



ON THE FRONT COVER

DAVID WALTER GIBBONS, Q.C.*

By the Honourable Josiah Wood, Q.C.

On August 27, 2004, at 3:18 A.M., David Walter Gibbons IV succumbed to pulmonary fibrosis, an incurable lung disease that can only be conquered by a lung transplant. He was then in the University Hospital, in Edmonton, Alberta, where he was on the list for a transplant operation as soon as a compatible lung came available. His time ran out after a 14-month wait, during which the effort of breathing became more difficult with each passing day.

For those of us who were his colleagues at the bar, his passing marks the end of an era, the like of which we shall not see again.

For all his many friends who knew and loved him, and whose lives he touched in one way or another, his passing leaves a void that simply cannot be filled.

For his wife, Janice, and his children, son David Walter V and daughter Lise, his passing is a loss that none of us can begin to comprehend.

Although packed into a small frame, Dave was a remarkable man with so much spirit, so much talent and so many wonderful qualities as to make us think of him at times as much larger than life itself. Thus, it seems right now to acknowledge his contribution to our profession by recording some highlights of his passage

* In the ordinary sequence of things, the president of the CBA B.C. branch appears on the front cover of the November issue and the president of the Law Society of B.C. appears on the front cover of the January issue. Michael C. Woodward and Ralston S. Alexander, Q.C., have graciously made way so that we could offer a timely tribute to the late David W. Gibbons, Q.C. We thank them for their generosity and understanding.

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through life and remembering some of those many occasions when he left us feeling better with ourselves for doing what we do.

In the closing years of the Great Depression an outstanding lacrosse player, David Walter Gibbons III, was lured from Burnaby, B.C., to an important railroad town in the province's interior on the promise of a job if he would play goalie for the local team. Accommodation was arranged for him in a rooming house owned by Mrs. Elsie Long, a widow with three children who also worked in the local brewery bottling plant. The second of Mrs. Long's children was a beautiful blond-haired daughter, Mary, who had just graduated from high school. The lacrosse star and the beautiful blond-haired Mary fell in love, married, and a few years later David Walter Gibbons IV was born. Thus it is that our great friend Dave, who always said he was a Burnaby boy, and who always was proud to be known as such, was actually born in Nelson, B.C.

A year later the lacrosse star moved back to Burnaby with his family. They took up residence in the rear of a barber's shop in the Jubilee area, about a block from where he had been born some 26 years earlier. Those were tough times for the family. The only thing that separated the living quarters from the barber's chair was a cloth curtain. In March 1943, Dave's brother Dick was born. Over the next years the family changed addresses many times, but always remained in south Burnaby.

Both Dave and Dick were outstanding athletes. In their younger years they played Little League baseball at Little Mountain Park, in what was the first Little League in the greater Vancouver area. They changed buses twice in order to get to their team's home park. After a year of Little League, Dave played Pony League at Carnarvon Park. The all-star team he played on that year went on to win the Canadian championship. In high school he played baseball, hockey and football, and he was an all-star in all three sports. Upon graduation from Burnaby South High School in 1958, he continued with football, playing first for the Burnaby Spartans and then, when that team disbanded, with the Vancouver Meralomas.

In 1961, brother Dick joined the Meralomas as quarterback. Dave was the middle linebacker and defensive captain. That year, together with a little help from the rest of the team, they won the B.C. title and the B.C.-Alberta championship, losing only to the Winnipeg Rods, who went on to win the Canadian championship in the next round. The following year the brothers played for UBC Thunderbirds. At the end of that season, Dave was named to the conference all-star team as middle linebacker. At 5'7", playing against much larger opponents, this was a sign of things to come.

Another early example of Dave's strength and determination occurred that year in a game against the University of Saskatchewan. He intercepted a pass and ran it back 65 yards for a touchdown. Dick, who was on the field at the time playing defensive halfback, ran beside him all the way, encouraging Dave to flip the ball to him as he was somewhat lighter and more fleet of foot. But Dave would have none of it, preferring instead to criss-cross the field several times straight-arming all who attempted to tackle him. He crossed into the end zone with a smile on his face, leaving the field behind him littered with prone opponents.

The strong legs that carried him to that memorable touchdown may well have been, at least in part, the result of his first job, which was delivering newspapers on his bicycle up and down the steep hills of South Burnaby. Other early forms of employment included setting bowling pins, pumping gas, working the green chain at local sawmills and labouring at a local foundry. He even sold cars in New Westminster for a time, but that job came to an abrupt end when the owner of the dealership found him shooting craps in the used-car salesman's shack.

Just before training camp in the fall of 1963, Dave sustained a shoulder injury that ended his football career. He decided to take a year out from university. After a sojourn in Europe, where he managed to take in the 1964 Winter Olympics in Innsbruck, Austria, he returned to UBC and in 1969 was a member of the law school's 22nd graduating class. He articulated to Marvin Storrow, Q.C., who many years earlier he had watched play baseball in Central Park. On the day of his call, he made his first appearance as a member of the bar in the Court of Appeal. He stayed on at the firm then known as DuMoulin, Storrow & Black, where he joined Marvin as junior counsel in several notable trials.

Perhaps the most notable of those was that of Arpad Eros, who had been charged with the attempted murder of his wife and daughter. Eros had previously been represented by a number of counsel. One had induced him to enter a guilty plea in Provincial Court, where, notwithstanding that court's lack of jurisdiction in such matters, he was sentenced to 10 years. Eventually the Court of Appeal straightened out that mess and ordered a new trial. Eros was then represented by two desperadoes who, in a hand-written retainer agreement, had promised him an acquittal in exchange for a \$500 fee. The \$500, received in advance, was spent on liquid refreshments which were consumed before, during and after court. The pair frequently disagreed with one another on how the defence strategy should unfold. One such disagreement ended with the two of them engaged in a wrestling match on the floor of the courtroom. When Eros finally realized he was not getting the best defence available, he retained Marvin and Dave, who persuaded the late Justice Dryer to declare a mistrial. The two desperadoes were eventually disbarred, but the damage had by then been done and, notwithstanding the combined talents of his new defence team, Eros went down, as they say, and was sentenced to four years.

Unfortunately, Eros's experiences with our profession, combined with a somewhat altered view of reality, produced in him a vengeful state of mind. Shortly after his statutory release from prison he accidentally blew himself up with a home-made bomb while crossing Fraser Street at 57th Avenue. A search of his apartment revealed 18 more bombs, together with a list of 19 people whom he had designated for execution. The list included Marvin and Dave, and all his other defence counsel, as well as all Crown counsel and jurists who had been involved in his case. Such an experience would have deterred many from further practice at the criminal bar, but not Dave. He was never lacking in courage.

In addition to practising primarily criminal law, first with Marvin Storrow's firm and then with his brother Dick at Poyner Gibbons Barrett & Gibbons, fol-

lowed by an association with John Baigent, Rod Germaine and Don Rosenbloom, Dave devoted his spare time in the early 1970s to various social causes. Perhaps the most prominent was his participation in the activities of Greenpeace during its early days, a role that culminated in him defending those accused of interfering with the 1978 seal hunt off the coast of Newfoundland, about which more will be said below. Rex Weyler, who has chronicled the Greenpeace epic, estimates that Dave contributed "thousands of hours" over the course of the 1970s defending Greenpeaceers who were charged with various offences as a result of what were sometimes called their "eco-terrorist" activities.

Politically a left-wing liberal in his early days, Dave had but a brief flirtation with the practical side of politics when he ran unsuccessfully as the Liberal candidate in Burnaby-Willingdon in the 1969 provincial election. His only other remotely politically connected activity came when he was appointed chair of the B.C. Racing Commission in 1974 by the NDP government of the day. His influence in that position was instrumental in changing the focus of the commission, which had long been the private preserve of the thoroughbred industry. In 1974 he presided over the hearings that resulted in the successful return of harness racing to British Columbia. That position also gave him the opportunity, if not a real excuse, to indulge himself in one of his favourite spectator sports—horse-racing. He had an uncanny ability to pick winners and was very much at home on both sides of the track.

In 1975–1976, Dave represented several of the defendants in the Palmer heroin conspiracy trial. He was part of a defence team that included Harry Walsh, Q.C., then perhaps the finest criminal lawyer in the country. It was during that trial that he took particular notice of one of three judge's clerks who frequently appeared in the public gallery to watch the proceedings. An introduction was arranged over lunch. After lunch, Justice Sam Toy happened to see them walking back to the courthouse. During that afternoon's sittings, the sheriff passed Dave a note from the judge, which was blunt and to the point: "Keep your hands off my clerk." The caution was ignored, and his friendship with Janice Dillon quickly blossomed into a devotion to her that lasted for the rest of his life.

The Palmer trial ended in the spring of 1976, and Dave found himself yearning for some excitement outside the law. He had purchased an Islander 36 and on July 3 of that year, after a still-talked-about party with family and friends at the Empress Hotel, he and three friends set sail for the South Pacific. Their travels took them first to Hawaii and thence to Fanning Island, a succession of other former colonial outposts and eventually to American Samoa. There, Dave decided to leave the boat for awhile and return to Vancouver to be with Janice, who was nearing the end of her articles. One small bit of fun from that moment reminds us of the unique combination of wit and creative thinking that was to contribute to his success as a criminal defence lawyer. Before leaving, he was determined to take the crew to the then-famous Margaret Mead lounge in the Rainmaker Hotel. He was wearing shorts, which were not a little the worse for wear after eight months at sea. A polite *maitre d'* advised that shorts—respectable or otherwise—were not

allowed. Dave noticed the waiters were all wearing lava lavas, a form of Polynesian dress not unlike a skirt. He asked why shorts were forbidden if skirts were allowed. The nature of the cultural dress was explained to him, whereupon he grabbed a nearby table cloth, wrapped it around himself in lava lava fashion and asked if he and his friends could now be seated. They were.

Over the course of the next two years, Dave and Janice sailed a bit in the South Pacific and lived together on a farm in the Gatineau, while Janice worked at the Law Reform Commission of Canada in Ottawa. During that time Dave sometimes parked his gown at a law office in Gastown, returning to Vancouver occasionally to defend the odd brief. He also spent time in those days reading, painting, fly fishing, cooking and generally enjoying the finer things in life while he contemplated returning to practice. But his principal diversion in the brief years of leisure was his pro bono practice for the causes in which he so strongly believed. One such brief was an application on behalf of the Canadian Civil Liberties Association for standing before the McDonald Royal Commission into illegal activities carried out by the R.C.M.P. Although Dave was denied standing as a full participant, Mr. Justice McDonald permitted a watching brief with the right to make final written submissions.

Perhaps the most memorable pro bono brief in that period led to Dave's role as lead counsel in the defence of the Greenpeace volunteers who were arrested in March 1978 for interfering with the progress of the Newfoundland seal hunt. The trials were scheduled in July of that year. Dave and Janice spent much of that summer in Corner Brook. The first trial, in which David led the defence team, resulted in an acquittal of all accused on a charge of loitering in a public place. This led to the Law Society of Newfoundland withdrawing its consent to allow out-of-province counsel to defend the accused. So Dave and Janice were left to sit in court as advisers to local counsel, which they did successfully. Patrick Moore and another Vancouver lawyer, Peter Ballem, were acquitted on charges of violating provisions of the federal *Seal Protection Act*. The federal government's decision to use that statute to prosecute those who were seeking to prevent the death of seal pups will be remembered as one of the great ironies of that decade.

In 1979, Dave and Janice returned to Vancouver, where he rejoined his gown on a full-time basis. He became a partner at the firm of Deverell Harrop, an association that lasted over a decade, until he left that firm to open a small criminal law boutique in the Marine Building, where he shared space with Peter Ritchie and others. At the time of his passing, his firm included Richard Fowler and Mathew Nathanson as partners and associates David Layton and Talman Rodocker.

From the time of his return to Vancouver until his death, Dave was defence counsel on some of the toughest and most notable criminal cases in Canada. He had a remarkable record of acquittals. His understanding of people, his determination to succeed and his refusal to regard any case as beyond hope of an acquittal made him an obvious choice for those who found themselves in the most serious trouble. In particular, he spent much of the next decade in Canada and elsewhere in the world defending Sikhs whose conduct during the turbulent years

leading up to and following the Indian Army's raid on the Golden Temple brought them into conflict with the law.

As a result of his efforts on behalf of Sikh defendants, Dave was himself the subject of electronic surveillance by CSIS. It was an experience that confirmed both his deep suspicion—one might almost say distrust—of the authority of the state as well as his commitment as a defender of the civil rights of us all. Although Dave was a true patriot, he had no illusions about the ability, if not the tendency, of those who wield the power of the state to exercise that power on occasion without appropriate regard for the means used to achieve the desired end. He took the view that the criminal defence lawyer was the foot soldier in the timeless war against state tyranny, and he had no illusions either that such tyranny is confined to the Third World or that it could never arise in a democracy—even one so benign as ours. In 1987, Talwinder Singh Parmar and others were acquitted of conspiring to blow up the Indian Parliament because the Crown refused to comply with the trial judge's order to disclose certain evidence used to obtain authorization to intercept their private communications. As Dave and the accused emerged onto the steps of the courthouse in Hamilton, Ontario, he announced to the media his view that the government ought to apologize to the accused for the manner in which the investigation and the case had been conducted. By this time, Parmar was widely regarded as the prime suspect in the Air India bombing two years earlier, and many thought Dave's statement bordered on the extreme. But for Dave it was unconscionable for the state to seek to convict an accused—no matter who he was or what he was thought to have done—on evidence that the prosecution refused to disclose. His passionate belief in everyone's right to a fair trial would not let him stand silent on that or any other occasions when he felt that right was threatened.

While Dave always defended all his clients with great vigour and determination, his relations with bench and bar alike always remained cordial. His candor and ever-present wit were qualities that endeared him to his colleagues at the bar, to the judges before whom he appeared and to the jurors to whom he pleaded so successfully. There are many wonderful stories of moments in and out of court when Dave brought a smile to the faces of those around him. On one occasion, after describing his client's unsuccessful defence in the court below, he reduced the Court of Appeal to unrestrained laughter by stating: "Now my Lords, even I don't believe that, and I'm from Burnaby." He went on to win the appeal. Dave always believed that "laughter is the enemy of the Crown", and he never let an opportunity to test his theory go by. Once, a Crown witness was asked by the prosecutor to describe the size of the knife with which the accused attacked him. The witness held up his hands to demonstrate the length of the blade and counsel asked Dave to agree that the witness was indicating a length of nine inches. No agreement was forthcoming, and as the argument between them went on, Dave remarked as how the witness's hands appeared to be moving ever further apart. In exasperation, the prosecutor stated for the record that in his estimation the witness was indicating a length of nine inches, whereupon Dave shot out of

his seat and, with a straight face and a tone of mock severity, said: "Well, we all know, M'Lady, how notorious men are for overestimating the length of things."

In addition to a constantly heavy trial schedule, Dave's commitment to pro bono work continued throughout the balance of his life. Examples of his dedication to the causes he championed included acting for those who had been enjoined from protesting the logging of old-growth trees in Clayaquot Sound, defending those charged with attempting to stop the hunting of bears on the west coast of Vancouver Island and acting for the West Vancouver Citizens' Group, which sought to stop the expansion of the Horseshoe Bay Ferry Terminal. His efforts resulted in one of the first successful attempts to reverse the conviction of an innocent person when he obtained an acquittal for a man who had served over half of a lengthy sentence after being erroneously identified as the perpetrator of an aggravated sexual assault. In 1992, he took up the cause of Alan Percy Hoare, a retired Vancouver City Police officer who had suffered serious wounds in a gun battle on Vancouver's False Creek Flats in 1947. As he aged, Hoare suffered medical complications and disability as a consequence of those wounds. When his efforts to obtain compensation from the Workers' Compensation Board failed, Dave brought an action on his behalf. The resulting publicity led to an out-of-court settlement. Dave always understood that the law sometimes works in mysterious ways. While his pro bono efforts were not always successful, such as the attempt he and Janice made on behalf of the families of Clifford Olson's victims to prevent the Olson family from profiting from his unspeakable crimes, they nonetheless enriched the legacy of our profession.

In addition to all of his other activities, Dave also found time to serve his profession by participating in its governance. In January of this year he became a life bencher of the Law Society, having served eight years as an elected bencher on the credentials, discipline, and futures committees and chairing the independence of the bar committee. As a life bencher he remained an active member of both the discipline and independence of the bar committees, participating vigorously at meetings via long-distance telephone from Edmonton until the late spring, when the effort to breathe during extended conversation became too great.

Although Dave was perhaps best known to the public generally as one of Canada's most prominent defence counsel, he had many talents other than in the law and a vast array of interests that he pursued with the same energy that characterized his defence of the always innocent. He was an accomplished fisher, as we now call such people, whether on a lake in the Interior with one of his large collection of fly rods, or on the ocean off the west coast of Vancouver Island. He was a great cook and a wonderful host, with a wine cellar that had something for every taste. Social occasions at the Gibbons' residence often featured an ensemble of local jazz musicians and an eclectic guest list. He was a faithful patron of the arts. Virtually every bit of space on the walls of his home and office is covered with the works of local artists. He read widely and was always up for a lively discussion, or better still a friendly argument, on matters of history, politics and issues of social concern.

Dave was also renowned for his generosity. He had great compassion for the less fortunate souls among us for whom panhandling is the only form of gainful employment. He often responded to their solicitations with "folding money" rather than coin, especially if, after a gentle cross-examination, they confessed to being more thirsty than hungry. Many a former client, struggling to get back on his or her feet, was favoured with his generous assistance. What surely must be regarded as a remarkable example, in that context, is the case of a young man who in 1972 was charged with the murder of his brother. The only real evidence the Crown had was his confession. Dave successfully argued that the confession should be excluded on grounds of the young man's "insanity", as it was then known. The result was an acquittal without the need to resort to that defence, which would have led to detention at the pleasure of the lieutenant governor, a pleasure that in those days seemed never to end. While that result was a strategic triumph, the young man's disability haunted him permanently, and he was never able to hold down gainful employment. It was only near the end of Dave's practising days, in the spring of 2003, that his partners and associates learned who it was that frequently visited with Dave privately just long enough to receive a generous handout and mutter a few words of thanks.

No one knew that Dave, a non-smoker, was first diagnosed with pulmonary fibrosis in 1996 at which time he was told that he had, at best, 10 years to live. With his characteristic determination and without complaint he pressed on with the tasks at hand, keeping a trial schedule and a workload moving at a pace many younger, healthier lawyers would find difficult to maintain. Perhaps the most wearing and difficult of all the trials he had in the last years he practised, and the one that will be most remembered in the years to come, was his successful defence of former premier Glen Clark on a charge of breach of trust. It was, in fact, the last full trial he finished. As the year it took to complete wore on, his gait slowed and his breath shortened, but his spirit never flagged and his will to win for his client never weakened.

There is much more that could be said about Dave, and so many more moments when he made us laugh with him as well as at ourselves that could be recorded. But in the end, it is perhaps enough simply to note that he was much loved by all who knew him. And, lest we mourn his passing too long, it is well to remember the words of a struggling poet—she must surely have been Irish—whose contribution to our literature Dave, with that twinkle in his eyes and the ever-present smile, would heartily endorse: "The sleep that has no waking should be followed by the wake that has no sleeping."

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