁵ Dale Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 11 [footnotes omitted] [Gibson, *General Principles*]; *Charter*, *supra* note 15.

³⁶ Hogg, *supra* note 33 at 15-57.

³⁷ [1978] 1 SCR 1064.

³⁸ Dale Gibson, “Torts — Negligence and Occupiers’ Liability — Role of Jury — Confusing Words from the Oracle,” Case Comment, (1978) 56 Can Bar Rev 653 at 693 [footnotes omitted].

³⁹ D’Arcy Jenish, John Howse & Luke Fisher, “A Disputed Choice,” *Maclean’s* (23 November 1992), online: <archive.macleans.ca/article/1992/11/23/a-disputed-choice#!&pid=54>.

⁴⁰ Dale Gibson, “Judges Not Immune to Fiscal Reality,” *Edmonton Journal* (2 March 1993) A10.

⁴¹ Centre for Constitutional Studies, *The Canadian Senate: What Is To Be Done?* (Edmonton: Centre for Constitutional Studies, 1988) at 104.

Henderson asked Gibson the following question: “Would you say there’s a conspiracy among legislators to deprive us of our Aboriginal rights?” In response, Gibson retorted “I’m starting to think it’s so obvious the courts could take judicial notice of it” to uproarious laughter from the audience of lawyers.⁴² Not all of Gibson’s jokes were well-received, however. In a 1989 *Constitutional Forum* article, Gibson used the analogies of “apples and oranges” and “chest to breasts” to make the argument that equality rights under section 15 of the *Charter* should be understood as an entitlement rather than a factual assertion of similarity across different groups of people.⁴³ Gibson used the example of topless sunbathing to illustrate that existing social standards might justify discriminatory laws on the basis of some identity characteristics (such as gender) but not others (such as race). However, Gibson’s article prompted a response article from legal theory students at the University of Victoria Faculty of Law, who argued that his analytical approach served to “entrench or build upon ... repressive social attitudes.”⁴⁴ The students who co-authored the article felt that Gibson’s approach trivialized the more substantive ways that gender inequality continue to persist in society and was counterproductive to a meaningful dialogue about equality rights under the *Charter*.⁴⁵ The critique was gracefully received by Gibson as it contributed to the dialogue on important equality issues.

V. CONVICTION

Throughout his career, Gibson embraced his Aboriginal and constitutional practice with conviction and a clear sense of purpose. He made significant contributions to the Royal Commission on Aboriginal Peoples, assisting with the preparation of the chapter on Métis rights alongside Clement Chartier, former President of the Métis National Council.⁴⁶ He greatly enjoyed using creative constitutional and *Charter* arguments to seek just outcomes for his clients, even if the successes were incremental. Gibson drafted the initial Manitoba Métis Federation statement of claim that later resulted in the successful Supreme Court decision and articulated the duty of diligence as part of the honour of the Crown enshrined by section 35 of the *Constitution Act, 1982*.⁴⁷ Gibson was also involved in the Federal Court claim *Maurice v. Canada*, which was a lawsuit on behalf of a named plaintiff (Mr. Maurice) and the Sapwagamik Métis community that focused on how the establishment of the Primrose Lake Air Weapons Range impacted the community’s Métis harvesting rights.⁴⁸

In the 1990s, Gibson fought persistently alongside co-counsel Jean McBean and Rangi Jeerakathil to have the name of Kathleen Steinhauer, formerly of Saddle Lake Cree Nation, returned to the Saddle Lake Band List after she married a non-status First Nations man.

⁴² Windspeaker Staff, “With Just a Bit of Good Faith ...,” *Windspeaker* (May 2000) 4, online: <www.windspeaker.com/sites/default/files/2019-12/May%202000.pdf>.

⁴³ Dale Gibson, “The Nature of Equality: Apples and Oranges / Chests and Breasts” (1989) 1:1 *Const Forum Const* 3.

⁴⁴ Legal Theory Students, University of Victoria, “Understanding Inequality: A Reply to Dale Gibson” (1990) 1:3 *Const Forum Const* 18 at 18.

⁴⁵ *Ibid* at 19.

⁴⁶ *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol 5 (Ottawa: Canada Communication Group, 1996), online: <www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>.

⁴⁷ *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14; Bryan P Schwartz, “Interview with Jean Teillet” (2018) 41:2 *Man LJ* 311 at 313–14; *Constitution Act, 1982*, *supra* note 23, s 35.

⁴⁸ 2004 FC 528. The claim eventually settled out of court in Mr. Maurice’s favour.

Steinhauer had started this fight in the late 1960s through a grassroots activist organization of disinherited First Nations women called Indian Women for Indian Rights. Steinhauer's legal claim was based on Bill C-31, an amendment to the *Indian Act* in 1985 that allowed First Nations women to have their Indian status restored after they married non-status men.⁴⁹ Bill C-31 was intended to bring the *Indian Act* in compliance with section 15 of the *Charter*, but after it was introduced some First Nations women continued to experience resistance from the Government of Canada and their local band councils.⁵⁰ Steinhauer was very impressed with Gibson and McBean's commitment to the cause. She noted that "Dale was a down-to-earth person but when he talked to a judge he was all-lawyer.... I get tears in my eyes when I think of everything Jean and Dale did for me."⁵¹ Steinhauer first started her lawsuit in 1992; it was 1999 when the Federal Court ordered her name to be added back to the Saddle Lake Band List.⁵² She passed away in 2012.⁵³

Equality issues were another key area of interest for Gibson. He was one of the founders (and the only male) of the Women's Legal Education and Action Fund (LEAF) in the mid-1980s and contributed to legal research and advocacy on behalf of the organization, including a submission to the Canadian Human Rights Commission on pregnancy and childbirth discrimination in 1986.⁵⁴ Gibson was a big proponent of the Government of Canada's Court Challenges Program in the 1990s as a way to fund *Charter* litigation and improve access to justice. He acted as counsel or co-counsel for interveners in numerous Supreme Court of Canada decisions related to gender equality and social justice issues, including *R. v. Mills* (the constitutionality of *Criminal Code*⁵⁵ provisions about the production of a sexual complainant's private health records) and *Vriend v. Alberta* (whether sexual orientation was a prohibited ground of discrimination in human rights legislation).⁵⁶ Gibson's scholarship was also cited in several seminal Supreme Court of Canada section 15 *Charter* decisions, including *Miron v. Trudel* (whether common-law partners fell within the definition of "spouse" for automobile insurance policies) and *Egan v. Canada* (whether same-sex partners were entitled to Old Age Security spousal benefits).⁵⁷ To this day, Gibson's extensive writing on section 15 of the *Charter* continues to be cited by Canadian courts, such as the recent Ontario Court of Appeal decision *R. v. Sharma*, which held that the provision of the *Criminal Code* that removed the availability of conditional sentences for some offences (section 742.1(c)) contravened both sections 7 and 15 of the *Charter* by discriminating against Aboriginal offenders.⁵⁸

⁴⁹ Assembly of First Nations, "What is Bill C-31 and Bill C-32," online: <www.afn.ca/wp-content/uploads/2020/01/16-19-02-06-AFN-Fact-Sheet-Bill-C-31-Bill-C-3-final-revised.pdf>.

⁵⁰ *Indian Act*, *supra* note 24; *Charter*, *supra* note 15, s 15.

⁵¹ Nellie Carlson & Kathleen Steinhauer, *Disinherited Generations: Our Struggle to Reclaim Treaty Rights for First Nations Women and their Descendants* (Edmonton: University of Alberta Press, 2013) at 108. *Ibid* at 128; *Kathleen Steinhauer-Anderson v Her Majesty the Queen*, 1999 CanLII 8398 (FCTD).

⁵² CBC News, "Saddle Lake 'Miracle' Women Honoured in New Museum Exhibit" (30 December 2017), online: <www.cbc.ca/news/canada/edmonton/saddle-lake-indian-rights-royal-alberta-museum-exhibit-1.4449274>.

⁵³ Gwen Brodsky & Leslie Pearl, "Pregnancy and Childbirth Discrimination" (1986), online: *Women's Legal Education and Action Fund* <www.leaf.ca/submission/submission-pregnancy-child-birth-discrimination/>.

⁵⁴ RSC 1985, c C-46.

⁵⁵ *R v Mills*, [1999] 3 SCR 668 [*Mills*]; *Vriend v Alberta*, [1998] 1 SCR 493. I had the privilege of being co-counsel on both of these cases.

⁵⁶ *Miron v Trudel*, [1995] 2 SCR 418 at para 14; *Egan v Canada*, [1995] 2 SCR 513 at paras 41–43.

⁵⁷ *R v Sharma*, 2020 ONCA 478 at para 202, n 3, citing Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990) at 70–81; leave to appeal granted; *Criminal Code*, *supra* note 55; *Charter*, *supra* note 15, ss 7, 15.

⁵⁸

Gibson also demonstrated a strong sense of conviction through his lifelong commitment to legal research and law reform. He played a key role as founder of the Legal Research Institute at the University of Manitoba in 1968, serving as Chair until 1982. At the time, Gibson envisioned the Legal Research Institute as an organization that would apply legal research and scholarship in the law school to law reform issues identified by the provincial government and members of the legal profession.⁵⁹ While the Manitoba Law Reform Commission was eventually established as a separate statutory entity from the Legal Research Institute in the early 1970s, Gibson had a clear vision for an organization that would lead law reform efforts in Manitoba years earlier. The late 1960s and early 1970s was a key period for the development of law reform organizations across Canada, and Gibson defined Manitoba as one of the early provincial leaders in this movement.⁶⁰ Gibson then served as one of the Commissioners of the Manitoba Law Reform Commission, contributing to several significant law reform projects including the advisability of a good Samaritan law for Manitoba, whether on-reserve status First Nations had the rights and obligations associated with jury service, new legal approaches for the summary disposition of builder's and workmen's liens, and whether "minerals" required further definition in Manitoba legislation to provide clarity to landowners.⁶¹

VI. FAILURE

Failure is inevitable for all litigators, especially constitutional litigators seeking to push the boundaries of the law like Gibson. He had a particular interest in litigating education issues under section 93 of the *Constitution Act, 1867*, but successful outcomes on these files were often rare.⁶² In *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, Gibson challenged the Alberta government's decision to remove the ability of public school boards to raise funds by taxation as they had done since their inception.⁶³ He argued that public school boards were a form of local government founded upon democratic principles and were entitled to reasonable autonomy based on legal norms established in the Preamble and sections 92 and 93 of the *Constitution Act, 1867*.⁶⁴ His second argument incorporated section 17 of the *Alberta Act* and was based on the fact that separate school boards retained some of their ability to tax under the government's changes while it was removed for public school boards.⁶⁵ This, it was argued, amounted to discrimination contrary to section 17(2) of the *Alberta Act* and violated the principle of mirror equality under section 17(1).⁶⁶ The Public School Boards Association was successful at trial, but the trial decision was overturned by the Alberta Court of Appeal. The success of the mirror equality argument at trial was a classic example of Gibson's creativity — it came to him in the bath prior to legal argument!

⁵⁹ Paul Thomas, "The Manitoba Law Reform Commission: A Critical Evaluation" (1975) 2:2 Dal LJ 417 at 421.

⁶⁰ For a full history of law reform agencies in Canada, see Department of Justice Canada, "Law Reform Agencies" (7 January 2015), online: <www.justice.gc.ca/eng/tp-pr/csj-sjc/ilp-pji/lr-rd/page2.html>.

⁶¹ Manitoba, Law Reform Commission, *Reports and Recommendations* (1971); Manitoba, Law Reform Commission, *Report on the Advisability of a Good Samaritan Law in Manitoba* (1973).

⁶² *Constitution Act, 1867*, supra note 18, s 93.

⁶³ 2000 SCC 45 [*Public School Boards*]. I was co-counsel at the Alberta Court of Appeal and the Supreme Court of Canada.

⁶⁴ *Ibid* at para 31; *Constitution Act, 1867*, supra note 18, ss 92–93.

⁶⁵ *Alberta Act*, SC 1905, c 3, s 17, reprinted in RSC 1985, Appendix II, No 20.

⁶⁶ *Public School Boards*, supra note 63 at para 13.

The Supreme Court of Canada dismissed Gibson's appeal, with Justice Major, writing for the Court, noting that Alberta's current legislative scheme was constitutional because provincial governments retained the plenary power over education and the funding framework promoted fairness by "providing redress against prior intra-provincial funding inequities."⁶⁷ The following year, Gibson acted for the Public School Boards' Association of Canada as an intervener in a similar Ontario case that made it to the Supreme Court and was also unsuccessful.⁶⁸ But sometimes the losses or failures helped in crystallizing important public policy issues and contributed to the thinking and discourse on these important issues, like public and separate schools in Alberta.

Occasionally, courts disapproved of Gibson's academic perspectives on the law; his expansive interpretation of legal principles often challenged judges and the principle of judicial restraint that largely informed their decision-making. In the 1986 Supreme Court of Canada decision in *RWDSU v. Dolphin Delivery Ltd.*, the Court declined to extend the protections of the *Charter* to the private sector and noted that Dale Gibson, among other legal academics, had expressed views to the contrary in Canadian legal journals.⁶⁹ The Court noted that "[t]o hold otherwise would be to increase the scope of the *Charter* immeasurably ... tantamount to setting up an alternative tort system."⁷⁰ Similarly, in *R. v. Crown Zellerbach Canada Ltd.*, Justice LeDain, writing for the majority, expressed some concern about Gibson's proposal that the "national concern doctrine" of the peace, order, and good government power would not mean that the *entire* legislative problem would fall within federal jurisdiction; only those "aspects of legislative problems which are beyond the ability of the provincial legislatures to deal."⁷¹ Justice LeDain expressed some reservations about this line of analysis, noting that Parliament should have the exclusive jurisdiction to legislate on the issue, including its intra-provincial aspects.⁷² While his opinions were not always embraced by the Supreme Court, the judiciary recognized that Gibson's scholarship provided rich, thoughtful analysis on constitutional issues at a level of depth that was largely unmatched by other constitutional scholars in Canada, such that it was important to engage with them.⁷³ For instance, when the Supreme Court was considering the meaning of bringing the administration of justice into disrepute, it did not ignore Gibson's proposal of using public opinion polls. Rather, it engaged with the idea and rejected it.⁷⁴

⁶⁷ *Ibid* at paras 41, 55.

⁶⁸ *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, 2001 SCC 15.

⁶⁹ [1986] 2 SCR 573 at 597 [*Dolphin Delivery*]; Dale Gibson, "The Charter of Rights and the Private Sector" (1982-1983) 12:2 *Man LJ* 213 at 213.

⁷⁰ *Dolphin Delivery*, *ibid*, citing A Anne McLellan & Bruce P Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986) 24:2 *Alta L Rev* 361 at 367.

⁷¹ [1988] 1 SCR 401 at 432-33.

⁷² *Ibid*.

⁷³ While primarily Supreme Court of Canada decisions are discussed here, Gibson's writings have been turned to by administrative tribunals and lower courts as well. A notable example is the Canadian Human Rights Tribunal decision in *Vaid v House of Commons*, 2001 40 CHRR 229 which cited his article "Monitoring Government Authority: Charter Scrutiny of Legislative, Executive, and Judicial Privilege" (1998) 61:2 *Sask L Rev* 297 [Gibson, "Monitoring Government Authority"]. The Supreme Court of Canada in its decision in *Canada (House of Commons) v Vaid*, 2005 SCC 30 did not cite the article, which is a shame given its vivid description of the historical privileges as "'constitutional cockroaches' [which] like evolution-resistant insects, survived centuries of legal and constitutional reform": Gibson, "Monitoring Government Authority," *ibid*.

⁷⁴ Gibson, "Determining Disrepute," *supra* note 15; Gibson, "Shocking the Public," *supra* note 15.

VII. FORESIGHT

Gibson’s interest in Canadian legal history — particularly in Alberta and Manitoba — made him very perceptive to the regional, cultural, and political forces that have influenced judicial decision-making over time. His last work is a two-volume exploration of *Law, Life, and Government at Red River*, the second volume of which is on the Quarterly Court of Assiniboia from 1844–1872.⁷⁵

Gibson traced Alberta’s unique judicial culture back to the days of William Aberhart and the Social Credit Party, where “Aberhart’s political evangelism and stubborn determination had a powerful formative influence on the distinctive collective character of Albertans that even today causes them to suspect the blandishments of eastern Canada, and to insist on doing things their own way.”⁷⁶ Gibson recognized that the vestiges of Aberhart’s political legacy continued to shape law and politics in Alberta into the 1980s and 1990s, particularly on issues of natural resources, Senate representation, equalization, and *Charter* rights.⁷⁷ In a book chapter on Alberta’s appellate court history, Gibson observed that Alberta’s early judicial decisions on rights and freedoms “exhibited a somewhat different character than those of the Supreme Court of Canada: less ardour for the Charter, and a tendency to favour majoritarian values and considerations over those of minorities.”⁷⁸ This historical context provided a unique Prairie perspective in Gibson’s constitutional scholarship and informed his later writing on *Charter* jurisprudence.

Gibson was still a Professor of Law at the University of Manitoba in 1982 when the *Charter of Rights and Freedoms* came into force. He provided thoughtful commentary in his academic role about the *Charter*’s structure and potential, often foreshadowing the development of *Charter* jurisprudence later in the 1980s and 1990s. In Gibson’s first book on the subject, *The Law of the Charter: General Principles*, he borrowed the living tree analogy from the *Person*’s case to describe the *Charter* as a “newly treed area [that] has been growing taller and thicker at an unprecedented rate.”⁷⁹ He described the purpose of this first book as follows:

This book is intended to provide a general map of the Charter forest before it becomes too high and too dense to survey. It attempts to describe the major features of the landscape, and to draw attention to areas where aberrant early growth patterns indicate a need for forest management measures by judges or legislators.⁸⁰

⁷⁵ Dale Gibson, *Law Life, and Government at Red River: Settlement and Governance, 1812–1872*, vol 1 (Montreal: McGill-Queen’s University Press, 2015); Dale Gibson, *Law Life, and Government at Red River: General Quarterly Court of Assiniboia, Annotated Records, 1844–1872*, vol 2 (Montreal: McGill-Queen’s University Press, 2015).

⁷⁶ Dale Gibson, “Bible Bill and the Money Barons: The Social Credit Court References and Their Constitutional Consequences” in Richard Connors & John M Law, eds, *Forging Alberta’s Constitutional Framework* (Edmonton: University of Alberta Press, 2005) 191 at 228.

⁷⁷ Dale Gibson, “The Supreme Court of Alberta Meets the Supreme Law of Canada” in Jonathan Swainger, ed, *The Alberta Supreme Court at 100: History & Authority* (Edmonton: University of Alberta Press, 2007) 99.

⁷⁸ *Ibid* at 125.

⁷⁹ Gibson, *General Principles*, *supra* note 35 at iii.

⁸⁰ *Ibid*.

In his subsequent book *The Law of the Charter: Equality Rights*, Gibson conveyed a sense of optimism about the unique potential of section 15 of the *Charter*. In the introduction, he noted:

It is already obvious, however, that neither individualism nor collectivism will ever win complete possession of the field [of equality rights]. The Constitution guarantees both individual and group rights, and it is the task of courts which apply section 15 of the Charter to do so in a manner that gives as much recognition as possible to both.

That means compromise. But there is no reason to denigrate compromise; all constitutional law is the fruit of compromise.... Perfect equality is unattainable. In terms, however, of incomplete but substantial progress toward the reduction of inequalities, the first four years' experience under section 15 of the Canadian Charter of Rights and Freedoms provides cause for optimism.⁸¹

In a later *Alberta Law Review* paper, Gibson argued that the jurisprudence on “analogous grounds” for equality claims was in a “grossly confused state, and that the most useful future development would be to abandon most of what has been decided so far, and begin afresh.”⁸² One development Gibson found particularly concerning was Justice Wilson’s emphasis on “disadvantaged group[s]” to evaluate analogous grounds in the Supreme Court of Canada decision *R. v. Turpin*, arguing instead that the *Charter*’s protection must be extended to “every individual.”⁸³ Gibson was concerned that an overemphasis on disadvantaged groups in section 15 analyses would run counter to a “‘large and liberal’ ... interpretation” of the *Charter* that focuses on individual rights and protections.⁸⁴ The tension of how to define and apply analogous grounds under section 15 of the *Charter* continues to be an unsettled area in *Charter* litigation.⁸⁵

Gibson’s work on the intersection between constitutional and environmental law was also very prescient. Over the course of his career, Gibson wrote numerous constitutional articles on water rights and the right to a healthy environment.⁸⁶ In 2001, he testified before the House of Commons Standing Committee on Environment and Sustainable Development regarding the constitutionality of proposed species at risk legislation.⁸⁷ In 1973, Gibson published one of his most heavily cited papers, entitled “Constitutional Jurisdiction over Environmental Management in Canada.” In that paper, he observed that “no issue of constitutional law is more important at the moment than the respective powers of the two orders of government in [the field of resource pollution].”⁸⁸ This paper was cited by the

⁸¹ Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990) at viii [Gibson, *Equality Rights*].

⁸² Dale Gibson, “Analogous Grounds of Discrimination Under the Canadian *Charter*: Too Much Ado About Next to Nothing” (1991) 29:4 *Alta L Rev* 772 at 773.

⁸³ Gibson, *Equality Rights*, *supra* note 81 at 154 [emphasis in original].

⁸⁴ *Ibid* at 155.

⁸⁵ See e.g. *Fraser v Canada (Attorney General)*, 2020 SCC 28.

⁸⁶ See e.g. Dale Gibson, “The Constitutional Context of Canadian Water Planning” (1969) 7:1 *Alta L Rev* 71; Dale Gibson, “Constitutional Arrangements for Environmental Protection and Enhancement Under a New Canadian Constitution” in Stanley M Beck & Ivan Bernier, eds, *Canada and the New Constitution: The Unfinished Agenda*, vol 2 (Montreal: Institute for Research on Public Policy, 1983) 113.

⁸⁷ House of Commons, Standing Committee on Environment and Sustainable Development, *Bill C-5, An Act respecting the protection of wildlife species at risk in Canada*, No 15 (26 April 2001).

⁸⁸ Dale Gibson, “Constitutional Jurisdiction Over Environmental Management in Canada” (1973) 23:1 *UTLJ* 54 at 79 [Gibson, “Environmental Management”].

Supreme Court of Canada in three key environmental law decisions (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, *R. v. Hydro-Québec*, and the *References re Greenhouse Gas Pollution Pricing Act*).⁸⁹

When Gibson wrote the article in the early 1970s, the concept of “climate change” was not yet part of public discourse; however, he noted that the issue of resource pollution would inevitably create tension between federal, provincial, and municipal governments in the future. Gibson opined that the federal criminal law power and the peace, order, and good government clause for matters of “national significance” would be key constitutional provisions for the federal government to rely upon in the future.⁹⁰ The “national concern doctrine” is now a key constitutional framework in climate change litigation and remains a rich area of judicial debate.⁹¹ One has to look no further than the Supreme Court of Canada’s recent *GGPPA Reference* decision to see just how influential Gibson’s scholarship on environmental law has been in the last several decades. Gibson’s work was cited 11 times in the *GGPPA Reference* — both in Chief Justice Wagner’s majority decision and the dissenting decisions of Justices Brown and Rowe. Chief Justice Wagner cited Gibson’s analysis of how to define the scope of “extraprovincial harm” as part of the national concern doctrine, one of many examples of how Gibson brought pragmatism and clarity to complex issues of constitutional interpretation.⁹² The fact that both the majority and dissenting Supreme Court justices engaged with Gibson’s scholarship in the *GGPPA Reference* further illustrates the wide appeal of his work.

Gibson was also ahead of his time in his scholarship on privacy law. He co-authored a Legal Research Institute paper in 1968 on privacy law and the implications of credit bureaus having largely unregulated access to personal information, which Gibson described as an “unjustifiably great intrusion into the privacy of the individuals being investigated.”⁹³ He later edited a volume of essays on privacy law in Canada in 1980, some twenty years before Canada implemented the *Personal Information Protection and Electronic Documents Act* governing how private sector organizations collect and use personal information.⁹⁴ Gibson also astutely recognized that privacy should not be an issue restricted to the legal domain: “The extent to which a society respects the privacy of its members will be determined chiefly by the attitudes of its citizens rather than by the stipulations of its laws.”⁹⁵ Gibson proposed that tort law be used as a tool to regulate personal privacy until more robust legislative protections were introduced.⁹⁶ More recently, Gibson’s scholarship was cited in the Ontario

⁸⁹ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3; *R v Hydro-Québec*, [1997] 3 SCR 213; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA Reference*].

⁹⁰ Gibson, “Environmental Management,” *supra* note 88 at 83.

⁹¹ *GGPPA Reference*, *supra* note 89 at paras 89–166; Andrew Leach & Eric M Adams, “Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction” (2020) 29:1 Const Forum Const 1 at 6.

⁹² *GGPPA Reference*, *ibid* at para 153.

⁹³ R Dale Gibson & John M Sharp, *Privacy and Commercial Reporting Agencies* (Winnipeg: Legal Research Institute of the University of Manitoba, 1968) at 7.

⁹⁴ Dale Gibson, ed, *Aspects of Privacy Law: Essays in Honour of John M Sharp* (Toronto: Butterworth, 1980); *Personal Information Protection and Electronic Documents Act*, SC 2000, c5.

⁹⁵ R Dale Gibson, “Legal Protections of Privacy” in R St J Macdonald & John P Humphrey, eds, *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworth, 1979) 179 at 193.

⁹⁶ D Gibson, “Common Law Protection of Privacy: What to do Until the Legislators Arrive” in Lewis Klar, ed, *Studies in Canadian Tort Law* (Toronto: Butterworth, 1977) 343.

Court of Appeal decision *Jones v. Tsige*, which created a new tort of “intrusion upon seclusion” for the invasion of personal privacy.⁹⁷ Gibson’s work was cited as part of the rationale for confirming the existence of the new tort, where the Court of Appeal noted that *Charter* jurisprudence has increasingly acknowledged informational privacy as a right that is distinct from personal or territorial privacy.⁹⁸

Gibson’s deep understanding of privacy issues informed his representation of the Sexual Assault Centre of Edmonton when it intervened in *R. v. Mills* to address the privacy rights complainants in sexual assault trials have in their own counselling records.⁹⁹

VIII. CONCLUDING REFLECTIONS

It is difficult to sum up Gibson and his many contributions. Yet, one final observation remains to be made. There are two apparently contradictory aspects of Gibson’s professional career which have contributed to the enduring legacy of his work.

The first aspect is Gibson’s fierce intellectual independence. While obviously present when he started his legal studies, his academic life facilitated and encouraged intellectual curiosity and exploration without artificial constraint. He owed allegiance to no person, institution, or political party. His commitment and passion was to the law and how the law could foster a more fair, equal, and just society. Gibson’s independence permitted him to use law as a tool to speak truth to power, regardless of the potential legal, political, or reputational consequences.

The second apparent contradictory aspect is that from the outset of his legal career, Gibson always kept his hand in practising law (though he completely retired from the practice by age 75). Continuing to represent people with their real legal problems kept Gibson grounded and practical. He represented everyone from disenfranchised individuals to governments. Law had never been just an intellectual construct but one that could make a real difference in people’s lives. Continuing to practice law not only kept him practical, it also engaged Gibson’s empathy and humanity.

A final illustration can be seen in Gibson’s 1991 paper “Equality for Some.” He ended his paper on section 15 of the *Charter* with this assertion: “A presumption in favour of the equality of the subject would make far more sense — historically, morally, and even legally — than a presumption in favour of interpretative timidity.”¹⁰⁰ In his scholarly writing, Gibson implored judges and lawmakers to be bold in their use and interpretation of the *Charter* because constitutional rights were neither a “zero-sum game” nor a “finite resource.”¹⁰¹ He advocated for this approach, not only because the constitution would be difficult to amend,

⁹⁷ 2012 ONCA 32.

⁹⁸ *Ibid* at para 66, citing D Gibson, “Common Law Protection of Privacy: What to do Until the Legislators Arrive” in Lewis Klar, ed, *Studies in Canadian Tort Law* (Toronto: Butterworth, 1977) 343.

⁹⁹ *Mills*, *supra* note 56. Again, I had the privilege of being co-counsel on this file.

¹⁰⁰ Gibson, “Equality for Some,” *supra* note 1 at 22.

¹⁰¹ Dale Gibson, “The Deferential Trojan Horse: A Decade of Charter Decisions” (1993) 72:4 Can Bar Rev 417 at 449.

but because it was the approach which would most likely result in a meaningful interpretation of rights. But law was not just an intellectual exercise, and Gibson wanted the fullest extent of those rights and freedoms to be realized *because* then the law could actually make a difference in the lives of Canadians.

These two strands, the intellectual/academic and the practical/empathetic, are dominant and complementary strands in the tapestry of Gibson's work. They combine to make his work relevant to all who are engaged with the law.

**APPENDIX A: SELECTED LIST OF
DALE GIBSON'S PROFESSIONAL CONTRIBUTIONS**

The following publications are listed in reverse chronological order. This list is not exhaustive.

ACADEMIA

- Belzberg Fellow of Constitutional Studies, University of Alberta, Faculty of Law (1993–2001).
- Bowker Professor of Law, University of Alberta, Faculty of Law (1991–1993).
- Belzberg Professor of Constitutional Studies, University of Alberta, Faculty of Law (1988–1991).
- Founding Editor, *Manitoba Law Journal* (1962–1965).
- Professor, University of Manitoba, Faculty of Law (Assistant 1959–1964, Associate 1964–1968, Full 1968–1991).

LAW REFORM

- Member, Manitoba Law Reform Commission (1970–1979).
- Chair, Legal Research Institute, University of Manitoba (1968–1982).

PUBLIC SERVICE

- Consultant and Writer, Royal Commission on Aboriginal Peoples (1994–1995).
- Member, Manitoba Human Rights Commission (1970–1979, Chairperson 1982–1984).
- Director, Archives of Manitoba Legal History (1970–1980).
- Chairman, Study Group on the Canadian Constitution (1970–1975).
- Constitutional Consultant, Yukon Government (1988–1989, 1995–1996).
- Constitutional Consultant, Government of Manitoba (1970–1977, 1982–1987).
- Constitutional Consultant, Government of Canada (1969–1970, 1980–1981).

SUPREME COURT OF CANADA APPEARANCES

- *Baier v. Alberta*, 2007 SCC 31.
- *Canadian Western Bank v. Alberta*, 2007 SCC 22.
- *Canada (House of Commons) v. Vaid*, 2005 SCC 30.
- *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19.
- *Ontario English Catholic Teachers' Assn v. Ontario (Attorney General)*, 2001 SCC 15.
- *Public School Boards' Assn of Alberta v. Alberta (Attorney General)*, 2000 SCC 45.
- *R. v. Mills*, [1999] 3 SCR 668.
- *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157.
- *Vriend v. Alberta*, [1998] 1 SCR 493.
- *LeBlanc v. City of Transcona*, [1974] SCR 1261.
- *Dressler v. Tallman Gravel & Sand Supply Ltd.*, [1962] SCR 564.

SUPREME COURT OF CANADA CITATIONS

- *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (majority by Wagner CJC and dissents of Brown and Rowe JJ).
- *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (concurrency by McLachlin CJC and Moldaver J).
- *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 (concurrency by Bastarache J).
- *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (concurrency by L'Heureux-Dubé J).
- *Reference re Firearms Act (Can.)*, 2000 SCC 31 (per curiam).
- *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 (concurrency by L'Heureux-Dubé J)
- *R v. Hydro-Québec*, [1997] 3 SCR 213 (dissent by Lamer CJC and Iacobucci J).
- *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 (partial dissent by La Forest J).
- *Adler v. Ontario*, [1996] 3 SCR 609 (dissent by L'Heureux-Dubé J).
- *Miron v. Trudel*, [1995] 2 SCR 418 (dissent by Gonthier J).
- *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 (concurrency by Lamer CJC).
- *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 (majority by La Forest J).
- *McKinney v. University of Guelph*, [1990] 3 SCR 229 (dissent by Wilson J).
- *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 (per curiam by Beetz J).
- *R v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 (majority by Le Dain J).
- *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110 (per curiam by Beetz J).
- *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573 (majority by McIntyre J, disagrees with Gibson).
- *R v. Therens*, [1985] 1 SCR 613 (dissent by Le Dain J, disagrees with Gibson).

**APPENDIX B:
SELECTED LIST OF PUBLICATIONS**

The following publications are listed in reverse chronological order. This list is not exhaustive.

ABORIGINAL LAW

Dale Gibson, “Métis Interjurisdictional Immunity: A Third Way to Protect Métis Constitutional Rights?” in Frederica Wilson & Melanie Mallet, eds., *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Law, 2008) 207.

Dale Gibson, “When Is a Métis an Indian? Some Consequences of Federal Constitutional Jurisdiction over Métis” in Paul L.A.H. Chartrand, ed., *Who Are Canada’s Aboriginal Peoples? Recognition, Definition, and Jurisdiction* (Saskatoon: Purich, 2002) 258.

**CONSTITUTIONAL LAW (FEDERALISM, DIVISION OF POWERS,
AND CONSTITUTIONAL THEORY)**

Dale Gibson, “Constitutional Vibes: Reflections on the *Secession Reference* and the Unwritten Constitution” (1999–2000) 11 NJCL 49.

Dale Gibson, “The *Canada Health Act* and the Constitution” (1996) 4 Health LJ 1.

Dale Gibson, “Founding Fathers-in-Law: Judicial Amendment of the Canadian Constitution” (1992) 55:1 Law & Contemp Probs 261.

Dale Gibson, “The Real Laws of the Constitution” (1990) 28:2 Alta L Rev 358.

Dale Gibson, “Monitoring Arbitrary Government Authority: *Charter* Scrutiny of Legislative, Executive, and Judicial Privilege” (1998) 61:2 Sask L Rev 297.

CONSTITUTIONAL LAW (RIGHTS/FREEDOMS AND CHARTER)

Dale Gibson, “Enforcement of the *Canadian Charter of Rights and Freedoms*” (2005) 28 SCLR (2d) 481.

Dale Gibson, “Equality for Some” (1991) 40 UNBLJ 2.

Dale Gibson, “Analogous Grounds of Discrimination Under the Canadian Charter: Too Much Ado About Next to Nothing” (1991) 29:4 Alta L Rev 772.

Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990).

Dale Gibson, "The Clapham Omnibus Meets the Trudeau Express: Tort Implications of the Canadian Charter of Rights and Freedoms" in Law Society of Manitoba, Manitoba Bar Association & Faculty of Law, University of Manitoba, eds., *The 1988-1989 Isaac Pitblado Lectures on Recent Developments in the Law of Contract and Tort, April 1989* (1989) 33.

Dale Gibson, "The Nature of Equality: Apples and Oranges / Chests and Breasts" (1989) 1:1 Const Forum Const 3.

Dale Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986).

Dale Gibson, "The Charter of Rights and the Private Sector" (1982–1983) 12:2 Man LJ 213.

Dale Gibson, "Constitutional Amendment and the Implied Bill of Rights" (1967) 12:4 McGill LJ 497.

ENVIRONMENTAL LAW

Dale Gibson, "Constitutional Arrangements for Environmental Protection and Enhancement Under a New Canadian Constitution" in Stanley M. Beck & Ivan Bernier, eds., *Canada and the New Constitution: The Unfinished Agenda*, vol. 2 (Montreal: Institute for Research on Public Policy, 1983) 113.

Dale Gibson, "Constitutional Jurisdiction Over Environmental Management in Canada" (1973) 23:1 UTLJ 54.

Dale Gibson, "The Constitutional Context of Canadian Water Planning" (1969) 7:1 Alta L Rev 71.

JURISPRUDENCE AND LEGAL THEORY

Dale Gibson & Janet K. Baldwin, eds., *Law in a Cynical Society? Opinion and Law in the 1980s* (Calgary: Carswell Legal Publications Western Division, 1995).

Dale Gibson, "Judges as Legislators: Not Whether But How" (1987) 25:2 Alta L Rev 249.

LEGAL HISTORY

Dale Gibson, *Law, Life, and Government at Red River: General Quarterly Court of Assiniboia, Annotated Records, 1844–1872*, vol. 2 (Montreal: McGill-Queen's University Press, 2015).

Dale Gibson, *Law, Life, and Government at Red River: Settlement and Governance, 1812–1872*, vol. 1 (Montreal: McGill-Queen's University Press, 2015).

Dale Gibson, "The Supreme Court of Alberta Meets the Supreme Law of Canada" in Jonathan Swainger, ed., *The Alberta Supreme Court at 100: History & Authority* (Edmonton: University of Alberta Press, 2007) 99.

Dale Gibson, "Bible Bill and the Money Barons: *The Social Credit Court References* and their Constitutional Consequences" in Richard Connors & John M. Law, eds., *Forging Alberta's Constitutional Framework* (Edmonton: University of Alberta Press, 2005) 191.

PRIVACY LAW

Dale Gibson, ed., *Aspects of Privacy Law: Essays in Honour of John M Sharp* (Toronto: Butterworth, 1980).

R. Dale Gibson, "Legal Protections of Privacy" in R. St. J. Macdonald & John P. Humphrey, eds., *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworth, 1979) 179.

D. Gibson, "Common Law Protection of Privacy: What to Do Until the Legislators Arrive" in Lewis Klar, *Studies in Canadian Tort Law* (Toronto: Butterworth, 1977) 343.

R. Dale Gibson & John M. Sharp, *Privacy and Commercial Reporting Agencies* (Winnipeg: Legal Research Institute of the University of Manitoba, 1968).

TORT LAW

Dale Gibson, "Tort Law and the *Charter of Rights*" (1986) 16:1 Man LJ 1.

Dale Gibson, "The New Tort of Discrimination: A Blessed Event for the Great-Grandmother of Torts" (1980) 11 CCLT 141.

Dale Gibson, "Torts – Negligence and Occupiers' Liability – Role of Jury: Confusing Words from the Oracle," Case Comment, (1978) 56 Can Bar Rev 652.

Dale Gibson, "Torts – Illegality of Plaintiff's Conduct as a Defence," Case Comment, (1969) 47 Can Bar Rev 89.

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