

Review of Alan M. Sinclair & Margaret E. McCallum, *An Introduction to Real Property Law*, 7th ed. (Toronto: LexisNexis Canada, 2017)

Paul T. Babie*

Alan M. Sinclair published *Introduction to Real Property Law* in 1969.¹ While the magisterial *Anger & Honsberger Law of Real Property* was available to the practitioner from 1959,² until the publication of Bruce Ziff's *Principles of Property Law* in 1996,³ Sinclair's book remained the only text available to Canadian law students on the intricacies of real property law. Through the third edition, published in 1987, Sinclair was the sole author of the book.⁴ In that third edition, Sinclair stated his aim, which was the book's hallmark through each of the editions he authored:

During several years teaching the elements of the law of real property to first year law students, it has been somewhat of a chore, not always an unpleasant one, to cover the material considered basic to an understanding of this important facet of the law. This factor, combined with the ever-increasing intrusion of new concepts and additional uses of old ones into the field leads today's student and teacher to the realization that a succinct statement of the basics of the law is essential. Many of us pay less attention than perhaps we should to the fundamentals; but time controls. This small volume is an attempt to alleviate the difficulty and enable the student to assimilate these basics more readily and for the teacher to move more rapidly on a broader base.⁵

The third edition contained a mere 105 pages, and it lived up to Sinclair's aim—to provide a succinct statement of the historical background to the doctrines of tenure and estates, and the rules which had been built around them to form the modern common law of real property. Uncluttered by footnotes or long expositions on the complexities of the historical and contemporary law, Sinclair's book was the perfect resource for the law student.

* ALS Professor of Property Law, The University of Adelaide, Australia.

¹ Alan M Sinclair, *Introduction to Real Property Law* (Toronto: Butterworths, 1969).

² HD Anger & JD Honsberger, *Canadian Law of Real Property* (Toronto: Canada Law Book, 1959); HD Anger & JD Honsberger, *Law of Real Property*, 2nd ed by AH Oosterhoff & WB Rayner (Aurora: Canada Law Book, 1985); HD Anger & JD Honsberger, *Law of Real Property*, 3rd ed by Anne Warner La Forest (Aurora: Canada Law Books, 2006).

³ Bruce H Ziff, *Principles of Property Law* (Scarborough: Carswell, 1993); for latest edition, see: Bruce H Ziff, *Principles of Property Law*, 7th ed (Scarborough: Carswell, 2018).

⁴ The second edition appeared in 1982: Alan M Sinclair, *Introduction to Real Property Law*, 2nd ed (Toronto: Butterworths, 1982).

⁵ Alan M Sinclair, *Introduction to Real Property Law*, 3rd ed (Toronto: Butterworths, 1987) at vii.

In 1997, Margaret McCallum joined Sinclair as an author for the fourth edition,⁶ and since then the book continues to attain succinctness—it remains slim, at just under 200 pages—while adding some light footnoting and a slightly fuller treatment of the complexities surrounding real property law.⁷ While joined by Ziff and an even more substantial *Anger & Honsberger*, Sinclair and McCallum’s *An Introduction to Real Property Law* remains an excellent primer for the Canadian law student.

In this review, I focus on one very important contribution contained in the seventh edition. In the Preface, McCallum offers this admonition:

The aphorism that property is theft, attributed to Pierre-Joseph Proudhon, is a rough summary of the following passage from his book, *What is Property? Or, an Inquiry into the Principle of Right and of Government* (1840):

If I were asked to answer the following question: *What is slavery?* and I should answer in one word, *It is murder*, my meaning would be understood at once. No extended argument would be required to show that the power to take from a man his thought, his will, his personality, is a power of life and death; and that to enslave a man is to kill him. Why, then, to this other question: *What is property!* may I not likewise answer, *It is robbery*, without the certainty of being misunderstood; the second proposition being no other than a transformation of the first?

Agreement with Proudhon does not necessarily follow from recognition that rules governing distribution of property rights do not ensure equal access to, or efficient allocation of, the world’s resources. That is not their purpose. As you read this book, think about why we have the property rules that it explains, and how you might organize the rights and obligations of owners of land if you were beginning anew.⁸

McCallum’s question challenges those who inquire into the nature and operation of real property law to ask about the reason for its rules and how we might want to change them if we seek a more just and equitable distribution of the earth’s goods and resources. Indeed, so important is McCallum’s admonition that one might wish it had been found not in the Preface, where it risks being overlooked, but in the Introduction, as the organizing theme of the entire book.

⁶ Alan M Sinclair & Margaret E McCallum, *An Introduction to Real Property Law*, 4th ed (Toronto: Butterworths, 1997).

⁷ For latest edition, see: Alan M Sinclair & Margaret E McCallum, *An Introduction to Real Property Law*, 7th ed (Toronto: LexisNexis Canada, 2017).

⁸ *Ibid* at ix.

If we used McCallum's admonition as the lens through which to view real property law, we would see that it requires both description—what the law is, what it does—and normative argument—how the law should be and what it ought to do. Description would reveal not only the rights which comprise it, but also that property carries the potential to do more than distribute resources. It can, as Proudhon reveals, concentrate power in a few, allowing them also to exploit others.⁹ The potential for such concentrations requires deep thought, then, about the fact that the rules are not entirely neutral. Instead, they might be politico-ideological responses to the world in which we live. If that is so, then rather than a mere collection of rights, property is also deeply concerned with obligations, duties, and responsibilities that go along with the exercise of its rights. Such obligations do exist, but it often takes effort to find them in the midst of the array of rights thrown at us as we consider the law of real property. This difficulty is compounded for the uninitiated who struggle to come to terms with the doctrines of tenure and estates, the rule against perpetuities, and the contingent remainder rules, to name but four parts of the law of real property. But McCallum challenges all of us—the initiated and the uninitiated—as we work our way through the intricacies of what the law is, to turn our minds to what real property could be, indeed, what it ought to be. For it is only when we consider those obligations that do exist that we can determine where they might also be lacking, where they need alteration, where they need supplementing, and where we might need to add obligations not yet recognized.

The seventh edition provides three helpful guideposts for describing real property law and for making normative claims about its obligations—for thinking not only about what real property law is, but also about how it might be changed to meet new socio-politico-economic conditions. First, the revised Introduction not only contains an excellent overview of tenure and estates (as has every edition), but also a contextualization of Canadian property law. While focused on Canadian law, this proves valuable to anyone interested in the operation of real property systems in post-colonial common law jurisdictions. This contextualization makes it possible to consider the normative question: how can real property adapt to contemporary challenges so as to ensure that in addition to rights, its holders also bear responsibilities to others in exercising the powers conferred by those rights? The Introduction, then, forms an important adjunct to McCallum's admonition.

A second guidepost explores how Canadian law has responded to the colonial dispossession of First Nations peoples and recognized rights to land and natural resources of those peoples as part of a response to colonial injustice. This is the single most important issue to face post-colonial legal systems.¹⁰ Since the Supreme Court

⁹ See Paul Babie, "A Great Exploitation: The True Legacy of Property", Review Essay of *The Great Demarcation: The French Revolution and the Invention of Modern Property* by Rafe Blaufarb (2018) 31 Intl J Sem L 977.

¹⁰ In the Canadian context, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Peter H Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017).

of Canada's 1973 decision in *Calder v British Columbia (AG)*,¹¹ common law Aboriginal Title in Canada has grown in importance. The emergence of this form of title in Canada mirrors similar developments in other commonwealth jurisdictions, most notably in New Zealand¹² and Australia.¹³ Any book on post-colonial real property therefore requires careful treatment of this significant topic; this is found in an entirely new chapter in the seventh edition.¹⁴ There is much to be learned from this chapter about the way in which real property law operated historically so as both to oppress and to work a grave injustice upon First Nations peoples. Equally importantly, the chapter provides guidance as to how the law of real property forms part of our modern response to past injustices. Indeed, First Nations law itself may contribute to an innovative re-purposing of property law to address contemporary challenges such as climate change. In response to the most recent report of the UN Intergovernmental Panel on Climate Change, for example, Indigenous leaders of 42 countries wrote that “[f]ailure to legally recognize our rights leaves our forests vulnerable to environmentally destructive projects that devastate forests and release massive amounts of carbon into the atmosphere.”¹⁵ As we consider the ways in which the rules of allocation might be changed so as to result in more equitable distributions of resources, in ways that minimize harm to others, the interaction of common law and First Nations perspectives has the potential to bear much fruit.

Finally—and this may be of greatest importance to first-year law students—learning the law of real property is best achieved by doing; the only way fully to internalize the operation of tricky concepts is by continuous practice. For that reason, and while earlier editions of Sinclair always assisted in an understanding of the difficulties of common law real property, the seventh edition includes an entirely new section of review problems as well as a glossary of terms.¹⁶ These additions allow students to internalize the rules of real property law for use in preparing for the immediate focus—exams—and the longer-term goal—legal practice.

In short, the seventh edition, albeit in a slightly different way, achieves Sinclair's original aim, as stated by McCallum: “to create order from the chaos of real property law, and to show the continuing significance of arcane and seemingly archaic common law doctrines.”¹⁷ But it does more than that alone, for it demands that we not

¹¹ *Calder v British Columbia (AG)* [1973] SCR 313, 34 DLR (3rd) 145. See also Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

¹² *R v Symonds*, [1847] NZPCC 387.

¹³ *Mabo v Queensland (No 2)*, [1992] 175 CLR 1, 107 ALR 1.

¹⁴ See chapter 6 in Sinclair & McCallum, *supra* note 7.

¹⁵ “A statement on the Intergovernmental Panel on Climate Change (IPCC) Special Report on Climate Change and Land from Indigenous Peoples and local communities* from 42 countries spanning 76% of the world's tropical forests” (2019), online: *Indigenous + Community Response to IPCC Report* <ipccresponse.org/home-en>.

¹⁶ Sinclair & McCallum, *supra* note 7, at 141–86.

¹⁷ *Ibid* at ix.

only seek to understand and bring order to what otherwise might be chaos, but that we also seek ways for ensuring that in the disorder, injustice is not worked. It asks us to think about both what exists, and what ought to exist.