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A PROPERTY LAW READER: CASES, QUESTIONS, AND COMMENTARY

FIFTH EDITION

Douglas C. Harris, Jeremy de Beer, Tenille E. Brown, Patricia L. Farnese



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A PROPERTY LAW READER

*CASES, QUESTIONS, AND
COMMENTARY*

FIFTH EDITION

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PREFACE

Nobody has been more influential over the past generation in the teaching of property law in Canada than Bruce Ziff. His *Principles of Property Law* is the foundational textbook on the subject. *A Property Law Reader: Cases, Questions, and Commentary*, which he first published as a sole author in 2004, has become, over three subsequent editions, the most widely used teaching material for property law in the country. Bruce retired from teaching property law in 2019. His retirement left major holes not only at the University of Alberta, where he taught for decades, but also throughout Canada in terms of guiding students, mentoring professors, and developing teaching materials and other resources for property law.

Bruce had brought in Jeremy de Beer, Douglas Harris, and Margaret McCallum to collaborate with him on the 2nd, 3rd, and 4th editions of *A Property Law Reader*, but with his retirement, and also with Margaret's, after years at the University of New Brunswick, the 5th edition is the product of a new scholarly collaboration with Tenille Brown and Patricia Farnese joining Jeremy and Doug. Although Bruce has stepped aside entirely from this 5th edition, his intellectual contributions remain profound. Much of the material within chapters has been updated or replaced, but the 5th edition retains the structure and organization that Bruce initially conceived. It also retains many of Margaret's contributions to the selection of material and the commentary.

The preface of the 4th edition began with this statement: "Property law—that body of rules which describes and defines relationships between people with respect to things—involves many choices." The opening paragraphs continued by emphasizing that these choices, explicit or implicit, involve important decisions about the allocation of resources, and further, that we needed to interrogate the justifications for these decisions. The materials in the 4th edition, and in this 5th edition, return repeatedly to the justifications for particular rules and to ask whether they remain convincing. Indeed, the collection of materials was designed to enable an investigation of property law rules, and of the justifications for them.

In this edition, we take up and problematize the statement about the essence of property law that, useful as it is, describes a body of law that emerged in England over centuries and was then transplanted to North America through processes of imperial and colonial expansion. In North America, that body of English law, itself the product of diverse legal sources, encountered the legal traditions of many Indigenous peoples into which English notions of property did not easily fit. Perhaps most profoundly, the clear and stark dichotomy between the human and non-human worlds—between humans as the subjects of property and everything else in the world as a potential object of property—did not work. Relations between humans were and are undeniably important in those legal traditions, but so too were and are relations between humans and the realms of other-than-human beings. The materials in this edition engage more fully with Indigenous legal traditions as one of the sources of Canadian property law and as

a lens through which to view bodies of law as cultural constructs, not statements of universal principles.

The issue of race and of the role of property in the racialization of people is also brought more prominently to the foreground in this edition. The historical status of Black people as objects of property—as slaves—has had profound effects on the unequal distribution of property and in the structures of property itself. The materials engage with these distributional and structural issues that result from, and arise in, the doctrine of property.

In choosing material for this edition, we have drawn heavily, as in past editions, from the decisions of judges in Canadian courts—the traditional source of principles and rules in a common law system—but this is far from a traditional casebook. In fact, that label, which suggests a curated collection of judicial decisions, seems increasingly incomplete given the diversity of material presented in the following pages. Moreover, this edition includes a great deal more material than can be covered in property law courses as they are currently offered in Canadian law schools. Our colleagues who use this resource will select from the array of subjects and sources presented here, and will augment their courses with a great deal more. Property law is perhaps the most local or provincial of compulsory subjects in the law school curriculum, so a resource that aspires to be relevant in common law jurisdictions across the country will require supplementary materials to engage with the particular.

At the start of each chapter, and then each section, we introduce and contextualize the materials, and throughout we provide commentary and ask questions of that material. However, the emphasis in *A Property Law Reader* is on writings from other sources. As a casebook, it is distinct from a legal textbook, which is intended as an exposition of the law. The structure of this 5th edition, as with the earlier editions, mirrors Bruce's *Principles of Property Law* textbook, currently in its 7th edition (2018) and soon to be available under the direction of new authors in an 8th edition.

In mentioning our colleagues in the teaching of property law, we acknowledge our many debts to them and to their inspirational work as scholars and as teachers. We feel privileged to work in a field with such committed, engaged, and talented faculty members. We have included material from many of them in this edition, and we intend to broaden our reliance on that work in future editions. The Association of Law, Property, and Society (ALPS) has provided fertile ground for discussing property law teaching, and so too has the Canadian Association of Law Teachers/L'Association Canadienne des Professeurs de Droit. Although identifying particular people is always hazardous because some deserving individuals may well be omitted, we would like to extend our particular thanks to Alex Flynn, Karin Mickelson, Dennis Pavlich, Graham Reynolds, and Stepan Wood at the University of British Columbia, Angela Cameron, Vanessa Gruben, Teresa Scassa, and David Wiseman at the University of Ottawa, and Felix Hoehn, Marilyn Poitras, Ruth Thompson, and the staff and students of the Program of Legal Studies for Native Peoples at the University of Saskatchewan. We are fortunate to work with such generous colleagues.

We have benefited enormously from our students. Property law flies somewhat under the radar when students think about law school and the subjects that might excite them, so we are always delighted when the course and its material become unexpected sources of interest and engagement. Teaching law involves traversing the terrains of law school curriculums, legal doctrine, social conflict, and the lived experiences of our students, and we as teachers are constantly adjusting our paths as these terrains change. This collection is an attempt to assist in navigating that path, and it owes a great deal to the willingness of our students in past years to join in the journey.

We extend our particular thanks to Georgia Coles (Ottawa) and Josephine Bulat (Ottawa), who surveyed and reported on the usage of the 4th edition, Erin Lashta (Saskatchewan), who worked diligently to secure permissions and update the index, and Clarence Lakpini (Ottawa) and Adedamola Adediji (Ottawa), who proof read the manuscript. At Thomson Reuters, Ken Murphy, as publishing manager, was unfailing supportive, and Alexandra Hutchinson was exceptionally careful and thorough as copy editor.

We also thank Professor David Garneau, Head of Visual Arts at the University of Regina, for permission to use his “Red River 1870s (beaded map)” on the cover. In his Artist’s Statement, David reveals the practice of beading as an expression of Métis identity. Recent work by Métis scholar Danielle Lussier describes Beadwork Practice also as a form of Indigenous legal pedagogy. With the selection of David Garneau’s artwork for this edition’s cover, we acknowledge the diverse sources of law in this country and the many ways in which law may be learned.

In this revised edition, Jeremy de Beer assumed primary responsibility for chapters 3, 4, and 7, Tenille Brown for chapters 1, 5, and 6, Patricia Farnese for chapters 2, 8, and 12, and Douglas Harris for chapters 9, 10, and 11. Doug also assumed general editorial oversight.

Douglas Harris
Jeremy de Beer
Tenille Brown
Patricia Farnese

July 4, 2022

COVER IMAGE ARTIST'S STATEMENT

“Red River 1970s (beaded map)”

My first maps paintings were “Red River 1870s (beaded map),” acrylic on canvas (2006), and “Edmonton 1880s (beaded map),” acrylic on canvas (2006). I was researching Métis material history and was surprised to learn that Edmonton and Winnipeg were originally settled according to the Métis/Quebec style of river lots. I knew about my family’s river lot (lot 7), in Edmonton, since childhood, but somehow didn’t make the connection that the whole settlement was divided by such lots. I painted the paintings because I wanted a record of this Métis trace.

For a few years, I had been making representational paintings of Métis history in styles informed by European art history traditions and American pop culture. I wanted to come up with a style informed by Métis material culture. I looked at historical beading. First, I tried actual beading. I wasn’t so good at it. I then decided to translate the beads into painted dots. The dots are rather random ways of filling space in these first efforts. In later paintings I play off specific traditional designs. I didn’t know about Christie Belcourt’s work or Aboriginal Australian dot painting until later. I was inspired by Alex Janvier’s maps. In 2008, I went to Australia where I learned that their dot paintings were also maps.

It was important to me to map the space that resides beneath and among the surface we think we know. I grew up knowing about river lot 7 but not how it was in a community, a Métis community of other river lot people. To find a way to make this record as art, as something that has a form that is identifiably Métis was also important. I wanted a form that had both continuity and was a translation that allowed me some artistic freedom to invent. Each of these paintings is a land claim, a personal claiming of Métis territory and memory.

The map has people know that the way the city is currently laid out, in the case of Winnipeg, is influenced by the original design/inhabitants. While in Edmonton, the colonial design (grid) overwhelms the former design/inhabitants. Each painting is in a public collection. It is important to me that my work reaches a broad and thinking audience who will want to know more. My work is often used as teaching tools.

David Garneau
Professor and Head of Visual Arts
University of Regina
July 4, 2022

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