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A Property Law Reader: Cases, Questions and Commentary, 4th Edition, Preface and Table of Contents

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CARSWELL

A PROPERTY LAW READER

CASES, QUESTIONS, & COMMENTARY

FOURTH EDITION

Bruce Ziff

Jeremy de Beer

Douglas C. Harris

Margaret E. McCallum



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PREFACE

Property law—that body of rules which describes and defines relationships between people with respect to things—involves many choices. The choices include determining when it is appropriate and desirable to label something as property or, more accurately, as subject to a relationship between people based in the rules of property law. The choices involve asking questions, including why it is that we create relationships based in property and who should benefit from them. The rules of property law are notoriously difficult and complex, and they frequently appear disjointed and unconnected, but they are not arbitrary. They are based on choices, sometimes made explicitly, other times implicitly, about what is important.

One of our principal goals in this collection of property law materials is to emphasize that the making of choices is a necessary, although commonly under-acknowledged, element in creating a regime of property law. We have made a choice to highlight what Margaret Davies has described as “asking the why question”. This involves using materials that prompt not only an investigation of the rules of property law but also the justifications for those rules.

Another choice we have made in compiling this material is to highlight the disparate sources of property law. Excerpts from the decisions of common law courts dominate the page count, and learning to derive the principles and the rules from these decisions is a core element in a common law legal education, but there is much else besides. We have chosen to emphasize Indigenous legal traditions as one of the sources of Canadian property law alongside the civil law tradition in Quebec and the common law tradition (including principles of equity) in the rest of the country. This presents challenges, not the least because the concept or category of property, as it has developed in western legal traditions, sits uneasily with many Indigenous legal traditions. But it is also a useful reminder that the rules governing human relationships with respect to things are not only jurisdictionally, but also culturally and historically specific.

The law of property is also to be found in a great diversity of legislative instruments, ranging from city by-laws, through provincial and federal statutes and regulations, to international agreements. These sources are scattered throughout the volume, but using them presents other challenges. Within the Canadian federation, property is primarily a matter of provincial jurisdiction, and the diversity of property regimes among the provinces limits our capacity to delve into the particular statutory framework of any one jurisdiction when producing a set of materials that is relevant across Canadian common law jurisdictions. As a result, we include examples from different jurisdictions and leave it to course instructors to add as much or as little of what is particular to their jurisdictions as they think desirable.

Although this volume includes a great deal more than excerpts from judicial decisions, it retains the “casebook” form. Casebooks are to a law course what a collection of primary documents is to a history course or a poetry anthology is to a course in literature. They are not intended as expositions of doctrine, but rather

to provide students the raw material from which to derive the law, learn the conventions of interpretation, and make normative judgments. As a result, the cases, statutory instruments, academic articles, and other material in this volume are intended to help students recognize the issues that property law addresses and to develop a basic understanding of the framework that structures property relationships. As a casebook, the *Reader* is designed to help students ask good questions as much as it is to provide answers.

It may be helpful to think about the *Reader* as containing the material to create a series of maps. Imagine the kind of information that enables one to navigate an urban setting. The topic headings in the casebook are like the names of neighbourhoods, the names of the cases and statutes like the names of streets, the statutory provisions the addresses. Lists of neighbourhoods, streets, or addresses would not be of much use in navigating a city, or at least not nearly so helpful as a map that revealed how the neighbourhoods and streets fit together, and perhaps some indication of the local topography. Learning property law requires maps at various scales to understand its scope and detail.

The processes of legal reasoning, argumentation, and decision-making may be understood as an exercise in winnowing. From the enormous complexity of human relations, the law of property attempts to isolate one subset of relationships: those between people with respect to things. This narrowing involves a great many choices about what is relevant and irrelevant, about what is appropriately within the law of property or beyond it. The judicial decision-making process on which the common law is built involves a further narrowing of focus in an effort to isolate “the issue”. Cases are often won or lost based on which characterization of “the issue” a court accepts.

We have compounded this process of narrowing in compiling the casebook. In most instances the materials are extracts from longer texts. Those texts, simplifications themselves of the human experience, usually consider a number of issues, but we have edited many of them to eliminate discussion of facts, legal principles, or authorities that are not necessary to understand the resolution of the property issues that matter for the purposes of this casebook. What one gains in focused analysis, one loses in context. We have used three dots to indicate where text has been omitted, square brackets to enclose added text.

Full texts of the material reproduced here are available in public or commercial databases or in courthouse and university libraries. In addition, law reports—compilations of cases—commonly provide a summary of the facts and the outcome (a headnote), a list of cases, statutes and academic authorities cited in the reasons for decision, the names of the lawyers representing the parties, and sometimes even a comment on the case. However, if you need to step back from a particular case or other source, to discover where it fits within the larger regime of property law, then textbooks are a useful reference.

Generally speaking, the *Reader* adopts the structure and tracks the contents of Bruce Ziff’s *Principles of Property Law* 6th ed. (Toronto: Carswell, 2014). That book, a property law textbook, is intended as an exposition of property law rather than a collection of teaching materials. This casebook may be used in conjunction with that textbook or as a stand-alone reader.

PREFACE v

Many people assisted with this project. We are grateful for the permission to reproduce previously published works. These are listed in the opening pages. We thank UBC Allard School of Law JD graduate Kaitlin Green who gathered syllabi from the instructors who have used earlier editions of the *Reader* and who created tables to help us learn what parts of the book were most useful to them. Andrew Pilliar, a law student in UBC's graduate program, helped with the editing process. Steve Hostetter provided superb production assistance at Carswell. Sarah Bourne and Erin Gwynne helped on the management side. We thank our property law colleagues from across Canada and beyond for generously sharing ideas about the teaching of property law. Finally, we thank our students for generously accommodating the fact that they landed in the classrooms of property enthusiasts and for providing the inspiration to find better ways to communicate that enthusiasm.

In this revised edition Jeremy de Beer assumed primary responsibility for chapters 3, 4, and 5, Douglas Harris for chapters 2, 9, and 12, Margaret McCallum for chapters 6, 7, and 10, and Bruce Ziff, for chapters 1, 8, and 11. Bruce also retained final editorial control over all the chapters.

The general cut-off date for the law is January 1, 2016.

Bruce Ziff
Jeremy de Beer
Douglas Harris
Margaret McCallum
May 25, 2016

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