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Exploring the “Canadian” in the
Canadian Yearbook of International Law

JOANNA HARRINGTON

INTRODUCTION

Anniversaries are often a time for reflection. The reaching of another year, or a block of several years, provides an opportunity for the celebrant to review an entity’s history, past achievements and challenges, as well as potential future directions. This is no less true for scholarly journals, although there may be those that disagree. Following the wise counsel of the late Professor David J Bederman of Emory University School of Law, I will note, and then put aside, the comment made by Judge Posner on the hundredth anniversary of the *Harvard Law Review* that because “[a] journal has no natural life span, the fact that it is 100 years old should interest only people who have a superstitious veneration for round

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numbers.”¹ In a country as young as Canada, and which is relatively new to the exercise of autonomy in foreign affairs, the reaching of fifty years for a specialist journal devoted to a field often viewed as marginal or esoteric by the Canadian legal profession is an occasion worthy of commemoration.²

To use its full title, *The Canadian Yearbook of International Law / Annuaire canadien de droit international (CYIL/ACDI)* was founded in 1961-62, with the first issue being published in 1963. To mark its fiftieth year, it would not be unusual for a member of the Board of Editors to pen a review of the journal’s role, content, or contributions, as was done to mark the journal’s twenty-fifth year.³ Not being a member of the Board of Editors, I have chosen to engage in this exploration of the past fifty years from the perspective of an outsider, relying on source material that is widely available but without the benefit or possible biases of internal editorial discussions. The categorization of “outsider” is, however, inevitably a matter of subjective perception (or delusion) and, hence, the fuller disclosure in the byline of my own sources of potential bias and perspective. Inevitably, it will be an incomplete picture, as a future perusal of the archives might indicate, and I have also felt it necessary to focus less on those who are still living to avoid premature assessments (and unintended offence).⁴

This article aims to be an exploration of the “Canadian” aspect or identity of the heritage, aspirations, and contributions of the *CYIL/ACDI*, and its key protagonists, written at a time when advances in electronic access may have made a geographical connection less relevant for both scholars and practitioners. This work will make

¹ Richard A Posner, “The Decline of Law as an Autonomous Discipline, 1962-1987” (1986-87) 100 Harv L Rev 761 at 761, cited in David J Bederman, “Appraising a Century of Scholarship in the *American Journal of International Law*” (2006) 100:1 AJIL 20 at 20.

² More optimistic appraisals do exist of the value of international law, both public and private, and transnational law to the practice of law in Canada, but the degree of optimism ebbs and flows.

³ Maxwell Cohen, “*The Canadian Yearbook* and International Law in Canada after Twenty-Five Years” (1987) 25 Can YB Int’l L 3.

⁴ I again follow Professor Bederman’s wise counsel that “to characterize the intellectual content of the Journal’s most recent volumes is an exercise so fraught with danger as to give pause to any writer. There is not only the problem of lack of historical perspective, but also the risk of causing reputational distortion because so many of the writers under review remain professionally active.” Bederman, *supra* note 1 at 46.

use of a narrative account reminiscent of the work of Professor Ronald St J Macdonald, whose contributions concerning international law’s historical place in Canada are one of the features for which this journal is known. I also include a short foray into the world of comparative assessment. I recognize that I have opted for a more impressionistic account of the contributions of the *CYIL/ACDI*, notwithstanding the love for metrics and quantification embraced by today’s university and the fact that database searches and tools such as Hein’s ScholarCheck make it relatively easy to produce citation tables.⁵ Personalities have, however, had a significant role in both the development and output of the *CYIL/ACDI*. I am also intrigued by the continuing value of a “yearbook” in the sense of a yearly review of key events for Canada within the practice of international law, particularly when some assume that all is readily accessible, and on an instant basis, with the expansion of the Internet.⁶

ESTABLISHING A YEARBOOK BY ESTABLISHING A SOCIETY

Although the *CYIL/ACDI* was founded in the early 1960s, the effort to establish a Canadian publication devoted to the discussion of international law (as distinct from international relations) dates back to the 1930s and 1950s. In both time periods, there was a sense that encouraging a greater knowledge of international law would help secure a post-war peace. There was also a sense that in the pursuit of peace and freedom, there was a role for lawyers in public service, both international and domestic.

The leaders of the cause in the 1930s were the two full-time professors of international law active in Canada at that time, namely N.A.M. (“Larry”) MacKenzie, then a law professor at the University of Toronto, and Percy E. Corbett, a professor of Roman and international law and the dean of the Faculty of Law at McGill University (until 1936).⁷ Both MacKenzie and Corbett had also gained some

⁵ Hein’s ScholarCheck allows researchers to identify which journal articles have been cited within other journal articles, potentially indicating the influence of an article on the scholarship in a particular field. On the “impressionistic” nature of my account of the *CYIL/ACDI*’s contributions, note that I have opted not to examine the contribution made through the *CYIL/ACDI*’s publication of a variety of book reviews.

⁶ See also James Hathaway, “The Value of Year Books of International Law” (2008) 27 *Austl YB Int’l L* i.

⁷ NAM MacKenzie, “Foreword” (1963) 1 *Can YB Int’l L* 7 at 7. Emphasis needs to be placed on the words “full-time” and “law” as MacKenzie does acknowledge

experience with the practice of international law, each having worked at the International Labour Organization in Geneva before embarking on their academic careers, and both had contacts with lawyers and others in government service and private practice. Both men had also come home from service in the First World War as “returned men” with a sense of pride in Canada’s contribution but also an awareness of the immense cost of Canada’s new status.⁸

Together, MacKenzie and Corbett tried to generate interest in forming a “Canadian Society of International Law” that would in turn publish a yearbook or other suitable publication.⁹ To this end, they secured support from the American Society of International Law (ASIL), which had been established in 1906, and the Carnegie Endowment for International Peace, an international affairs think-tank founded in 1910. The latter provided a grant of \$100 to assist in organizing either a new society or a committee of the then Canadian Institute of International Affairs (CIIA).¹⁰ The CIIA was an organization founded “to promote an understanding of international questions and problems, particularly those which affect

the existence of “Henry F. Munro and his successors in political science at Dalhousie University” during this time period as well as part-time lecturers at the Universities of Laval and Montreal (a reference presumably to Adjutor Rivard and Rodolphe Lemieux respectively). See R St J Macdonald, “An Historical Introduction to the Teaching of International Law in Canada” (1974) 12 Can YB Int’l L 67 at 83, 87. There were, however, only a few lawyers engaged in the practice of international law on behalf of Canada at this time, with the Department of External Affairs (as it was then known) having only thirty-three officers on duty in Ottawa in 1939. FH Soward, “Inside a Canadian Triangle: The University, the CIIA, and the Department of External Affairs: A Personal Record” (1977-78) 33 Int’l J 66 at 73. MacKenzie would later serve as president of the University of New Brunswick (1940-44), president of the University of British Columbia (1944-62), and a member of the Senate of Canada (1966-69). See further PB Waite, *Lord of Point Grey: Larry MacKenzie of UBC* (Vancouver: UBC Press, 1987).

⁸ History professor (and contemporary) Frederic Soward has suggested that “these feelings to varying degrees were shared by men such as Brooke Claxton, P.E. Corbett, Harold Innis, Sherwood Lett, A.R.M. Lower, N.A.M. MacKenzie, Lester B. Pearson, Kenneth W. Taylor, and F.H. Underhill.” Soward, *supra* note 7 at 66.

⁹ MacKenzie, *supra* note 7 at 8.

¹⁰ *Ibid.* A connection with the American Society of International Law (ASIL) had been made, and an apparent degree of respect had been accorded, as Professor Corbett served as one of four speakers at the annual banquet of the ASIL. “Members and Guests in Attendance” (1937) 31 Am Soc’y Int’l L Proc 199. Corbett would later serve as a Canadian member of the ASIL’s Executive Council from 1941 to 1943.

Canada and the British Commonwealth and Empire,” attracting members from academia, business, journalism, and politics.¹¹ It was founded by MacKenzie and others in 1928¹² and was affiliated with both the Royal Institute of International Affairs, now known as Chatham House,¹³ and an American association of organizations interested in Asia-Pacific matters, known as the Institute of Pacific Relations.¹⁴ The effort, however, to establish a Canadian international law society was interrupted when Corbett left Canada to become a professor at Yale University and then postponed indefinitely by the Second World War.

¹¹ “Canadian Institute of International Affairs” (1946) 1 *Int’l J* 4. In order for the CIIA to be affiliated with the Royal Institute of International Affairs (RIIA), members had to be British subjects. TB Millar, “Commonwealth Institutes of International Affairs” (1977-78) 33 *Int’l J* 5 at 11.

¹² The CIIA’s inaugural meeting was held on 30 January 1928 at Sir Robert Borden’s house in Ottawa. Borden had served as Canada’s prime minister from 1911 to 1920, during which time he secured a separate seat for Canada at the Paris Peace Conference and later the League of Nations. See Millar, *supra* note 11 at 12. See also Millar’s characterization of the early CIIA as a “frankly elitist organization” (*ibid* at 24). MacKenzie would agree, preferring a limited membership to focus on “those who might be able to make some contribution to [the] knowledge and study of international affairs” (quoted in Waite, *supra* note 7 at 76).

¹³ The idea of an Anglo-American institute to study international problems as a means to secure peace was conceived by British and American delegates to the Paris Peace Conference in 1919, led by Lionel Curtis (later an advocate of British Empire federalism). The British Institute of International Affairs (BIIA) was founded in 1920 and received its Royal Charter in 1926, becoming RIIA. The RIIA is located in Chatham House in London, and in 2004, the RIIA Council decided to adopt “Chatham House” as the institute’s primary identifier. See Chatham House, online: <<http://www.chathamhouse.org>>. The RIIA’s sister institute is the Council on Foreign Relations, an influential international affairs think-tank founded separately in the United States in 1921 and the publisher of *Foreign Affairs*. See Council on Foreign Relations, online: <<http://www.cfr.org>>.

¹⁴ The Institute of Pacific Relations (IPR) grew out of a private conference organized in Honolulu in 1925 by the Young Men’s Christian Association (YMCA) for those interested in Pacific Ocean affairs. Some of the Canadians interested in the work of the IPR were also members of the RIIA, such that when the CIIA was founded, it was thought appropriate to affiliate with both organizations. As later explained: “The geographical span of the subsequently formed IPR was narrower than that of the BIIA [later the RIIA], and the range of concern much wider.” Millar, *supra* note 11 at 11. MacKenzie was one of the Canadians with such a dual interest, having become a member of the BIIA when in England (Waite, *supra* note 7 at 75) and having the IPR to thank for facilitating the publication of his first book. NAM MacKenzie, ed, *The Legal Status of Aliens in Pacific Countries* (Oxford: Oxford University Press, 1937).

After the war, the effort to establish a Canadian society of international law resurfaced in connection with the establishment of the Canadian Branch of the International Law Association (ILA). Founded in 1873 as the Association for the Reform and Codification of the Law of Nations, and renamed the International Law Association in 1895, the ILA is a non-governmental international association devoted to the study, clarification, and development of both public and private international law. With its headquarters in the United Kingdom, the ILA operates through national branches. However, for roughly 80 years, there were so few Canadian ILA members that, looking back, MacKenzie once observed that apart from his own attendance at an ILA conference in 1926, he did not know of any other Canadian who had taken part in the work of the ILA.¹⁵ The Canadian branch of the ILA was established in 1952 by a group of Montreal-based lawyers who were “concerned at the lack in Canada of non-governmental legal activity on the international level” and considered “the Canadian lawyer’s comparative isolationism in legal matters” to be due to a lack of informal contacts with lawyers in other countries.¹⁶ A leading member of the group was also of the view that “Canadian lawyers will benefit from meeting men trained in other legal systems and Canadians will, in turn, have much to contribute to the international pool of legal knowledge from the great laboratory of civil and common law that is Canada.”¹⁷ There was also a sense that substantial Canadian contributions to the international community had been made on political, economic, and technical matters but not in law.¹⁸

Once established, the Canadian branch of the ILA perceived a need for a broader geographical presence, and to this end, its officers focused on establishing sections in Vancouver, Toronto, Halifax, and Ottawa (a pattern previously established by the CIIA, which began with branches in Montreal, Ottawa, Toronto, Vancouver, and Winnipeg and also developed “women’s branches”).¹⁹ Within a year,

¹⁵ MacKenzie, *supra* note 7 at 8.

¹⁶ Gerald F FitzGerald, “The Canadian Branch of the International Law Association” (1953) 31 *Can Bar Rev* 1021 at 1021. FitzGerald also provides the names of the lawyers participating in the establishment of the Canadian branch of the ILA (at 1022).

¹⁷ *Ibid* at 1021.

¹⁸ *Ibid* at 1021, 1027.

¹⁹ R St J Macdonald, “Charles B. Bourne: Scholar, Teacher, and Editor, Innovator in the Development of the International Law of Water Resources” (1996) 34 *Can*

the Canadian branch had sixty-five members, with representation in seven provinces (the outliers being Alberta, Nova Scotia, and Prince Edward Island).²⁰ Membership was restricted to Canadian citizens and non-Canadians normally resident in Canada, the latter in recognition of post-war immigration.²¹ The provisional officers turned over the reins at the branch’s first annual meeting in 1953, resulting in Professor Maxwell Cohen of the Faculty of Law at McGill University assuming the presidency and Gerald F. FitzGerald, a senior legal adviser with the International Civil Aviation Organization, serving as vice-president.²² MacKenzie, by this point the president of the University of British Columbia, was named as the branch’s honorary president, and the director of the legal branch of Canada’s Department of External Affairs, K.J. Burbridge, was named as a councillor. Three more law professors also joined the executive, representing the Universities of New Brunswick, Saskatchewan, and Toronto. Another leading force behind the ILA’s founding was Major Louis M. Bloomfield, QC, a prominent Montreal lawyer and businessman, who also served on the executive.²³ Three years later, Professor Charles B. Bourne of the Faculty of Law at the University of British Columbia had become the head of the Vancouver section, serving from 1956-60. He became vice-president

YB Int’l L 3 at 34. Unlike similar organizations in the United Kingdom and the United States, the CIIA took the form of widely separated units rather than one central organization, thus permitting variety in activities to match the interests of a particular branch. For example, branches dominated by businessmen (a term used deliberately to reflect the times) could focus on the economic aspects of international affairs, while the Ottawa branch drew its membership from the civil service. By the time the CIIA published the first issue of its journal in 1946, it had twenty-three branches. “Canadian Institute of International Affairs” (1946) 1 Int’l J 4.

²⁰ FitzGerald, *supra* note 16 at 1023.

²¹ *Ibid* at 1025.

²² In a coincidental case of repetition, Cohen would write (like MacKenzie before him) that in 1950, “there were perhaps no more than two professional teachers of International Law in Canada,” even though a course on public international law was then required by the Quebec Bar Regulations. See MacKenzie, *supra* note 7; Maxwell Cohen, “The Condition of Legal Education in Canada” (1950) 28:3 Can Bar Rev 267 at 284-85. See also R St J Macdonald, “Maxwell Cohen at Eighty: International Lawyer, Educator, and Judge” (1989) 27 Can YB Int’l L 3 at 16. Cohen would later serve as dean of the Faculty of Law at McGill University from 1964 to 1969.

²³ Macdonald, *supra* note 22.

of the Canadian branch in 1958 and then president in 1961, which in turn led to the founding of the *CYIL/ACDI* in 1962.²⁴

As Bourne has acknowledged, the publication of a scholarly journal had been considered by the executive committee of the Canadian branch of the ILA in the 1950s but was rejected due to financial concerns. According to an account by Macdonald, the proposal to establish such a publication was first brought forward by FitzGerald and Cohen around 1955, as they believed that “the need for a journal had become evident ... as a result of Canada’s newly acquired status as a middle power in the post-war years and the multiplication of its international contacts.”²⁵ Both men were also aware that the number of individuals teaching international law in Canada had expanded, with “several Canadian instructors of international law ... writing at acceptable levels” to support the ongoing operation of a scholarly journal.²⁶ There had also been growth within the federal government, notably in the Departments of External Affairs, Justice, Defence, and Fisheries, and there were two areas of specialization developing within the Canadian legal academy that were likely to generate interest in international law, namely the Institute of Air and Space Law at McGill University (with Cohen later serving as director from 1962 to 1965) and the development of oceanic legal studies at Dalhousie University.²⁷ FitzGerald would later put forward a written proposal for the establishment of a Canadian international law journal to the Canadian branch’s executive committee in 1960 but without success.²⁸

Upon assuming the presidency of the Canadian branch of the ILA in 1961, Bourne, with the help of Dean George F. Curtis, approached soon-to-be president emeritus MacKenzie for assistance with what would become the *CYIL/ACDI*.²⁹ MacKenzie was readily

²⁴ The dates are found in Macdonald, *supra* note 19 at 35.

²⁵ *Ibid.* Others were having similar thoughts, with *The Japanese Annual of International Law* being first published by the Japan branch of the ILA in 1957. See further Maxwell Cohen, “Some Bibliographical Problems of Public International Law” (1959-60) 6 McGill LJ 277.

²⁶ Macdonald, *supra* note 19 at 35.

²⁷ *Ibid.*

²⁸ CB Bourne, “In Memoriam: Gerald F. FitzGerald” (1987) 25 Can YB Int’l L 381 at 381.

²⁹ Curtis was also a strong proponent of furthering the study of international law, having himself pursued such studies at the University of Oxford under the supervision of Professor JL Brierly. R StJ Macdonald, “International Law at the University of British Columbia, 1945-2000” (2003) 41 Can YB Int’l L 3 at 7-8.

supportive, a position that is hardly surprising given his long-standing commitment to encouraging Canada and Canadians to understand more about the world and Canada’s place within it.³⁰ MacKenzie provided an initial \$1,000 grant from his university president’s discretionary fund and later assisted with an application for \$3,500 from the Leon and Thea Koerner Foundation of Vancouver (then one of three private foundations in British Columbia, with MacKenzie serving as chairman of its board).³¹ The *CYL/ACDI* also received funding from the Bank of Montreal and ILA member Bloomfield and, in subsequent years, from the Canada Council (with which MacKenzie was also involved) and its successor the Social Sciences and Humanities Research Council of Canada.³² As an interesting aside, 1961 was also the year in which MacKenzie was instrumental in bringing the journal *Pacific Affairs* to Canada and the University of British Columbia.³³ *Pacific Affairs* had previously been published by the Institute of Pacific Relations — the same association of organizations with which MacKenzie had been involved in the 1930s.³⁴

Over time, the connection between the Canadian legal academy and the Canadian branch of the ILA appeared to fade. In 1972, a new Canadian organization was formed, known as the Canadian

³⁰ MacKenzie is reported to have declined an invitation from Professor Arnold McNair (later Judge, then Lord McNair) to apply for the chair of international law at the University of Cambridge because he recognized his strengths as being on the “public side” of international law rather than with the science of international law and felt there was a need in Canada for his work as a popularizer of international law. Waite, *supra* note 7 at 83.

³¹ CB Bourne, “In Memoriam: Norman Archibald MacRae MacKenzie” (1985) 23 *Can YB Int’l L* 328 at 328. He also relied on Waite, *supra* note 7 at 222-23. Bourne would later describe MacKenzie as having acted as the “financial godfather of the Yearbook that made it all happen.” Macdonald, *supra* note 19 at 35.

³² CB Bourne, “Preface” (1963) 1 *Can YB Int’l L* 11 at 11.

³³ See further NAM MacKenzie, “A Word of Welcome” (1961) 34 *Pacific Affairs* 4.

³⁴ See earlier discussion in note 14 of this article. Founded in 1925, the IPR came under attack in the 1950s, during the McCarthy era, for allegedly promoting communism. See, for example, *United States v Lattimore*, 215 F 2d 847, 94 US 268 (DC Cir 1954). The IPR later lost its tax-exempt status for allegedly distributing communist propaganda. Although the IPR won the subsequent legal battle to regain its status, the combined effect of negative publicity and financial cost led to the IPR’s demise in 1960. See further “About Us — Our History: A Note from the Editor,” online: *Pacific Affairs* <<http://www.pacificaffairs.ubc.ca/about/about-us-our-history/>>.

Council on International Law/Conseil canadien de droit international (CCIL-CCDI), with Macdonald, then dean of law at Dalhousie University, serving as its first president. As Macdonald has written, the annual conference of the CCIL-CCDI came to serve as an opportunity for the editorial board of the *CYIL/ACDI* to meet, and by 1992 it was formally agreed that the *CYIL/ACDI* would be published under the auspices of both the Canadian branch of the ILA and the CCIL-CCDI.³⁵ Financial worries are, however, an ever-present concern for a journal, even one with a supportive university press that was able to continue work during periods of deficit.³⁶ Bourne made efforts in the 1980s to secure assistance from the Department of External Affairs and the Law Foundation of British Columbia, only to have the 1990s, as with today, usher in a period of cutbacks to government, research council, and university funding.³⁷

THE FOUNDERS' INTENTIONS

From the beginning, the publication of the *CYIL/ACDI* was a project of the Canadian branch of the ILA, with an academic home first at the University of British Columbia (from 1962-93) and then at the University of Ottawa (from 1993 on), and also with the backing of an academic press.³⁸ These partnerships and their geographic locale have given the journal its "Canadian" credentials, and, since the beginning, the *CYIL/ACDI* has served as a publication devoted to the discussion of international law for scholars and practitioners in Canada. However, it is, to borrow the words of MacKenzie, a "yearbook on international law for Canada" rather than a yearbook devoted to exploring what it means to bring a Canadian approach (if there is one) to current problems of international law.³⁹ The primary purpose of the *CYIL/ACDI* has been to provide a venue for exploring international legal matters of interest to those working in Canada, whether in academia, government service, or private practice, with articles typically written by those based in, or with a

³⁵ Macdonald, *supra* note 19 at 37-38.

³⁶ The publisher was initially the University of British Columbia Publications Centre, ceding to the University of British Columbia Press when it was established in 1971. *Ibid* at 36.

³⁷ *Ibid* at 38-39.

³⁸ The Canadian branch of the ILA is also identified as "The Canadian Society of International Law" in volumes of the *CYIL/ACDI* published in the 1970s.

³⁹ MacKenzie, *supra* note 7 at 7.

connection to, Canada. It was also intended as a means to further a “national interest in international legal scholarship,” Cohen having acknowledged that, by the 1960s, there was “evidence of a sufficient intensity in teaching and research interest in international law to provide the scholarly foundations for a continuing Canadian literature.”⁴⁰ (In 1950, Cohen had expressed the view in print that “the amount of research and writing by Canadians [in international law] is negligible.”⁴¹)

This notion of Canadian by residence, employment, or career path, rather than Canadian in terms of a specific approach to the law, would appear to accord with the intentions of the founding editor-in-chief of the *CYIL/ACDI*, who envisioned “a publication that would make available to Canada and to the international community a systematic presentation of the thinking of Canadians in the field of international law.”⁴² No further indications were given as to the meaning or definition of “Canadian” with respect to the journal’s intentions, and there were no requirements for authors to be Canadian by nationality or origin (Bourne himself hailed from Barbados).⁴³ There was, however, a perceived need for a Canada-based journal, with Bourne recognizing in his preface to the first volume that “the number of persons with training and practical experience in the field had greatly increased” and that “since 1945 many graduate law students had gone abroad to specialize in international legal studies and had returned to Canada to teach in the Law Schools, to work in the government service, and to practise law.”⁴⁴ He concluded that “[t]here was, therefore, a sufficiently large pool of scholars to sustain a learned journal devoted to international law.”⁴⁵ There was, however, one additional sign of the

⁴⁰ Macdonald, *supra* note 22 at 19; Maxwell Cohen, “Some Main Directions of International Law: A Canadian Perspective” (1963) 1 *Can YB Int’l L* 15 at 16.

⁴¹ Cohen, *supra* note 22 at 285.

⁴² Bourne, *supra* note 32 at 11.

⁴³ Macdonald, *supra* note 19 at 4. For comparison, membership in the Council on Foreign Relations is restricted to US citizens and permanent US residents who have applied for US citizenship: Council on Foreign Relations, “Applying for Individual Membership,” online: <<http://www.cfr.org/about/membership/rules.html>>.

⁴⁴ Bourne, *supra* note 32 at 11. Bourne himself was “going abroad” in 1963-64, using his sabbatical year to begin his doctoral studies at Harvard University under the supervision of Richard Baxter. He received his SJD from Harvard in 1970. Macdonald, *supra* note 19 at 23-24.

⁴⁵ Bourne, *supra* note 32 at 11.

CYIL/ACDI's 'Canadian-ness' and that was Bourne's clear statement from the beginning that "[t]he Yearbook will publish contributions in both English and French."⁴⁶ Jacques-Yvan Morin of the University of Montreal thus served as associate editor and performed editorial work on the French-language contributions. (Morin would later serve as the leader of the official opposition in Québec and then as a minister in the Parti Québécois government of René Lévesque.)

COMPARISONS WITH OTHER NATIONAL JOURNALS OF INTERNATIONAL LAW

This vision of a journal "for Canada," but not necessarily for the development of a Canadian approach to international law, stands in contrast with that of the founders of the *American Journal of International Law (AJIL)* — a journal established in 1906 by a then newly established ASIL. As explained by Columbia University professor Lori Fisler Damrosch, writing as co-editor-in-chief of the *AJIL* during its hundredth year: "The creators of the Journal were quintessentially American in their roots, loyalties, affiliations, and perspectives. All were American citizens, mainly from families who had been in the country for generations; their principal professional locus centered on the Eastern seaboard of the United States."⁴⁷ Drawing on the work of Professor Emeritus Frederic Lee Kirgis of Washington and Lee University School of Law, Damrosch also notes that the founders of the *AJIL* shared a common vision involving the promotion of American ways to attain peace.⁴⁸ While many of the founders had pursued education abroad or had overseas experience and were internationalists in outlook, they pursued this interest with an American grounding and with a sense of faith in the projection of American institutions.⁴⁹

Times, of course, have changed since 1906, and the *AJIL* has for many years provided an outlet for scholarly contributions from a global panoply of authors, without the need for a shared (let alone articulated) vision of an "American" approach to international law.

⁴⁶ *Ibid* at 12.

⁴⁷ Lori Fisler Damrosch, "The 'American' and the 'International' in the *American Journal of International Law*" (2006) 100:1 *AJIL* 2 at 2.

⁴⁸ Frederic L Kirgis, "The Formative Years of the American Society of International Law" (1996) 90:4 *AJIL* 559. See also Frederic L Kirgis, *The American Society of International Law's First Century: 1906-2006* (Leiden and Boston: Martinus Nijhoff, 2006).

⁴⁹ See also Bederman, *supra* note 1 at 23.

However, even in 1906, there were indications that the “international law” part of the *AJIL*’s title would be in competition with the “American” aspect. The founders were aware that there was a “lack in the English-speaking world of any periodical devoted exclusively to international law,” and thus they intended the journal to serve as a means to support the study and wider promotion of this field.⁵⁰ The draft for the proposed journal also contemplated the publication of a “chronicle of important international events, such as treaties, conventions, arbitrations, and awards” as well as “decisions of domestic and foreign courts” (with a British case concerning the South African Rand provided as an example).⁵¹ It also mentioned the provision of a “summary or synopsis of the literature of international law” as well as a bibliographic service highlighting what were phrased as “American, English and foreign publications.”⁵² Moreover, as Damrosch points out, even at this earliest stage, the founders had contemplated soliciting articles from “the great foreign authorities and publicists of France, Germany, Italy, Spain, [and] Russia” for translation and publication.⁵³ Thus, one of the earliest missions of the *AJIL* was to provide material on the writings of non-Americans and on non-American perspectives, with the very first issue featuring contributions concerning Latin America and Japan. This mission later operated in the other direction, with the *AJIL* being translated into Spanish from 1912 to 1922 for distribution to foreign ministries and subscribers in Latin America.⁵⁴

Notwithstanding the existence of the *AJIL*, the *CYIL/ACDI* was more likely inspired by the *British Year Book of International Law (BYIL)*.⁵⁵ MacKenzie’s early efforts were certainly so motivated, as he was once a correspondent for the *BYIL*’s notes section.⁵⁶ Bourne

⁵⁰ “The Aim and Scope of the American Society of International Law” (1907) 1:1 *AJIL* 130 at 131; “History of the Organization of the American Society of International Law” (1907) 1 *Am Soc’y Int’l L Proc* 23 at 14.

⁵¹ “Draft of the Proposed Journal of International Law” (1907) 1 *Am Soc’y Int’l L Proc* 29 at 29.

⁵² *Ibid* at 30.

⁵³ *Ibid*. See also Damrosch, *supra* note 47 at 3.

⁵⁴ *Ibid* at 7-8.

⁵⁵ Now the *British Yearbook of International Law (BYIL)*; originally “Year Book” was written as two words.

⁵⁶ MacKenzie, *supra* note 7 at 7. PE Corbett was also familiar with the *BYIL* as an author and as a fellow of All Souls College at Oxford University. See PE Corbett,

was also said to have modelled the *CYIL/ACDI* on the *BYIL*, and Cohen's first article on international law was in fact published in the latter.⁵⁷ The *BYIL* was founded in 1920, at the end of the First World War, with a clear mission to promote the study and discussion of international law with "the war [having] left in the minds of many people the belief that international law is a thing of the past."⁵⁸ The promoters of the *BYIL* disagreed and wanted to "provide scope for well-informed and careful contributions to the science of international law, wherein the fruits of research can be applied to the problems of the day."⁵⁹ However, as perhaps an indication of concerns at the time, the five-member editorial committee, led by Sir Erle Richards (then Chichele Professor of International Law and Diplomacy at Oxford University), also emphasized the need for "absolute" independence from both governments and private organizations.⁶⁰ However, after a year, the *BYIL* was affiliated with the British Institute of International Affairs,⁶¹ while a combination of publishers supported it, including Henry Frowde, Hodder and Stoughton, and Oxford University Press (the latter becoming the lead publisher from the fifth year of issue on).⁶²

While not named on the initial frontispiece, one of the *BYIL*'s key promoters had been the renowned German jurist Lassa Oppenheim,

"What Is the League of Nations?" (1924) 5 *Brit YB Int'l L* 119; PE Corbett, "The Consent of States and the Sources of the Law of Nations" (1925) 6 *Brit YB Int'l L* 20.

⁵⁷ Macdonald, *supra* note 19 at 37; Maxwell Cohen, "Espionage and Immunity: Some Recent Problems and Developments" (1948) 25 *Brit YB Int'l L* 404.

⁵⁸ "Introduction" (1920-21) 1 *Brit YB Int'l L* iii at iii.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at iv. The other four members of the editorial committee were Professor A Pearce Higgins (who replaced Oppenheim as the Whewell Professor at Cambridge), Sir John Macdonell, Sir Cecil Hurst, and Edward A Whittuck (a financial supporter and a governor of the London School of Economics and Political Science), with Cyril M Picciotto, a former Whewell Scholar, listed as editor. *Ibid* at ii. With the passing of Sir Erle Richards in 1922 (see Viscount Finlay, "The Late Sir H. Erle Richards, K.C.S.I., K.C." (1922-23) 3 *Brit YB Int'l L* 16), James L Brierly became Chichele Professor and a member of the *BYIL*'s editorial committee: (1923-24) 4 *Brit YB Int'l L* ii. On Whittuck's role, see "Edward Arthur Whittuck" (1924) 5 *Brit YB Int'l L* 1.

⁶¹ "Introduction" (1921-22) 2 *Brit YB Int'l L* iii. On the British Institute of International Affairs, see note 13 earlier in this article.

⁶² (1924) 5 *Brit YB Int'l L* iii.

then Whewell Professor of International Law at the University of Cambridge.⁶³ Unfortunately, Oppenheim died in the months before the journal’s launch, but his vision (including his strong belief that “international law is actual law and not a law of nature or of diplomatic usage”) can be seen in the form of the publication.⁶⁴ This form included the preparation and publication of lists of international agreements concluded in the year under review as well as summaries of cases dealing with international law decided by the English courts during the preceding year, thus initiating the publication of regular sections on the actual practice of international law that would be mirrored elsewhere. Given Oppenheim’s own combination of Anglo-American and continental legal sensibilities, it is not surprising that the *BYIL* was never intended to be confined to “British” views and “British” topics nor to “British” authors by origin or nationality. By the third issue, five “foreign correspondents” (representing Australia, Egypt, Japan, New Zealand, and South Africa) had been recruited by the editorial committee, with a Canadian and an American correspondent, as well as a correspondent for Palestine, joining from the fifth volume on.⁶⁵

Of course, one must acknowledge that the world had become a very different place at the time of the founding of the *CYIL/ACDI* in the 1960s as compared to the pre- and immediate post-First World War periods associated with the creation of the *AJIL* and the *BYIL*. It is therefore worth mentioning in the space available one other national journal established in the 1960s, in a country often thought comparable to Canada, namely the *Australian Year Book of International Law* (*Australian Year Book*).

Following in the footsteps of the *CYIL/ACDI* in 1965, the *Australian Year Book* was intended from the beginning, as indicated on its title page, to serve as an “annual survey of current problems of public and private international law with a digest of Australian practice.”⁶⁶

⁶³ EA Whittuck, “Professor Oppenheim” (1920-21) 1 *Brit YB Int’l L* 1 at 1. Another obituary can be found at “Professor Oppenheim” (1920) 14:1 *AJIL* 229.

⁶⁴ Whittuck, *supra* note 63 at 6. See generally LFL Oppenheim, *International Law: A Treatise*, volume 1: Peace (London: Longmans, Green and Company, 1905); LFL Oppenheim, *International Law: A Treatise*, volume 2: War and Neutrality (London: Longmans, Green and Company, 1906). The connection between Oppenheim’s vision and the format adopted by the *BYIL* was expressly acknowledged by Whittuck, *supra* note 63 at 1.

⁶⁵ (1922-23) 3 *Brit YB Int’l L* ii; (1924) 5 *Brit YB Int’l L* iv.

⁶⁶ See [1965] *Austl YB Int’l L* 1.

Its “modest aim,” according to the founding editor, J.G. Starke, QC, then a senior fellow at the Institute of Advanced Studies at the Australian National University, was “above all, to be informative, and thereby to contribute to the extension of the world rule of law.”⁶⁷ Starke provided no further discussion of the intended “Australian” character of the *Australian Year Book*, other than identifying an Australian connection to the international body most clearly tasked with the “world rule of law” — the International Court of Justice (ICJ). By coincidence, both the Canadian and Australian yearbooks made connections to the first (and, to date, only) Canadian and Australian respectively to sit as permanent (rather than ad hoc) judges of the ICJ, with the Honourable John E. Read, QC, named as an honorary editor for the *CYIL* and Sir Percy Spender writing the first article for the *Australian Year Book* at a time when he was president of the ICJ.⁶⁸ (Read also wrote articles for the first and second volumes of the *CYIL/ACDI*.)⁶⁹

⁶⁷ JG Starke, “Preface” [1965] *Austl YB Int’l L* 3. For a fuller description of Starke’s career, see Ivan Shearer, “J.G. Starke, Q.C.” (2006) 25 *Austl YB Int’l L* i. Like MacKenzie and Corbett in Canada, Starke had also experienced international legal practice, serving in the Legal Secretariat of the League of Nations from 1937 to 1940. Shearer recalls that one of Joe Starke’s tasks was to write to Leon Trotsky, who wished to propose that Josef Stalin be brought before the new International Criminal Court after learning that the League of Nations had adopted a Convention for the Prevention and Punishment of Terrorism in 1937. The convention never entered into force.

⁶⁸ Sir Percy Spender, “The Office of President of the International Court of Justice” [1965] *Austl YB Int’l L* 9. At the time of his nomination to the court in 1957, Sir Percy was the Australian ambassador to the United States and a former minister for foreign affairs. He sat on the International Court of Justice (ICJ) from 1958 to 1967, serving as president of the Court from 1964 to 1967. It was after the *Australian Year Book*’s founding that Sir Percy (infamously) cast the deciding vote in the South West Africa cases. See *South West Africa, Second Phase*, Judgment, [1966] ICJ Rep 6 at 51-57. A second Australian is likely to become a member of the ICJ in 2014. See Commonwealth of Australia, Minister for Foreign Affairs, Press Release, “Nomination of Professor James Crawford SC to the International Court of Justice” (30 October 2012), online: Government of Australia <http://foreignminister.gov.au/releases/2012/bc_mr_121030.html>. See also JKT Chao, “John E. Read, Q.C., D.C.L., LL.D. (1888-1973): The First and Only Judge with Canadian Nationality of the International Court of Justice” (2005) 23 *Chinese (Taiwan) YB Int’l L & Aff* 17; Shabtai Rosenne, “Judge John E. Read and the International Court of Justice” (1979) 17 *Can YB Int’l L* 3.

⁶⁹ John E Read, “The Trail Smelter Dispute” (1963) 1 *Can YB Int’l L* 213; John E Read, “The World Court and the Years to Come” (1964) 2 *Can YB Int’l L* 164.

Starke is credited with getting the *Australian Year Book* started. However, he did believe that “the interests of the Year Book would be better served if it could be serviced by the resources of a Law School.”⁷⁰ (Starke at that time held a fellowship at a research-focused institute that had no teaching duties.) Others agreed, and so the responsibility for the production of the *Australian Year Book* was assumed by Monash University, for the third, fourth, and fifth volumes. The *Australian Year Book* was not, however, always yearly, with eventual production of the fifth volume covering 1970-73.⁷¹ It was also beset by financial problems, with low sales leading its commercial publisher to doubt its viability.⁷² By the *Australian Year Book*’s sixth volume, the commercial publisher, Butterworths, had been replaced with the Faculty of Law at the Australian National University, where it has been based ever since — a move that was also thought to facilitate a desired cooperation with the Australian Department of Foreign Affairs, which is also located in Canberra.⁷³

It is also worth noting that Starke worked on the *Australian Year Book* without an editorial board in place. However, by the third volume, an editorial committee had been established, under the leadership of D.W. Greig and then H.B. Connell, both then of Monash University.⁷⁴ The representatives on the editorial committee were expressly designated as being from the Universities of Adelaide, Melbourne, Queensland, Sydney, and Tasmania as well as (initially) the University of Papua New Guinea.⁷⁵ There was also a representative from the “Department of External Affairs and Attorney-General’s Department” (later a representative from each) and two “overseas consultants” (one from the United Kingdom and one from the United States).⁷⁶ By the sixth volume, edited again by

⁷⁰ DW Greig, “Preface” [1967] *Austl YB Int’l L* vii at vii. See Shearer, *supra* note 67 at iii.

⁷¹ A problem also encountered in the 1980s, with the tenth volume covering 1981-83 and the eleventh volume covering 1984-87.

⁷² Robert Miller, “Preface” [1970-73] *Austl YB Int’l L* vi.

⁷³ DW Greig, “Preface” [1974-75] *Austl YB Int’l L* vii.

⁷⁴ HB Connell, “Preface” [1968-69] *Austl YB Int’l L* v.

⁷⁵ “Editorial Committee” [1967] *Austl YB Int’l L* iii; but see “Editorial Committee” [1970-73] *Austl YB Int’l L* v, where Macquarie University replaced the University of Papua New Guinea. The University of Sydney was not listed for the fifth volume of the *Australian Year Book* but was back for the sixth.

⁷⁶ “Editorial Committee” [1967] *Austl YB Int’l L* iii; “Editorial Committee” [1970-73] *Austl YB Int’l L* v.

Greig (who by that point was at the Australian National University), there were no longer overseas consultants, and the renamed editorial “board” now included representatives from nine Australian universities.⁷⁷ There was also a new category of “members by invitation” that included Starke, Julius Stone (then Challis Professor of Jurisprudence and International Law at the University of Sydney), and a “Mr. E. Lauterpacht, QC” (then a British barrister serving as the Legal Adviser on international law for the Australian Department of External Affairs).⁷⁸ This category of “members by invitation” continued for four more volumes and was then abandoned, as was the practice of designating university representatives. Individual editorial board members are now simply listed by name.

In addition to editing the first two volumes, and writing several of the articles published in the early issues, Starke also initiated a regular section providing an account of Australian practice in international law for the period under review. As noted by Ivan Shearer in 2006: “This section has since grown greatly in volume as the body of Australian practice has increased, and came in later years to engage the labours of officers of the Departments of the Attorney-General and Foreign Affairs and Trade. The section must now be regarded as a compilation of record and an essential research tool for all Australian international lawyers.”⁷⁹ A regular summary of “recent developments in private international law,” featuring both Australian and English cases, was also initiated by Starke with the release of the second volume.⁸⁰ It is these sections that over the years have given the *Australian Year Book* its “Australian” quality, by collecting in one place the source material necessary to illustrate Australia’s position on international legal questions.

THE CANADIAN CONTENT OF THE *CYIL/ACDI*

For the first volume of the *CYIL/ACDI*, the task of defining a “Canadian perspective” fell to Cohen, who chose to entitle the publication’s very first article: “Some Main Directions of International Law: A Canadian Perspective.”⁸¹ For Cohen, there were a number

⁷⁷ “Editorial Board” (1974-75) 6 *Austl YB Int’l L* iii.

⁷⁸ *Ibid.*

⁷⁹ Shearer, *supra* note 67 at iii. See also Hathaway, *supra* note 6 at ii.

⁸⁰ JG Starke, “Preface” [1966] *Austl YB Int’l L* 3.

⁸¹ Maxwell Cohen, “Some Main Directions of International Law: A Canadian Perspective” (1963) 1 *Can YB Int’l L* 15.

of international law problems that had given Canada a certain expertise that could be viewed as “the unique Canadian contribution to the data on state practice,” with Cohen listing as examples:

[T]he management of boundary and trans-boundary lakes and rivers; bilateral and multi-lateral conservation and exploitation of the resources of the sea; sovereignty over the polar area; the techniques for management and sharing the economic and defence problems of a common continent with a great and powerful neighbour; and, finally, the administrative and legal consequences of inviting the world’s shipping to traverse a great inland seaway, itself shared by Canada and her neighbour.⁸²

It was not, however, Cohen’s view that this list of concrete Canadian-specific concerns arising within the practice of international law should “preclude reaching for the distant horizons of general international law, of legal theory, or of the vast inter-disciplinary movement that [was then] reconstructing much of international law.”⁸³ And yet, while there has certainly been room in the *CYIL/ACDI* for the publication of theoretical works, it would appear that much has been written over the years on the problems of international law that relate to matters of perceived Canadian identity such as rivers, seas, and natural resources as well as to associated concerns with respect to the environment, trade, and investment. A strong interest in multilateral institutions, both regional and universal in orientation, can also be detected as well as an interest in the national application of international law (especially as it applies within a federation) and the law of armed conflict and legal restraints on the use of force. There was, however, a surprising dearth of articles in the early years on matters of international human rights law.⁸⁴

⁸² *Ibid* at 17.

⁸³ *Ibid*. A notable theoretical work appearing in the *CYIL/ACDI* is Douglas M Johnston, “Functionalism in the Theory of International Law” (1988) 26 *Can YB Int’l L* 3. Johnston would later write *The Historical Foundations of World Order: The Tower and the Arena* (Leiden: Martinus Nijhoff, 2008), which was awarded the ASIL Certificate of Merit for Pre-eminent Contribution to Creative Scholarship posthumously in 2009.

⁸⁴ An exception is Ivan L Head, “The Stranger in Our Midst: A Sketch of the Legal Alien in Canada” (1964) 2 *Can YB Int’l L* 107. By comparison, the fifth volume of the *Australian Year Book* featured a symposium on human rights, including a lead article by Gareth Evans, then a lecturer in law at the University of Melbourne. Gareth Evans, “Prospects and Problems for an Australian Bill of Rights” [1970-73] *Austl YB Int’l L* 1.

Undertaking a detailed review of almost fifty years of scholarship is a daunting task, and one that will not be attempted here. It is also difficult to determine how to structure even a cursory review of forty-nine volumes, with a degree of artificiality attached to any division by number of years (notwithstanding any veneration for round numbers). There is also a degree of crossover and subjectivity in any assignment of subject matter as a means of organizing the source material. Nevertheless, certain features are noticeable from even an impressionistic review. For example, it is evident that, in the *CYIL/ACDI*'s early years, there was a clear interest among the members of the editorial board, if not the members of the Canadian international legal community, in matters concerning waters, the Arctic, and fishing, as well as air and space law (with the latter topic benefiting from the constant efforts of one of the *CYIL/ACDI*'s key promoters).⁸⁵ International criminal law was also a subject area of early interest, as were Cold War bipolarity and Soviet approaches to international law, reflecting both a connection to world events (such as the Cuban missile crisis of 1962) and the particular interests of an editorial board member.⁸⁶ Asia was also a region of interest, driven again by a combination of current events

⁸⁵ On waters, see, for example, GV La Forest, "Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident" (1963) 1 *Can YB Int'l L* 149; CB Bourne, "The Right to Use the Waters of International Rivers" (1965) 3 *Can YB Int'l L* 187; CB Bourne, "Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate" (1972) 10 *Can YB Int'l L* 212. On the Arctic, see Donat Pharand, "Innocent Passage in the Arctic" (1968) 6 *Can YB Int'l L* 3; Jacques-Yvan Morin, "Le progrès technique, la pollution et l'évolution récente du droit de la mer au Canada, particulièrement à l'égard de l'Arctique" (1970) 8 *Can YB Int'l L* 158. On fishing, see AE Gotlieb, "The Canadian Contribution to the Concept of a Fishing Zone in International Law" (1964) 2 *Can YB Int'l L* 55; Jacques-Yvan Morin, "La zone de pêche exclusive du Canada" (1964) 2 *Can YB Int'l L* 77. Gerald F FitzGerald authored an annual article in his personal capacity on matters of air and space law for each of volumes 1-12. He would later author additional articles for volumes 17, 20, 22, and 25.

⁸⁶ On international criminal law, see, for example, Gerald F FitzGerald, "Offences and Certain Other Acts Committed on Board Aircraft: The Tokyo Convention of 1963" (1964) 2 *Can YB Int'l L* 191. On the Cold War and Soviet approaches to international law, see Edward McWhinney, "Soviet and Western International Law and the Cold War in the Era of Bipolarity Inter-Block Law in a Nuclear Age" (1963) 1 *Can YB Int'l L* 40; Edward McWhinney, "Soviet Bloc Publicists and the East-West Legal Debate" (1964) 2 *Can YB Int'l L* 2 (building upon Edward McWhinney, "Peaceful Co-Existence and Soviet-Western International Law" (1962) 50:4 *AJIL* 951). See also André Patry, "La conception soviétique du droit international" (1971) 9 *Can YB Int'l L* 102. This topic is of continuing interest. See Edward McWhinney, "International Law Making in Times of Competing

and personalities, with the yearbook publishing articles on the status of Taiwan, Canada's role in Vietnam, and Canada's approach to the emergence of two Chinas.⁸⁷ Authors were also interested in international institutions, including regional organizations, as well as general topics of international law such as state succession.⁸⁸ There was also an evident interest in the future uses of developing technology, reflected in works on satellites and broadcasting, as well as an interest in international dispute settlement and the inter-relationship between federalism and foreign affairs.⁸⁹ On occasion,

Ideologies or Clashing Civilizations: Peaceful Coexistence and Soviet-Western Legal Dialogue in the Cold War Era" (2006) 44 *Can YB Int'l L* 421.

- ⁸⁷ Dai Poeliu was another regular contributor, writing articles primarily on developments in Asia for volumes 2-6, 8, 10-12, and 17. He had graduated from Johns Hopkins University in 1934 with a doctorate in international law and relations and worked at the International Civil Aviation Organization in the 1960s, before becoming a political science professor at the State University of New York at Potsdam. His contributions to the *CYIL/ACDI* included Dai Poeliu, "Canada and the Two-China Formula at the United Nations" (1967) 5 *Can YB Int'l L* 217; Dai Poeliu, "Recognition of States and Governments under International Law with Special Reference to Canadian Postwar Practice and the Legal Status of Taiwan (Formosa)" (1965) 3 *Can YB Int'l L* 290; Dai Poeliu, "Canada's Role in the International Commission for the Supervision and Control in Vietnam" (1966) 4 *Can YB Int'l L* 161. On the status of Taiwan, see also D Barry Kirkham, "The International Legal Status of Formosa" (1968) 6 *Can YB Int'l L* 144.
- ⁸⁸ On international institutions, see, for example, AE Godlieb, "The International Law Commission" (1996) 4 *Can YB Int'l L* 64. On regional organizations, see R St J Macdonald, "The Developing Relationship between Superior and Subordinate Political Bodies at the International Level: A Note on the Experience of the United Nations and the Organization of American States" (1964) 2 *Can YB Int'l L* 21; John PS McLaren, "The Dominican Crisis: An Inter-American Dilemma" (1966) 4 *Can YB Int'l L* 178. The European Union has also been a regional organization of interest to authors published in the *CYIL/ACDI*, as has the African Union in more recent years. On state succession, see, for example, KP Misra, "Succession of States: Pakistan's Membership in the United Nations" (1965) 3 *Can YB Int'l L* 281; Hugh J Lawford, "The Practice Concerning Treaty Succession in the Commonwealth" (1967) 5 *Can YB Int'l L* 3.
- ⁸⁹ On satellites and broadcasting, see, for example, AE Godlieb and CM Dalfen, "Direct Satellite Broadcasting: A Case Study in the Development of the Law of Space Communications" (1969) 7 *Can YB Int'l L* 33. On international dispute settlement, see Ivan L Head, "A Fresh Look at the Local Remedies Rule" (1967) 5 *Can YB Int'l L* 142; Ronald G Atkey, "Foreign Investment Disputes: Access of Private Individuals to International Tribunals" (1967) 5 *Can YB Int'l L* 229. On the inter-relationship between federalism and foreign affairs, see Louis Sabourin, "La participation des provinces canadiennes aux organisations internationales" (1965) 3 *Can YB Int'l L* 73; Edward McWhinney, "Federalism, Biculturalism, and International Law" (1965) 3 *Can YB Int'l L* 100.

the *CYIL/ACDI* was also used to report on new developments within the Canadian international legal community, such as the first “scientific” conference of the Canadian branch of the ILA, and the first (and subsequent) conferences of the then newly formed CCIL-CCDI.⁹⁰ The *CYIL/ACDI* also began a practice of publishing memorials to mark the passing of community members.

While the law of the sea continued its hold, international environmental law as a separate but related field also gained greater prominence in the *CYIL/ACDI* in the 1970s, coinciding with the first “Earth Day” as well as with Prime Minister Pierre Trudeau’s announcement of new legislation to protect Canada’s marine environment.⁹¹ The law of armed conflict also gained greater attention throughout the 1970s and 1980s, as did matters of transnational criminal law.⁹² Certain human rights issues also garnered interest, such as refugee law and the rights of minorities, whereas human rights were a topic of attraction in earlier years from an institution-building perspective.⁹³ There was, however, a greater interest in

⁹⁰ Edward McWhinney, “Coexistence, National and International: The First Annual Scientific Meeting of the International Law Association (Canadian Branch)” (1966) 4 *Can YB Int’l L* 216; DM McRae, “Annual Conference of the Canadian Council on International Law” (1972) 10 *Can YB Int’l L* 278. McRae would subsequently write reports on the second to fifth conferences.

⁹¹ See, for example, J Alan Beesley, “The Canadian Approach to International Environmental Law” (1973) 11 *Can YB Int’l L* 3. See also ALC de Mestral, “La Convention sur la prévention de la pollution résultant d’immersion de déchets” (1973) 11 *Can YB Int’l L* 226; R St J Macdonald, “The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice” (1970) 8 *Can YB Int’l L* 3. The reservation preventing scrutiny by the court was reportedly described by AE Gotlieb and CM Dalfen as a “decisive act” in the move towards a Canadian foreign policy focused on national interests. McRae, *supra* note 90 at 279.

⁹² On the law of armed conflict, see most notably LC Green, “Superior Orders and Command Responsibility” (1989) 27 *Can YB Int’l L* 167. For a more recent contribution, see Christopher K Penny, “Obeying Restraints: Applying the Plea of Superior Orders to Military Defendants before the International Criminal Court” (2010) 48 *Can YB Int’l L* 3. On transnational criminal law, see J-G Castel and Sharon A Williams, “The Extradition of Canadian Citizens and Sections 6(1) and 1 of the Canadian Charter of Rights and Freedoms” (1987) 25 *Can YB Int’l L* 263.

⁹³ Contrast AE Gotlieb, “Canada and the Refugee Question in International Law” (1975) 13 *Can YB Int’l L* 3, with R St J Macdonald, “The United Nations High Commissioner for Human Rights” (1967) *Can YB Int’l L* 84, and R St J Macdonald, “A United Nations High Commissioner for Human Rights: The Decline and Fall of an Initiative” (1972) 10 *Can YB Int’l L* 40. See also John P Humphrey, “United

human rights treaties as Canada neared adoption of the *Canadian Charter of Rights and Freedoms*.⁹⁴ The years 1970 and 1974 also marked the first times that the editors of the *CYIL/ACDI* published articles co-authored and sole-authored, respectively, by a woman.⁹⁵ Sharon Williams of Osgoode Hall Law School later became the first female regular contributor.⁹⁶ The 1970s and early 1980s also saw the publication of a valuable series of articles on the teaching of international law in Canada by Macdonald, starting in 1974.⁹⁷

As the *CYIL/ACDI* continued into the 1980s and 1990s, a greater variety of topics appeared to attract coverage, with world events supporting a continuing interest in the law concerning the use of force, including humanitarian intervention.⁹⁸ Matters of litigation, such as those concerning the continental shelf and the Gulf of Maine, were natural candidates for coverage within a “Canadian” journal devoted to international law.⁹⁹ So too were contemporary events such as the *Cosmos 954* incident and the adoption of a new *State Immunity Act*.¹⁰⁰ However, there also appeared to be more

Nations High Commissioner for Human Rights: The Birth of an Initiative” (1973) 11 Can YB Int’l L 220.

⁹⁴ Hugo Fischer, “The Human Rights Covenants and Canadian Law” (1977) 15 Can YB Int’l L 42. The author was a former official with Canada’s Department of Justice. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁹⁵ Christiane Verdon and Charles M Dalfen, “Coopération régionale: nouvelle voie ou impasse dans le développement du droit des satellites de radiodiffusion directe” (1970) 8 Can YB Int’l L 89; Michla Pomerance, “Methods of Self-Determination and the Argument of Primitiveness” (1974) 12 Can YB Int’l L 38.

⁹⁶ Williams assumed the task of preparing the digest of cases, started by J-G Castel in 1968-69. See Sharon A Williams, “Digest of Important Canadian Cases Reported in 1974 in the Fields of Public International Law and Conflict of Laws” (1975) 13 Can YB Int’l L 396, and subsequent contributions.

⁹⁷ Macdonald, *supra* note 7. Parts II, III, and IV in Macdonald’s series on the teaching of international law in Canada can be found in volumes 13, 14, and 21 respectively of the *CYIL/ACDI*. See also Macdonald, *supra* note 29.

⁹⁸ See, for example, R St J Macdonald, “The Nicaragua Case: New Answers to Old Questions?” (1986) Can YB Int’l L 12; John H Currie, “NATO’s Humanitarian Intervention in Kosovo: Making or Breaking International Law?” (1998) 36 Can YB Int’l L 303.

⁹⁹ See ML Jewett, “The Evolution of the Legal Regime of the Continental Shelf” (1984) 22 Can YB Int’l L 153 (with Part II in (1985) 23 Can YB Int’l L 201); LH Legault and DM McRae, “The Gulf of Maine Case” (1984) 22 Can YB Int’l L 267.

¹⁰⁰ Edward G Lee and DW Sproule, “Liability for Damage Caused by Space Debris: The *Cosmos 954* Claim” (1988) 26 Can YB Int’l L 273; HL Molot and ML Jewett,

articles written on matters of trade and investment than in previous decades.¹⁰¹ With the 1993 World Conference on Human Rights, general matters of human rights law also attracted interest, including the use of reservations.¹⁰² The relevance of international law within Canada and private international law also became topics of interest (beyond the usual digests of practice and cases).¹⁰³ By the end of the 1990s, key campaigns and key cases in which Canada was involved had also earned coverage in the *CYIL/ACDI*.¹⁰⁴

At the conclusion of his thirty-year term as editor-in-chief, Bourne was reportedly not that pleased with the *CYIL/ACDI*'s evolution, viewing "much of the material that has appeared in the Yearbook as not being of much lasting value."¹⁰⁵ The passage of time is needed before one can adequately evaluate this claim, with the *CYIL/ACDI*'s improving electronic accessibility potentially leading to greater use of its contributions in future years. One feature that is noticeable from even a cursory review of the *CYIL/ACDI*'s more recent volumes is the widening pool of authors. There is less reliance on multiple contributions from founding editorial board members and prominent members of the Canadian Departments of Foreign Affairs and Justice and greater representation of a "younger" generation of international law teachers and scholars in Canada.¹⁰⁶ I will avoid

"The State Immunity Act of Canada" (1982) 20 Can YB Int'l L 79. *State Immunity Act*, RSC 1985, c S-18.

¹⁰¹ See, for example, Robert K Paterson, "Canadian Investment Promotion and Protection Treaties" (1991) 29 Can YB Int'l L 373; JC Thomas, "Investor State Arbitration under Chapter 11" (1999) 37 Can YB Int'l L 99.

¹⁰² William A Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform" (1994) 32 Can YB Int'l L 39.

¹⁰³ Gerard V La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can YB Int'l L 89; Robert Wai, "In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Private International Law" (2000) 39 Can YB Int'l L 117.

¹⁰⁴ See Philippe Kirsch and John T Holmes, "The Birth of the International Criminal Court: The Rome Conference" (1998) 36 Can YB Int'l L 3; Daniel Turp and Gibran van Ert, "International Recognition in the Supreme Court of Canada's Quebec Reference" (1998) 36 Can YB Int'l L 335.

¹⁰⁵ Macdonald, *supra* note 19 at 40.

¹⁰⁶ Those employed by the Department of National Defence have also made contributions, writing in their personal capacity. See, for example, WJ Fenrick, "The Exclusion Zone Device in the Law of Naval Warfare" (1986) 24 Can YB Int'l L 91; Robin F Holman, "The Rogue Civil Airliner and International Human Rights Law: An Argument for a Proportionality of Effects Analysis within the Right to Life" (2010) 48 Can YB Int'l L 39.

listing names for fear of overlooking a member of a club of which I am a part, but I confess my surprise to find that many of those who now teach international law in Canada’s law schools (with some exceptions) have recognized a value in publishing at least one article in the *CYIL/ACDI*.¹⁰⁷ In 2009, the *CYIL/ACDI* also branched out to provide a home for student-authored contributions by LLB/JD students.

THE CONNECTION TO THE PRACTICE OF INTERNATIONAL LAW

For Bourne, the most important section of the *CYIL/ACDI* was the one providing an annual review of Canadian practice.¹⁰⁸ This section first appeared in volume 2 (1964), covering practice in 1963, and evolved to include a regular survey of published and unpublished official statements and views in cooperation with the then Department of External Affairs as well as a digest of important Canadian cases in both public and private international law, which was published from 1969 on. A review of relevant parliamentary statements and votes was added in 1973, and a separate section reviewing treaty actions began in 1978. Reflecting a growing interest in matters of international commerce, finance, and investment, a section on developments in international economic law was added in 1989.

For Cohen, “the service side of the Yearbook, with its reports on documents and case law as well as other indices of Canadian practice, including parliamentary and other official statements, all signif[ied] the professional value of the Yearbook as the standard Canadian reference tool for international law scholarship.”¹⁰⁹ And yet, while these sections are undoubtedly of use, especially to those working in the field, it must also be noted that one can find few Canadian judicial citations to this valuable resource, including in cases where it would be relevant.¹¹⁰ It must, however, also be noted that articles, notes, and comments published in the *CYIL/ACDI* have also failed

¹⁰⁷ By the 1990s, Bourne reported a steady decline in the number of Canadian international lawyers submitting manuscripts on a regular basis (see Macdonald, *supra* note 19 at 41), so the problem may be one of repeat submission in a world where there is now a multiplicity of journal options available.

¹⁰⁸ Macdonald, *supra* note 19 at 40.

¹⁰⁹ Cohen, *supra* note at 27.

¹¹⁰ A notable example is provided by *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 at para 32, where no mention is made of the government’s stated position on the status of the precautionary

to attract much judicial citation.¹¹¹ Notable exceptions include L.C. Green's 1989 article on superior orders and command responsibility; Ivan L. Head's 1964 article on the legal status of aliens (which gained judicial attention in the 1990s, perhaps confirming that the passage of time may provide a fuller picture as to the influence of a scholarly work); and, more recently, the 2002 work of Jutta Brunnée and Stephen Toope on the use of international law by Canadian courts.¹¹² Lawyers litigating before Canadian courts, or judges and their clerks, have also turned to the *CYIL/ACDI* on a few occasions for updates on, or analysis of, extradition law in Canada, current developments with respect to ocean dumping, the negotiation of a new drug trafficking convention, and the adoption of a new *State Immunity Act*.¹¹³ Judicial citation is, however, a fickle metric of any publication's influence and relevance, although it is fascinating to see a degree of balance between male and female authors among the few citations.¹¹⁴

principle, despite this having been discussed in Michael Leir, "Canadian Practice in International Law at the Department of Foreign Affairs in 1998-99" (1999) 37 *Can YB Int'l L.* 317 at 319-324. For further discussion, see Gibran van Ert, "The Problems and Promise of *Spraytech v. Hudson*" (2001) 39 *Can YB Int'l L.* 371. See also Jutta Brunnée and Stephen Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 *Can YB Int'l L.* 3 at 47.

¹¹¹ Various works have received citation from scholars writing in other journals, notably in subject specific journals such as the *American Journal of Comparative Law*, the *Journal of Environmental Law*, the *Journal of International Economic Law*, the *Journal of Space Law*, and the *Natural Resources Journal*.

¹¹² Green, *supra* note 92, cited in *R v Finta*, [1994] 1 SCR 701; Head, *supra* note 84, cited in *R v Church of Scientology of Toronto*, [1996] 33 OR (3d) 65 (CA); and *Lavoie v Canada*, [2000] 1 FC 3 (CA); Brunnée and Toope, *supra* note 110, cited in *Islamic Republic of Iran v Hashemi*, 2012 QCCA 1449.

¹¹³ Castel and Williams, *supra* note 92, cited in *United States of America v Cotroni*; *United States of America v El Zein*, [1989] 1 SCR 1469; Elaine Hughes, "Ocean Dumping and Its Regulation in Canada" (1998) 26 *Can YB Int'l L.* 155, cited in *Nanoose Conversion Campaign v Canada (Minister of Citizenship and Immigration)*, [1997] 141 FTR 54; DW Sproule and Paul St-Denis, "The UN Drug Trafficking Convention: An Ambitious Step" (1989) 27 *Can YB Int'l L.* 263, cited in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982; Molot and Jewett, *supra* note 100, cited in *Republic of Iraq c Export Development Corp.*, [2003] RJQ 2416 (Qué CA).

¹¹⁴ Including the citation to one, but not two, articles on the legal status of Taiwan. See Poeliu *supra* note 87, cited in *Parent c Singapore Airlines*, 2003 CanLII 7285 (QCCS).

THE BOARD OF EDITORS

It would be remiss in any article commemorating fifty years of intellectual contribution and effort not to make some mention of the Board of Editors. In addition to the Herculean efforts of an editor-in-chief, the *CYIL/ACDI* has drawn upon the expertise of a board, consisting at first of five editors, six associate editors, and two honorary editors but later evolving to have one editor-in-chief, an associate editor with responsibility for French-language contributions, and ten to twelve board members, plus several honorary editors.¹¹⁵ By the twelfth volume, the role of assistants to the editors was introduced, becoming a “training ground” for the roles of associate editor and editor-in-chief.¹¹⁶

Bourne himself credited FitzGerald as being “the dominant influence in the selection of the editor and the first members of the editorial board.”¹¹⁷ From the beginning, there has been an emphasis on the legal nature of the enterprise, with the board comprising individuals from Canadian law faculties, government legal service, and private practice, with no clearly indicated representatives from other disciplines.¹¹⁸ It is also apparent that the *CYIL/ACDI* was intended to be “Canadian,” in the sense that its editors and board members worked in Canada and were representative of Canada’s bilingual and bilingual traditions (although it is acknowledged that

¹¹⁵ The role of editor-in-chief has been carried out by CB Bourne from 1963 to 1992, DM McRae from 1993 to 2009, and John H Currie of the University of Ottawa since 2010. The role of associate editor has been carried out by Jacques-Yvan Morin from 1964 to 1973, A Donat Pharand from 1974 to 1982, ALC de Mestral from 1983 to 2009, and René Provost of McGill University since 2010.

¹¹⁶ Former assistants to the editors have included ALC de Mestral (1974-82), DM McRae (1974-92), Daniel Turp (1983-88), France Morrissette (1989-99), Joost Blom (1993-99), John H Currie (2000-09), René Provost (2000-09), and now Nicole LaViolette of the University of Ottawa and Frédéric Mégret of McGill University (each since 2010).

¹¹⁷ Bourne, *supra* note 28 at 390.

¹¹⁸ Long-serving board member FitzGerald worked for the Canadian government from 1940 to 1946, the International Civil Aviation Organization from 1946 to 1970, and then the Canadian government again, specifically the Department of Justice, from 1970 to 1985; Bourne, *supra* note 28 at 389. It is interesting to note that Bourne had in the early years taught a compulsory course on public international law for the LLB program that was open to students from across the University of British Columbia, attracting students of history, political science, and international affairs. According to Macdonald, *supra* note 19 at 17, “[t]he course proved so popular outside the faculty of law that the number of non-law students was capped in order to retain the legal flavour of the subject matter.”

many of Canada's international lawyers were born elsewhere or educated abroad (or both)).¹¹⁹ From the beginning, efforts were also made to ensure a degree of cross-Canada representation in geographic terms, akin to the efforts of the Canadian branch of the ILA to establish sections in various Canadian centres. A category of honorary editor has also existed from the beginning, with the first two honorary editors being Read (by then a former judge of the ICJ) and MacKenzie (who by 1962 had just finished his term as president of the University of British Columbia). As the years have passed, a number of former editorial board members have joined this group. There were no women on the editorial board for many years, until the twenty-fourth volume when Christiane Verdon of the Department of Justice (and the first woman published in the *CYL/ACDI*) and Sharon Williams joined the board in 1986.¹²⁰ (By way of comparison, a woman had served as secretary of state for external affairs in Canada in 1979.)¹²¹

There has also been a high degree of loyalty to the enterprise from editors and editorial board members, although one could also describe this situation as exhibiting a low degree of turnover, with possible impacts for diversification. Most editorial board members with the *CYL/ACDI* have served for many years, with many also being frequent contributors of published material, whether articles, notes, or digests (most notably, by order of their current citation counts — although many remain active as scholars and writers — Joost Blom, Leslie C. Green, Edward McWhinney, Ronald St. J. Macdonald, Armand L.C. de Mestral, Gerald F. FitzGerald, Donald M. McRae, Maureen Irish, Sharon A. Williams and Jean-Gabriel Castel). In fact, almost all board members have supported the *CYL/ACDI* with the authorship of at least one contribution (with two exceptions among board members appointed since the 1990s).¹²² If an anniversary serves as an opportunity to look forward as well as

¹¹⁹ By comparison, from 1944 to 1969, only American citizens were eligible to serve on the *AJIL's* Board of Editors. Damrosch, *supra* note 47 at 11.

¹²⁰ Verdon and Dalfen, *supra* note 95.

¹²¹ The public record does not indicate whether a woman was asked, and declined, to join the Board in earlier years.

¹²² Two other board members have never published an article, note or digest in the *CYL/ACDI* but each served for uncharacteristically short terms of service of less than three years in the early 1960s and mid-1970s. Bederman notes that the waning of editorial board members as authors is "part of the normal course of maturation of any academic periodical." Bederman, *supra* note 1 at 56.

back, consideration might be given to fixed terms and the open advertisement of vacancies to recruit both established and newly emerging scholars as well as the American notion of “term limits” — the *AJIL* having engaged in a similar discussion.¹²³

CONCLUSION

While its name may indicate its locality, the *CYIL/ACDI* has also served an important role as an outlet for scholarship by academics and practitioners (and those who straddle the perceived divide) who choose to work in Canada. It is this locality that generates an interest in rivers, seas, and ice as well as fish, the environment, and trade and also an interest in multilateral institutions aimed at promoting peace and security, regional cooperation, cross-border transactions, and the conflict of laws. But we are also “Canadian” in our scholarship because we choose to write for a journal that embraces the “Canadian” in its title, at a time when there is no shortage of excellent journals and other vehicles for expression. Over time, these choices result in a collection of works that will serve as a resource for any future assessment of the “thinking of Canadians in the field of international law.”¹²⁴ The *CYIL/ACDI*’s very existence as a “Canadian” journal may itself encourage the exploration of “Canadian” viewpoints, approaches, and perspectives, and its yearly nature may encourage a more sustained approach.

The *CYIL/ACDI* also offers emerging scholars and newer voices who are based (and increasingly educated) in Canada with an opportunity, through its board of editors, to work with established scholars and those with connections to the practice of international law. In looking forward, as one is wont to do during any anniversary, this benefit could be more widely advertised, much like the *BYIL* offers the hopeful author the opportunity to work with chairholders at Oxford and Cambridge. No student-run journal can offer the depth of experience found within the *CYIL/ACDI*’s board of editors, and while those of long service are to be commended for their contributions, a greater turnover on the board, as well as open and competitive recruitment of future members, may further enhance this aspect, if the experience of the *AJIL* is any guide. The creation of a prize for the best article published by an academic or practising lawyer on a topic of either public or private international law might

¹²³ Damrosch, *supra* note 47 at 17; Bederman, *supra* note 1 at 56.

¹²⁴ Bourne, *supra* note 32 at 11.

also be a project for the future, as might a collection of representative samples of the *CYIL/ACDI*'s past contributions to the exploration of a Canadian approach to international law.

As for the goal of the *CYIL/ACDI* to provide an authoritative record of Canadian practice in the field of international law, inspired by the positivism of Oppenheim and others, perhaps greater promotion of this function is needed. Connecting with the network of younger instructors of international law who have published in the *CYIL/ACDI* may be one means of encouraging the teaching of the lawyers of tomorrow about the utility of this record of statements, positions, and views.¹²⁵ A more detailed breakdown of topics covered in these sections within the table of contents might also assist lawyers and others, given the use of alert services for such tables.

Sommaire

Le premier tome de l'*Annuaire canadien de droit international / The Canadian Yearbook of International Law (ACDI/CYIL)* a été publié en 1963. Puisque les anniversaires invitent à réflexion, cet article traite de l'aspect canadien du patrimoine, des aspirations et des contributions de l'*ACDI/CYIL* à l'occasion de sa cinquantième année de publication. En plus d'indiquer sa localisation, l'identité canadienne de l'*ACDI/CYIL* sert également à souligner son rôle important comme forum pour la diffusion d'études scientifiques, tant par des universitaires que des praticiens basés au Canada. En a résulté une collection importante d'œuvres qui donne un aperçu des opinions des Canadiens et Canadiennes sur des questions de droit international. Mention est également faite de la valeur professionnelle de l'*ACDI/CYIL*, qui a servi de registre faisant autorité de la pratique canadienne dans le domaine.

Summary

The first volume of *The Canadian Yearbook of International Law/ Annuaire canadien de droit international (CYIL/ACDI)* was published

¹²⁵ For teaching materials that draw attention to the utility of this valuable resource through the inclusion of many excerpts from these statements of practice, see, for example, John H Currie et al, *International Law: Doctrine, Practice, and Theory*, 2nd edition (Toronto: Irwin Law, 2014).

in 1963. Anniversaries being a time for reflection, this article examines the Canadian aspect of the *CYIL/ACDI*'s heritage, aspirations, and contributions on the occasion of its fiftieth year of publication. In addition to indicating its locality, the Canadian identity of the *CYIL/ACDI* also serves to highlight the journal's important role as an outlet for scholarship by academics and practitioners based in Canada, resulting in a collection of works that provides insight into the views of Canadians on matters of international law. Mention is also made of the professional value of the *CYIL/ACDI* in its provision of an authoritative record of Canadian practice in the field.