

BRUCE ZIFF'S LEGAL HISTORY

ERIC M. ADAMS*

This article explores Bruce Ziff's life and career as legal history. It charts Ziff's biography, journey in law, and contributions to Canadian legal history. Doing so provides a snapshot of Canadian legal education in transition: from the modest scholarly environment Ziff encountered as a Canadian law student in the 1970s, to the generation of legal scholars he joined in the 1980s, determined to push Canadian law teaching and scholarship in new directions. Canadian legal history came of age in this period as scholars, Ziff included, found in Canada's legal past deeper stories to tell about law's life on the ground, and exciting new avenues of research for the future.

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I. INTRODUCTION

Like thousands of other law students in Canada, I first met Bruce Ziff in words. The assigned text in my first-year Property Law class at Dalhousie Law School was the second edition of Bruce Ziff's *Principles of Property Law*.¹ My regard for the book, its capacity to bring sense to a subject I often found unwieldy and foreboding, ensured my nervousness when I first met Professor Ziff a few years later. Fortune placed me beside him at the closing banquet of my first academic conference as a graduate student. Bruce ate quickly, and said little. He looked about the room wryly, and left early. What a legend, I thought. Chance smiled on me in a more lasting way when I subsequently joined the University of Alberta, Faculty of Law and Bruce became my colleague.

Given my scholarly interests, I have always been particularly drawn to the branch of Bruce Ziff's work best described as legal history. Of course, most of Ziff's scholarship in property law is deeply historically-informed and literate. That is an important part of its depth, sophistication, and appeal. Ziff's doctrinal work understands that the common law is literally legal history in the sense that law builds upon itself backwards in time.

* Professor of Law, University of Alberta, Faculty of Law. I want to express appreciation to Malcolm Lavoie for organizing the event honouring Professor Ziff at which these remarks were first delivered. Thanks, most of all, to Professor Bruce Ziff, both for agreeing to be interviewed for this article, and for the preceding years of mentorship and friendship.

¹ Bruce Ziff, *Principles of Property Law*, 2nd ed (Scarborough: Carswell, 1996). The illustrious text is now in its eighth edition and remains the foundational text in the field (Eran Kaplinsky, Malcolm Lavoie & Jane Thomson, *Ziff's Principles of Property Law*, 8th ed (Toronto: Thomson Reuters Canada, 2023)).



Understanding the common law, its present dilemmas, and its future application always requires a sense of its past. But my interest, and by extension this article, is about a narrower band of Ziff's scholarship, the work that more explicitly and deliberately employs the methodologies and perspectives of legal history. In a handful of articles on caves, squatters, and sealers, and especially in his monograph on Reuben Wells Leonard and the Leonard Trust, Ziff prioritizes archival sources to place legal happenings in historical context, to illuminate what might have otherwise remained a dark corner of the cave with the legal historian's flickering flambeau.

This article, however, is mostly about Bruce Ziff *as* legal history. It charts Ziff's journey in law, the legal education he received, and the legal profession he entered. I argue that Ziff's law school experience and subsequent scholarly career straddles two distinct eras in the Canadian legal academy: one marked by tradition, caution, and modest doctrinal ambition and reach; the other typified by interdisciplinarity and new conceptions of the form and purpose of legal scholarship. It was a transformation which Bruce Ziff both participated in and represents. Bruce Ziff's legal history, it turns out, tells us a great deal about an important moment of change in Canadian legal education and scholarship.

II. BEGINNINGS: "A TYPICAL SUBURBAN UPBRINGING"

Bruce has described his childhood as "a typical suburban upbringing, so much so, that as soon as I could leave the place, I did."² He was born 15 August 1953 in Toronto, and raised in North York by his hard-working parents Rita and David Ziff. The household was Jewish, although not particularly religious. Still, Bruce attended weekend Hebrew School and celebrated a Bar Mitzvah at Holy Blossom Temple, a hub of Jewish life in north Toronto. Bruce's mother had worked as a secretary prior to her marriage, and continued to assist with the bookkeeping of her husband's businesses during Bruce's childhood. His father had graduated from the University of Toronto with a degree in metallurgy and served in the Royal Canadian Air Force during the Second World War. For most of Bruce's childhood, his father ran a muffler shop, a fact law students may have gleaned from the 1960s-era commercial muffler sign later affixed to the wall of Bruce's faculty office.³

Bruce remembers no childhood ambition to become a lawyer or to follow a career plan of any sort, but members of his extended family gestured to the possibilities of a life in law. An uncle on his father's side was a lawyer in Fort Erie, Ontario, and then mayor of the town. An older cousin, Harvey Ziff, had graduated from Stanford Law School and then Northwestern with a Master of Laws in the late 1960s. An off-print of one of Harvey's law review articles found its way to the door of the Ziff fridge and Bruce recalls his admiration at seeing his cousin's name and arguments in print.⁴ In high school, Bruce attended York Mills Collegiate, and graduated from A.Y. Jackson Secondary School. He tolerated school, but found his passion in music, especially after seeing Pete Seeger perform at Massey Hall, and attending the legendary Mariposa Folk Festival in the early 1970s. Channelling the

² Interview of Bruce Ziff by Eric Adams (19 January 2023) (Edmonton, Alberta) [digital recording on file with author] ["Ziff Interview"].

³ All Ziff biographical details taken from Ziff Interview, *ibid.*

⁴ Harvey L Ziff, "Recent Abortion Law Reforms (Or Much Ado About Nothing)" (1969) 60:1 J Crim L Criminology & Police Science 3.

politics of the era, by his teens, Bruce had developed an affinity for student dissidents, a dislike of high-school pep rallies, and the ambition to get out of North York as soon as possible.

Carleton University in Ottawa provided that opportunity. In September 1972, Bruce began his Bachelor of Arts in Political Science. In first year, he found himself in an Introduction to Law Class taught by Professor King George McShane. Bruce excelled, and his A+ grade and first overall standing in the 300-person course suggested a nascent aptitude for legal analysis.⁵ More personal influences emerged in the teaching and mentorship of Professors Leo Panitch and Jane Jenson. Panitch arrived at Carleton in the same year as Bruce did, beginning a long career in leftist political and economic analysis of the modern state, especially the role of labour parties.⁶ Jenson, an expert on political parties, social movements, feminism, and the state, began teaching at Carleton in 1974. In what Bruce remembers as an otherwise impersonal experience at Carleton, Professors Panitch and Jenson, early career scholars both at the outset of what would become impressive careers in political science, noticed and encouraged Bruce's scholarly talents and interests while he soaked up the influence of their thought and thoughtful approach to teaching.⁷ Taking a diverse array of courses in law and politics and earning good grades kindled not only thoughts of law school but of a future academic career as well. Ziff has the moment pinpointed. In Sociology 100, Bruce recalls the professor wearing a "woolly sweater" and

hushpuppies ... pontificating up on that stage. I remember looking at this guy ... and I thought, wouldn't I love to have a job like this. It looked so fun. And so easy. And so gentle. And that stayed with me. And I bought my first pair of hush puppies.⁸

A law professor was being born.

III. LAW SCHOOL: ZIFF'S RULES OF THUMB

With the decision to pursue a legal education, Bruce elected to stay in Ottawa and began his legal studies at the University of Ottawa, Faculty of Law in the fall of 1975. First established in the late nineteenth century, the Faculty of Law ceased operations only a few years later for reasons lost to history. The re-formation of a Civil Law degree in 1953, followed by a Common Law section of the Faculty in 1957, coincided with the expansion of university-based legal education across Ontario as the monopoly on legal education controlled by the profession out of Osgoode Hall ended.⁹ Two years before Ziff entered law school, the University of Ottawa Faculty of Law moved into its new dedicated building at Fauteux Hall under the leadership of its new Dean, Alan Hubbard. Dean Hubbard inherited a faculty of conservative orientation, traditional course offerings, and meager budget. In 1972, a report of the Committee of Ontario Deans singled out the Common Law section of

⁵ Carleton University Transcript of Bruce Ziff [on file with author].

⁶ Stefan Kipfer, "Remembering Leo Panitch (1945–2020)" (2021) 32:1 *Capitalism Nature Socialism* 19.

⁷ Jon H Pammett et al, "The Perception and Impact of Issues in the 1974 Federal Election" (1997) 10:1 *Can J Political Science* 93 at 93 (Jenson hired Ziff as a research assistant and thanks him for "untiring research").

⁸ Ziff Interview, *supra* note 2.

⁹ C Ian Kyer & Jerome E Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario, 1923–1957* (Toronto: Osgoode Society, 1987).

the University of Ottawa as “the smallest of all Ontario law schools — in relative as well as absolute numbers — with respect to budget, students, faculty, and support staff.”¹⁰ For Ziff, that meant a large roster of compulsory courses across his three years, the content of which had not changed much in the preceding two decades, and sessional instructors in many classes. First year involved the still familiar courses in Legal Research, Contracts, Criminal Law, Torts, Property, Civil Procedure, and Legal Institutions.

It will surprise no one that Ziff’s favourite first year course was Property Law, especially “the archaic bits.”¹¹ The course was taught by a sessional instructor, Bernard Starkman, formerly on the faculty at Windsor, whose teaching Ziff acknowledges helped to spark what would become his lifelong interest in the subject. In preparing for the final Property Law exam, Bruce compiled a list of guiding principles he termed Ziff’s Rules of Thumb as a way of organizing the course into categories of meaning capable of solving exam hypotheticals. Already identified as someone willing to assist with the myriad problems Property Law seems to especially engender among law students, Bruce passed along a copy of Ziff’s Rules of Thumb to a fellow student to assist her exam studying.¹² He was a little taken aback to see many copies appear in the hands of students on exam day, although he does credit the success of Ziff’s Rules of Thumb among his classmates for the subsequent invitation to join the law school hockey team. Despite the common feeling among capable law students that he had done poorly, Bruce stood first in the class after first year.

Ziff’s abilities caught the attention not only of his classmates, but also his instructors. His teacher in Torts, Julien Payne, hired Bruce as a research assistant putting together a casebook in Family Law, becoming, in the process, a mentor and booster throughout Bruce’s studies. Bruce does not otherwise have glowing reviews of a legal education comprised largely of doctrinal-based common law courses evaluated with 100 percent final exams, many taught by sessional instructors, or faculty members without particular scholarly renown.¹³ An exception was the opportunity to earn credits as an editor of the *Ottawa Law Review* (the *Review*). Founded in 1966, the *Review* had a tradition of encouraging student editors to contribute a case comment or short article.¹⁴ Under the editorship of Saul Schwartz, Ziff worked on the ninth issue of the *Review* and penned an article on hearsay exceptions that would be printed two issues later.¹⁵ It was his first publication and its sophistication and confident prose revealed an academic in the making. He graduated with distinction in the spring of 1978, a wayward grade in Consumers’ Protection the only blemish on an otherwise

¹⁰ “Reunion: Common Law History at the University of Ottawa” (2022) at 45 online (pdf): [perma.cc/XWC5-3TJC], citing *Brief on the Funding of the Common Law Section* (8 June 1973), Ottawa, University of Ottawa Archives (Fonds 23, container 27.3739, file Faculty Council 1972–1973, 3).

¹¹ Ziff Interview, *supra* note 2.

¹² *Ibid.* “In the final exam,” Bruce remembers, “we were all studying in little carrels up in the library, and I had a seat beside me for when people would come up beside me to ask me questions.”

¹³ In second year, Bruce took Commercial Law, Company Law, Constitutional Law, Family Law, Property II, Administrative Law, Conflicts, Wills, and Labour Law. In third year, he took Remedies, Civil Procedure II, Evidence, Taxation, Trusts, International Law, Advanced Criminal Law, Consumers’ Protection, Creditors’ Rights, and the *Ottawa Law Review* editorship course.

¹⁴ Peter C Oliver, “A Brief History of the *Ottawa Law Review*” (2019) 50:3 *Ottawa L Rev* 31.

¹⁵ Bruce Ziff, “Statements Against Penal Interest: A New Exception to the Hearsay Rule in Canada” (1979) 11:1 *Ottawa L Rev* 163. A second publication from that period followed in short order, Bruce Ziff, “Maintenance Claims in Divorce Actions: Goldstein Revisited” (1979) 2:3 *Fam L Rev* 186.

impressive transcript. His thoughts at the end of law school are a familiar one to most law students: "I am glad this is done, I've had enough."¹⁶

Wanting to experience law in the real world but with thoughts already percolating about a future academic career, Ziff searched for an articling position at the end of second year. "Late off the mark," he concedes "because I didn't realize I should have been early off the mark."¹⁷ Influenced by his regard for the Family Law Payne had exposed him to, Ziff searched for midsize firms in Toronto with a family law aspect to their practice. Although his mother worried that his now generous beard would hurt his employment prospects, Bruce forged ahead with the hirsute confidence of the young. He landed at Morris, Bright, and Rose LLP. "I chose them because they chose me right away," Ziff explains, not to mention that "my beard was better than the guy interviewing me."¹⁸ Other choices soon beckoned. Not enjoying the articling experience, Bruce remembers "sitting there in my office late at night in my tower on King Street. 30th floor ... Dictaphone. And I said to my secretary, 'can you open a file called graduate school?'"¹⁹ Eager to venture further afield this time, Ziff filled that file with applications to the large British universities, and for Canadian scholarships to support his studies. Both came through. Supported by a generous Social Sciences and Humanities Research Council doctoral fellowship, and pitching a Family Law project, Bruce received multiple acceptance letters, including the one he was most hoping for: historic Magdalen College and the Faculty of Law at Oxford University. "One of the times in my life," Bruce says, "when the grass was not greener on the other side. I thank my lucky stars."²⁰

IV. PUB ADVENTURES: BECOMING A LEGAL ACADEMIC

A grateful and "awed" Bruce arrived in Oxford, the city of dreaming spires in the fall of 1979. Living in the spartan quarters of Magdalen College — room 2A, staircase 4 — steps from ancient libraries, secluded gardens, and cobbled streets, Bruce launched himself into his Master of Letters thesis on the nature, validity, and enforceability of spousal contracts at marital breakdown in England and Canada.²¹ His supervisor, John Eekelaar, a South African by birth, had brought to Oxford a more socio-legal approach to studying Family Law than was typical at an institution renowned for its analytic jurisprudence.²² Eekelaar supervised Bruce with a light but supportive touch, and Bruce, self-directing and motivated, adopted a research methodology that he would rely on throughout his career: assessing a present legal rule with a deep dive into an ocean of historical common law antecedents, braided with an interest in how such a rule worked its impacts in material terms on real people. When not reading old cases, he gathered data from agencies dealing with spousal disagreements to see the role that the common law played in mediating, exacerbating, or settling marital disputes in practice. Bruce found the breaks from his thesis in Oxford's rich intellectual, artistic, and

¹⁶ Ziff Interview, *supra* note 2.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² AW Brian Simpson, *Reflections on The Concept of Law* (Oxford: Oxford University Press, 2011) (an insightful recreation of Oxford's postwar intellectual climate).

musical cultural life, and with a handful of trips to the continent — Paris and Amsterdam — when his carefully managed budget allowed.

As his project progressed, so did Ziff's certainty that his legal career would be a scholarly one with a return to a Canadian law school. During a trip home in the summer of 1980, Ziff sent applications to whatever Canadian law schools had openings, and several others that did not, just to be sure. In the style of the time, Ziff's covering application letter was brief and direct, the enclosed impressive curriculum vitae intended to do the work of securing potential interviews. A few soft expressions of interest followed, including a long personal note from the Dean at the University of Alberta, Faculty of Law explaining that no positions existed at present, but offering hope of future interest. By February of 1981, a position at the University of Alberta had materialized but not the funds to fly Bruce to Edmonton from Oxford for an interview. In a telephone call on the Magdalen College communal phone, Alberta's Dean Frank Jones pitched an alternative plan. What if a faculty member in Oxford on sabbatical interviewed Bruce there? How could Bruce say no. And so it was that Bruce's faculty interview, such as it was, took place at the charming Abingdon Arms pub, in the village of Beckley, with Professor David Percy, and David's wife, Tikker.

David remembers it this way:

We chatted with Bruce over pints of Halls Harvest Ale and I soon discovered that he was a most thoughtful scholar. He was an early exponent of what might loosely be described as sociological jurisprudence, of how law worked in practice.... Bruce's interests somehow did not match his appearance. With his long hair and beard, he could well have been mistaken for a rabbinical scholar rather than a person with an interest in how property principles really worked in practice.... This "interview" broke all the rules that are now applied in modern interviewing techniques. On this shaky basis, I actually recommended Bruce highly to the Selection Committee and he was appointed to the Faculty.²³

Bruce's memory adds only that the rustic pub was particularly enticing, the beer terrific, and that "we had a splendid time talking about everything, including law."²⁴

It had not been long since Canadian law deans, often serving for decades at a time, controlled every aspect of faculty hiring. That world was ebbing away as law faculties increased in size, decanal terms shortened, and collegial governance entrenched themselves in the expectations and practices of faculties of law, but it had not vanished entirely. It was still possible in the early 1980s for a Dean of Law to hire faculty members unencumbered by job talks and faculty consultation. The next call from Dean Jones to the Magdalen College dorm was to offer Bruce a job as an Assistant Professor at the University of Alberta, Faculty of Law.

V. FINDING THE GROUND IN PROPERTY LAW

At a yearly salary of \$25,000 and saddled with the prospect of teaching three courses for the first time, Criminal Law, Personal Property, and Real Property, Bruce arrived in

²³ Email from David Percy to Eric Adams (20 January 2023) [on file with author].
²⁴ Ziff Interview, *supra* note 2.

Edmonton in the summer of 1981. Ziff remembers the culture shock of arriving in the West — he had never previously been to Alberta — with no furniture, little savings, and few personal contacts. “My father bought me a blue blazer and blue slacks. That’s what I had,” Ziff recalls.²⁵ His first term involved seven hours of classroom teaching, with classes on every day of the week. “I was a long way from Oxford now, trying to survive. One day ahead of the class.”²⁶ The scramble of late-night class preparation did have one advantage. “I knew intuitively what they would find difficult, because the night before I had found it difficult,” Bruce explains.²⁷ Borrowing outlines and tips from colleagues, Ziff worked to adopt a teaching style borrowed from the professors he had previously admired. “I decided that I wanted to provide an atmosphere where people would be comfortable.” In short, “I tried to be normal person.”²⁸ There are worse teaching philosophies.

A few years in to his career, Bruce replaced Criminal Law with Family Law in his teaching roster, the subject he initially assumed would remain his principal scholarly focus. But it was Property Law and its puzzles that kept turning in his mind. The feeling, he came to realize, was not universal. Students struggled with Property Law, and colleagues did not want to teach it, or write about it. “People didn’t see Property as their number one interest,” Bruce noticed.²⁹ “It was a service course. What if I made it my own,” he wondered.³⁰ There was no suitable textbook either, certainly nothing devoted to comprehensively outlining a distinctive approach to Canadian Property Law.³¹ The course was taught with an amalgam of excerpts of English or American texts, and mimeographed books of cases. A sabbatical in Australia in 1991 exposed Bruce to a different possibility. Discovering a series of texts focused exclusively on Australian land law, Ziff set out to write the Canadian version. He started by writing the preface of the book to use as a roadmap, “as if the book had already been written.”³² Whatever his modest ambitions at the start of the project, the book grew in breadth, depth, and complexity as Bruce worked. “I loved it. I thought about it all day long. And when I got home, I wrote. . . . I poured my heart and soul into that textbook.”³³ The result was the first edition of *Principles of Property Law*.³⁴

Ziff’s focus on Property Law made for a relatively easy turn to produce more deliberate legal history scholarship. It is not a coincidence that several of Canada’s legal historians — Philip Girard, Jim Phillips, Douglas Harris, and Margaret McCallum — teach or taught Property Law at their respective law schools. Even more than most private law subjects, systems of property entwine themselves in history, partly as a means of justifying the unequal distribution of material goods through the imprimatur of time. Property law scholars, by virtue of their field, toil in legal terrains of the past. Ziff’s more explicit legal historical work began in an effort to provide deeper historical context to the property law cases he

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Ibid. On Bruce Ziff’s innovative teaching practice see Malcolm Lavoie, “Bruce Ziff’s Property Pedagogy” (2023) 61:1 *Alta L Rev* 123.

²⁹ Ziff Interview, *ibid.*

³⁰ *Ibid.*

³¹ Alan M Sinclair, *Introduction to Real Property Law* (Toronto: Butterworths, 1969) (provided a brief account of some aspects of property law doctrine aimed at simplifying the field for law students, but without deep research).

³² Ziff Interview, *supra* note 2.

³³ *Ibid.*

³⁴ Bruce Ziff, *Principles of Property Law*, 2nd ed (Toronto: Carswell, 1996).

found especially interesting. The project that would become his monograph, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* began as an article devoted to excavating the deeper story behind the cases grappling with the law of trusts and the discriminatory directives of the Leonard Trust.³⁵ Wanting to enhance his lectures on the case he tried to find Leonard's biography. Finding none, he ended up writing it himself. But like all good legal history, the story became wider than simply that of an eccentric, rich, racist and the trust he established in 1923 as an educational endowment. Pointing out the long absence of criticism of the trust's explicitly racist aims, Bruce observes that the fact that "the values encased in the trust could find a congenial home in Canadian social and intellectual thought in the inter-war years suggests something about our ignoble legacy of discrimination, prejudice, and intolerance."³⁶ But it is the gift of the talented legal historian to also demonstrate how those values take particularly influential shape in law. "[L]aw is a form of rhetoric," Bruce persuasively argues, "a set of stories, symbols, and visions, which are especially useful because they strive to tell us how conflicting interests ought to be ordered."³⁷

Ziff noticed other gaps in the standard foundational teaching cases about property. Every Canadian law student read the American classic, *Pierson v. Post*, in order to puzzle over the meaning of possession, to say nothing of "saucy intruders," but where were the great Canadian equivalents?³⁸ The pursuit of what Ziff called "chestnuts" involved laborious and painstaking search through dozens of forgotten volumes of Canadian case reports, most of which have never been digitized. In those pages, Bruce found a cluster of nineteenth century cases from Newfoundland courts telling dramas involving dangerous weather on the ocean, ice jammed ships, valuable seal pelts, and local law and custom about who owned what on the floating ice pans of a treacherous sea.³⁹ His colleagues will especially remember this article as the one for which Bruce rented a dry ice machine to fill the seminar room with fog in order to "set the mood" while he presented his research. A similar flair for the dramatic accompanied Bruce's exploration of the legal history of the American caves decisions on competing ownership interests of the subterranean.⁴⁰ Not content to simply have written the definitive account of two famous cases from the American Property Law canon,⁴¹ Bruce composed a song on banjo, "Logan's Dissent," that plums the emotional depths of the "stygian darkness," while summarizing the case to boot.⁴² That attentiveness to the role of property law in the making of place and belonging also fuelled Ziff's work on the origins of

³⁵ *Canada Trust Co v Ontario Human Rights Commission*, (1990) 74 OR (2d) 481 (CA); Bruce Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (Toronto: University of Toronto Press for the Osgoode Society for Legal History, 2000) [Ziff, *Unforeseen Legacies*].

³⁶ Ziff, *Unforeseen Legacies*, *ibid* at 8.

³⁷ *Ibid* at 10.

³⁸ *Pierson v Post*, 3 Cai R 175 (NY Sup Ct of Judicature 1805); Angela Fernandez, *Pierson v. Post, The Hunt for the Fox: Law and Professionalization in American Legal Culture* (Cambridge: Cambridge University Press, 2018).

³⁹ Bruce Ziff, "The Law of Capture, Newfoundland-Style" (2013) 63:1 UTLJ 53. An earlier version of the article appeared in Eric Tucker, Bruce Ziff & James Muir, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law for The Osgoode Society for Legal History, 2012).

⁴⁰ Bruce Ziff, "The Great Onyx Cave Cases: A Micro-History" (2013) 40:1 N Ky L Rev 1 [Ziff, "The Great Onyx Cave Cases"].

⁴¹ *Edwards v Sims*, 24 SW (2d) 619 (Ky CA 1929); *Edwards v Lee's Adm'r*, 96 SW (2d) 1028 (Ky 1936).

⁴² The song can be heard online: *University of Alberta* [perma.cc/WT6X-UTAW].

the Edmonton settlement and the role of law-making and rule breaking in devising ownership in seized lands.⁴³

All of that legal history work relied on Ziff's rich archival findings, sensitive attention to the historical context in which each case resided, an eye for human frailties, and the perceptive connections between the broader life of cases and the legal rules they generate. Writing good legal history involves pushing academic lawyers outside of their preferred and comfortable sources — cases and statutes, sometimes legislative debates — into an altogether messier world of archives, newspapers, private papers, and the ways people engage with law and legal norms in everyday encounters. Such sources paint pictures vivid, but often conflicting and uncertain — beginning to dig a little usually requires digging a lot. For Bruce, the connective thread of his legal history work was a desire to tell “the story that’s not been told” to reveal the “human story” not captured by the judge’s definitive pronouncements.⁴⁴ “[L]ife,” Ziff has written, “is rarely as simple as suggested [by a case’s] sparse facts.”⁴⁵ Beyond the narrow facts and bald legal principles that lawyers most comfortably wield, Ziff’s legal history demonstrates that law — whether fashioned to resolve disputes in underground caverns among neighbours, regarding the efficient use of sea pelts on ocean ice, between collisions between a donor’s racist intent and equality rights, and about who could lay claim to live on land by the North Saskatchewan River — above all told stories of dramas of the human condition. It is that human story of property and law and the complex relations they structure and arise from that Bruce tells so well in his legal history work.

VI. CONCLUSIONS: ZIFF IN TIME

Good musicians require a refined sense of time. Bruce, a fine musician, enjoyed a scholarly career of exceptional timing. Initially, his legal education might have suggested otherwise. It is not easy to find near universal agreement among law professors, but one exists in the shared dreary assessment of Canadian legal education in the 1970s. “[T]he transcript of the average student graduating in 1976,” Harry Arthurs lamented at the time, “would not look radically different from that of 1956 or even 1926.”⁴⁶ Although at the outset of the 1970s, an agreement between Ontario law schools and the Law Society had loosened the previous prescription of an all-mandatory curriculum across all three years, the appearance of a more diverse array of course offerings was slow to develop.⁴⁷ “Law school calendars, like Civil Codes,” Rod Macdonald observed, “tend to become etched in stone.”⁴⁸ “[A]n examination of the calendars of the Canadian law schools for the up-coming year is striking because of the lack of real change from the standard curriculum proposed by the Canadian Bar Association sixty years ago,” Edward Veitch agreed.⁴⁹ “The truth is that we

⁴³ Bruce Ziff & Sean Ward, “Squatters’ Rights and the Origins of Edmonton Settlement” in Jim Phillips, R Roy McMurty & John T Saywell, eds, *Essays in the History of Canadian Law: Volume X: A Tribute to Peter N. Oliver* (Toronto: University of Toronto Press for Osgoode Society for Legal History, 2008). Ziff Interview, *supra* note 2.

⁴⁴ Ziff, “The Great Onyx Cave Cases,” *supra* note 40 at 1.

⁴⁶ Harry W Arthurs, “Paradoxes of Canadian Legal Education” (1977) 3:3 Dal LJ 639 at 645.

⁴⁷ WR Lederman, “Canadian Legal Education in the Second Half of the Twentieth Century” (1971) 21:2 UTLJ 141 (on the curriculum requirements for law schools in the 1970s).

⁴⁸ Rod Macdonald, “Legal Education on the Threshold of the 1980’s: Whatever Happened to the Great Ideas of the 60’s” (1979) 44:1 Sask L Rev 39 at 60.

⁴⁹ Edward Veitch, “The Vocation of Our Era for Legal Education” (1979) 44:1 Sask L Rev 19 at 31–33.

have run out of ideas.”⁵⁰ A man of ideas, with inherent dislike in troughs of thinking based solely on past practice, in the mid-1970s Bruce Ziff did not receive a legal education he found especially inspiring.

Legal history, alongside any serious law and society teaching and research, was virtually non-existent in Canadian law schools in the 1970s. Bruce did not take a class in legal history or receive legal historical training because none was to be had. It is not an exaggeration to say that much of the significant Canadian legal history scholarship from the period was about the sorry state of Canadian legal history scholarship.⁵¹ “Canadian legal history should be respectable and flourishing,” R.C.B. Risk pronounced, “but it is not.”⁵² Philip Girard persuasively locates the reticence of Canadian scholars to engage in historical research in the rise of American-inspired legal functionalism and its project in the here and now. “[T]he study of Canadian legal history seemed to hold little promise for advancing the broadly progressive agenda they were trying to implement in Canadian law and legal education,” Girard notes.⁵³ “[U]nlike their colleagues from Nigeria to New Zealand, the Canadian legal academic community could not come together to produce even third-rate legal history of the country. That is distinction of a sort.”⁵⁴

The lack of distinction attached to more than Canada’s legal history. “Canadian legal scholarship, in all of its manifestations,” Arthurs suggested, “is often inadequate, sometimes acceptable, but seldom — on an objective scale — first class.”⁵⁵ Signalling out the absence of ambitious Canadian doctrinal texts, and interdisciplinary research of all sorts, Arthurs pined for a generation of scholars that would undertake the sustained and creative work Arthurs deemed vital to a humane and effective legal education. Arthurs placed that perspective at the heart of the analysis in his well-known *Law and Learning Report*.⁵⁶ “[T]here is not much fundamental scholarship undertaken in Canada by legal academics,” Arthurs and his coauthors argued, too little work “designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophic, linguistic, economic, social or political implications of law.”⁵⁷ The narrowness of the law school curriculum both reflected and reproduced the narrowness of research produced, absence of scholarly ambition, and conservative methodologies. “Faculty members are a product of this curriculum and culture and, at the same time, constrained by it.”⁵⁸ Legal education, Arthurs feared, would go on repeating its principal deficits since every new generation of law professors had been trained in an environment that made the status quo seem inevitable.

⁵⁰ *Ibid* at 33.

⁵¹ RCB Risk, “A Prospectus for Canadian Legal History” (1973) 1:2 Dal LJ 227; Graham Parker, “The Masochism of the Legal Historian” (1974) 24:2 UTLJ 279; Andre Morel, “Canadian Legal History: Retrospect and Prospect” (1983) 21:2 Osgoode Hall LJ 159. See also Edward Veitch & RA MacDonald, “Law Teachers and Their Jurisdiction,” Comment, (1978) 56:4 Can Bar Rev 710 at 711 (noting “that the study of Canadian legal history was non-existent”).

⁵² Risk, *ibid* at 227.

⁵³ Philip Girard, “Who’s Afraid of Canadian Legal History” (2007) 57:4 UTLJ 727 at 741.

⁵⁴ *Ibid* at 741.

⁵⁵ Arthurs, *supra* note 46 at 654. See also R Dale Gibson, “Legal Education: Past and Future” (1974) 6:1 Man LJ 21 at 37 (agreed that the “lack of good up-to-date Canadian textbooks on even basic legal subjects is lamentable”).

⁵⁶ Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Information Division of Social Sciences and Humanities Research Council of Canada, 1983) [Arthurs Report].

⁵⁷ *Ibid* at 66, 69.

⁵⁸ *Ibid* at 136.

If the Arthurs Report had canvassed and exposed the desultory state of Canadian legal scholarship of the era, it quickly became apparent that the unflattering mirror Arthurs had held aloft looked backward, but not forward. The law and society movement and critical legal studies, the founding of the Osgoode Society for Canadian Legal History, the arrival of the *Canadian Charter of Rights and Freedoms*,⁵⁹ the rise of feminist legal scholarship, the diversification and expansion of a new generation of legal scholars who identified themselves as researchers and scholars not beholden to the traditional lanes of Canadian legal scholarship — all of this altered the culture, methodologies, productivity, and imagined horizons of Canadian law professors. Just as Arthurs issued his cri de cœur on the woeful state of Canadian legal education and scholarship, promising signs began to suggest that “Canadian legal history is now entering a new phase in which scholars are confidently overcoming the obstacles to the discipline.”⁶⁰ Others announced with satisfaction “the birth of a Canadian legal historiography,” the sudden appearance in the 1980s of collections of scholars dedicating themselves to serious legal historical research on the broad expanse of Canadian legal topics awaiting excavation.⁶¹ By the close of the decade the early signs had become an entrenched fact. Canadian legal history, interdisciplinary in methodology, sophisticated in approach, ambitious in reach, had arrived.⁶²

Bruce Ziff began at the University of Alberta just as these currents of change began to coalesce and alter the culture of Canadian legal education. Aware of the Arthurs Report and broadly sympathetic with its critique and aims, Ziff had been educated in one version of the Canadian legal academy but quickly found himself yearning for, and helping to build, a version of law school he had not attended. He was not alone, of course, in doing so. Ziff took advantage of the movements in both law and society and the emergence of the new Canadian legal history to extend his scholarly networks across the changing demographics of Canadian law professors, and to find inspiration in the nature of the scholarship he would produce. Transitions of culture and practice, in law school as elsewhere, are always partial and dynamic and scholars perhaps indulge in exaggerating the deficits and overlooking the attributes of the generation they come to replace. The fulcrum Ziff straddled across eras of Canadian legal education had as many commonalities as divergences. And yet, the three decades in which Ziff produced his major scholarship mark a turning point in Canadian legal education of which Ziff is an exemplar. Finding no sufficient Property Law text, Bruce wrote one. And, if no one could explain the full context of some of the curious cases students encountered in their readings, what else to do than write that legal history? Doing so required shaking off the precedents of the legal education he had received, and moving beyond the ambitions of an earlier generation of legal scholarship. The results placed the footing of Canadian legal scholarship on altogether firmer ground. I will continue to admire the legal history Bruce published, but I am more grateful still for the legal history that his career helped to make.

⁵⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

⁶⁰ Barry Wright, “Towards a New Canadian Legal History” (1984) 22:2 Osgoode Hall LJ 349 at 358.

⁶¹ DG Bell, “The Birth of Canadian Legal History,” Note, (1984) 33 UNBLJ 312 at 313, dating that birth to the arrival of “the first Osgoode Society volume of *Essays in the History of Canadian Law*” in 1981 (Bell, *ibid* at 316). See also David H Flaherty, “Writing Canadian Legal History: An Introduction” in David H Flaherty, ed, *Essays in the History of Canadian Law*, vol 1 (Toronto: University of Toronto Press, 1981) 3.

⁶² Barry Wright, “An Introduction to Canadian Law in History” in W Wesley Pue & Barry Wright, eds, *Canadian Perspectives on Law & Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 7.

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