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Abstract
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INTERNATIONAL LEGAL SCHOLARSHIP IN CANADA

BY JOHN E. CLAYDON* AND D.M. MCRAE**

International law scholarship in Canada is largely limited to a small group of decentralized writers facing a vast and ill-defined field. In those areas in which significant work has been undertaken — the law of the sea, for example — Canadian scholarship is limited by a commitment to a national perspective rather than a recognition of the interests of the global community. The work is largely descriptive, and avoids a deeper theoretical analysis. International law is seen as a fringe discipline, and is presently unable to support the specialized effort necessary to produce the fundamental research that is badly needed if the significance of the area is to be recognized.

I. INTRODUCTION

Any assessment of Canadian international legal scholarship must answer three basic definitional questions. First, what is meant by 'international law'? Second, what is 'Canadian' for the purpose of the assessment? Third, how should 'scholarship' be defined?

Traditionally, international law has been viewed as the body of rules governing relations between nation-states. The wide ambit encompassed by even this conventional conception has been described as the sense of futility shared by international law teachers embarking on "the yearly effort to cover what amounts to the international equivalents of property, contract, tort, criminal law, legal process, and procedure within the compass of forty-five or sixty hours."\(^1\) Recently, however, increasing interdependence has broadened the reach of international law even further in two significant ways. First, the ambit of the traditional definition has been expanded to include such areas as environmental and commercial law. Second, the parameters of the traditional definition have been extended to include relations between a state and its citizens (human rights), multinational corporations, and international organizations. The result has been a blurring of the old boundaries between public and private international law and between international law and domestic law. One important consequence has been that domestic courts now have

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increasing opportunities to apply international law, whether in interpreting
the Charter or in dealing with a state claim of sovereign immunity
involving a commercial transaction. With these developments in mind
we have adopted, for the purpose of our assessment of Canadian
international legal scholarship, a more inclusive definition.

Since this Symposium is evaluating the research produced by scholars
working in Canada, we include the work of scholars based in Canada,
regardless of their origin, nationality, or training, or of the place of
publication. Writings by scholars based outside Canada, whether or not
'tCanadians' or concerned with 'Canadian' issues, have been excluded,
regardless of place of publication. Publications on international law by
non-lawyers working in Canada have also been considered.

This review emphasizes writing during the past ten years, for two
reasons. First, the state of Canadian legal scholarship as it existed ten
or so years ago has already been assessed elsewhere. Second, the beginning
and end of this ten-year period were marked by the publication of two
collections of essays which are important both for this review and for
Canadian scholarship in international law in general. The earlier book
comprises nearly forty essays and a thousand pages by Canadian writers
on virtually every area of international law. Designed to be "a fairly
complete reflection of contemporary Canadian approaches to interna-
tional law," it was the first serious collection of writings by Canadians.
The later book has as many chapters and more pages; but rather than
offering Canadian scholarship in microcosm it deals with only one topic
— international legal theory. Apart from the chapters written by the
two editors and one other, there is no essay by a Canadian, nor is the
book concerned with the Canadian contribution to theory. These two
publications provide an important background for any consideration of
Canadian international legal scholarship.

We propose to review briefly the writing in various areas of
international law since 1973 and then to consider the state of Canadian
theorizing about international law. We view the emphasis on theory

2 D.M. McRae, "Innovation in International Law: Canada" (1972) [unpublished]; J. Claydon,
"Canadian Perspectives on International Law and Organization: Toward an Expanding Role in
World Order" (1975) 2 Dal. L.J. 533.
3 R.StJ. Macdonald, G.L. Morris & D.M. Johnston eds., Canadian Perspectives on International
4 Ibid. at xix.
5 R.StJ. Macdonald & D.M. Johnston, eds., The Structure and Process of International Law:
6 K.V. Raman, "Towards a New World Information and Communication Order: Problems
of Access and Cultural Development" in ibid. at 1027.
7 Our most useful single bibliographical source for material published prior to 1983 has been
to be justified not only because globally "the science of international law seems seriously deficient in major theoretical works," but also by the Arthurs Group's conclusion that "legal theory, and particularly fundamental research into the values, operation and effects of law, have been largely neglected."9

II. CRITERIA FOR SCHOLARSHIP

To evaluate the scholarly quality of Canadian international law writing and research we must identify criteria relevant for defining scholarship. In our view scholarly inquiry requires both a distinctive orientation and the performance of a series of interrelated intellectual tasks.

The need to define a scholarly perspective is relevant also to domestic law when one considers how much of the agenda, if not the specific content, of research is determined by the priorities of governments, law reform commissions, and the like.10 This concern is even greater in the international law field, where "those engaged in full-time academic appointments are likely to find significant portions of their time devoted to advisory and consultative services for governments and agencies confronted with the need to react to current events."11 Whatever the impact of these relationships on scholarship (for example, confusion about what scholarship is, distortion of priorities), two additional factors unique to international law research render it imperative to distinguish the scholarly role from active involvement in the international adversary process.

The first factor is the difficulty of distinguishing adversarial postures from scholarly inquiry in a legal system still largely bereft of adjudicating institutions. In light of this situation it is particularly important for scholars to provide the authoritative evaluation of challenged national courses of conduct which can be provided by courts in domestic law.12 However, the difficulty of maintaining dedication to the common interests of the world community rather than to the special interests of a particular state is compounded by the second factor: the Canadian international law scholar is a citizen of Canada, or at least has a significant commitment

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10 Ibid. at 82-83.
11 Supra, note 8 at 4.
to the Canadian polity. Although Canadian scholars do write about global problems simply because they are global issues, for a host of reasons (funding, a perceived need to appear ‘relevant’, the consulting nexus, perhaps even a tendency to compensate for non-Canadian origin), a significant amount of research involves issues of international law closely linked to Canadian foreign and domestic policy. This raises the question whether, in the course of their research, scholars have demonstrated the observational standpoint of commitment to the common interests of the entire global community.

In our view, the intellectual tasks which any scholar should undertake, and which we adopt as our criteria, are the standard fare of problem-solving analysis. First, it is necessary to specify carefully the full range of issues comprising the ‘problem’, including the relevant contextual features which give rise to the problem and which any solution will affect. Second, the scholar should elaborate and justify the policy goals which he or she is prepared to espouse to solve the problem. Interdisciplinary research can be central to this particular task. For example, if the issues involved in the problem concern the claims of ethnic minorities to legal protection of their cultural distinctiveness (embodied in such demands as self-government and the protection of culture-related individual rights), the insights of social psychology can be used to make a case for the value of culture to individuals and of cultural pluralism to society at large. Third, the current state of the law should be analyzed. This task is, of course, the basic component of doctrinal research; it should, however, transcend ‘doctrine’ to include all decisions which are both authoritative and effective, and also a description of the variables, ranging from the idiosyncrasies of particular decision makers to broad features at the heart of the international system, that have conditioned over time the course of decisions. Here again interdisciplinary research can be useful. Finally, there should be recommendations of specific solutions for bridging the gap between reality and ideal outcomes — that is, for solving the ‘problem’ which stimulated the research in the first place.

These inquiries do not have to be made in any particular order, nor even rigidly adhered to. For instance, one could combine the identification of issues with a description of trends in decisions. Moreover, the dividing line between the postulation of goals and the recommendation

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13 As a group, however, when compared with their counterparts in such countries as the United Kingdom, the United States, Germany, and France, a significant proportion of Canadian international lawyers is of non-Canadian origin or has received basic education outside Canada.

14 By doctrinal research we mean a focus on such traditional legal sources as cases, statutes, and treaties, which are analyzed as separate from features of the social context.
of specific solutions is often not clear cut. It is crucially important, however, 
that the scholar articulate a particular approach to the problem so that 
his or her policy preferences are openly displayed and can be evaluated 
and that the trends in decision are analyzed critically. This is mandated 
both by the scholar's responsibility to seek to solve rather than merely 
to describe problems and by the preferred status enjoyed by scholars 
in society.\textsuperscript{15} Even if one were to reject an integrated conception of serious 
scholarly inquiry in favour of more or less discrete types of inquiry 
(doctrinal, interdisciplinary, theoretical, historical, and so on) there exists 
a critical imbalance — tilted toward the doctrinal — which alone justifies 
according greater significance to other modes of analysis.\textsuperscript{16} 

Although we emphasize the performance of a series of interrelated 
intellectual tasks as the goal of serious scholarship, we recognize that 
there exists a wide variety of approaches to performing each task. Thus 
definitive assessments about what is and what is not scholarship are 
difficult to make and, to some extent, any assessment will be affected 
by research needs at a given time. In reality there is a spectrum. At 
one end of the spectrum is our scholarly ideal: explicit and systematic 
policy clarification and justification, using interdisciplinary research and 
providing standards for evaluating the trends in decisions, including 
consideration of the factors affecting those decisions. At the other end 
lies literal description of rules with no attempt at evaluation and no 
sensitivity to context. Closer to the ‘no scholarship’ end lie attempts to 
synthesize rules, often in terms of implicit or explicit ‘internal’ standards 
such as coherence, purpose, and consistency. Where integrative description 
in a particular area is needed — for example, to identify legal uniformities 
in fact where apparent confusion in form exists, or to show that particular 
factors (background of decision makers, political or economic context) 
have played a vital role in defining the law — this particular approach 
can be justified.\textsuperscript{17} The best of the legal descriptive writing will transcend 
literalism to focus on the importance of context. To the extent that this 
writing incorporates ‘external’ criteria for evaluation (whether intuitive 
or systematic, whether implicitly or explicitly), it moves closer to the 
ideal ‘scholarship’ end of the spectrum.

Hall L.J. 427. In this respect, it is clear that more should be expected from the university-based 
scholar than from government officials or private practitioners.

\textsuperscript{16} The Arthurs Report found such an imbalance in Canadian legal research generally and 
in the international law field specifically. See supra, note 9 at 75-80. Our own survey of the international 
law area confirms this assessment.

\textsuperscript{17} See, on the difficulty of identifying norms of customary international law, Panel, “Application 
Soc. of Int’l. L. at 231.
Because of the instability of the law-making and law-creating processes in international law and the political, economic, and social diversity within the international system, it might be expected that the starting point for inquiry for international legal scholars would be well beyond gratuitous description. Although this combination of rule uncertainty and contextual diversity calls for the sort of integrative descriptive research referred to above, it is also a powerful incentive for consideration of the 'ought' as well as the 'is' or for a merger of the two. Whether scholars have exploited this built-in advantage over their domestic law counterparts will now be considered.

III. TRENDS IN SCHOLARSHIP

A systematic assessment of the trends in Canadian international legal scholarship is made difficult because in many areas of international law the Canadian contribution consists only of isolated articles by particular individuals. On the other hand, in some areas such as the law of the sea, human rights law, and air and space law, there is a significant body of Canadian writing. Although our assessment of Canadian international legal scholarship is only impressionistic, we have singled out the law of the sea for two reasons. It is an area of relative abundance of scholarship and has undergone major changes during the last ten to fifteen years. Thus, there has been scope for going beyond doctrinal analysis to the elaboration of policy goals.

Several topics recur in recent law of the sea literature: marine pollution, the Arctic, fisheries, and maritime boundaries. All are areas of specific Canadian interest. Assessments of the progress at the Third United Nations Conference on the Law of the Sea (UNCLOS) are frequently found, including the success with which Canadian policies and interests have been pursued at the Conference and secured in the 1982 Convention on the Law of the Sea. Some of the literature is merely descriptive, identifying a Canadian approach and charting its progress at the Conference. In other cases, the literature explains some development in light of the past law of the sea and shows its possible future application — to effect a synthesis of a particular area. Less frequently the writing evaluates existing law or future developments critically using objective criteria or goals. Overall, the major deficiency in this scholarship is the lack of clearly articulated goals or alternative approaches or solutions.

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19 Much of the literature falls into this category.
The law of the sea also indicates the observational standpoint of Canadian international lawyers. With some notable exceptions,20 the perspective of much of the law of the sea literature is national, even where a neutral perspective is apparently adopted. Few scholars have taken an overtly ‘international’ perspective from which to measure developments in the law of the sea. Insofar as the literature is concerned with government policies it tends to be descriptive rather than analytical, and acquiescent rather than critical.21 As a result, there is not much literature that assesses governmental approaches to the law of the sea from a ‘world community’ perspective.22 Thus, a scholar outside the country might well refer to Canadian literature on the law of the sea to gain some idea of Canadian perspectives and approaches or for the treatment of issues that are predominantly Canadian, for example, the Arctic, or the legal regime for anadromous species. It is less likely that recourse would be made to the literature for the definitive treatment from a world community perspective of matters of more universal interest.23

The law of the sea area is also notable for the involvement of scholars from other disciplines — political scientists, economists, geographers, and marine scientists — which provides opportunities for interdisciplinary work. The most significant outcome of this collaboration has been that the law of the sea scholars have a broader appreciation of the importance of context than is manifest in the work of legal scholars in other areas of international law. Scholarship on the law of the sea generally demonstrates an awareness of the process by which law is identified and applied and of the political and economic environment of international law making. Yet there is little indication that interdisciplinary collaboration has led scholars to refine their observational standpoint or to take a more systematic approach to the identification of problems or to the clarification of objectives.

In general, then, interdisciplinary work has not had a substantial intellectual impact on the work of international lawyers in the field of

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20 In particular the work of Douglas Johnston and his associates in the Dalhousie Ocean Studies Programme.

21 The generally uncritical reception given the adoption of the Arctic Waters Pollution Prevention Act exemplifies this.

22 Such an approach would have been useful at a time when Canadian policies in this area were perceived in the press and in some other countries as “expansionist” or engaging in a form of “creeping” jurisdiction.

23 Again the work of Douglas Johnston constitutes an exception, although his principal contribution in this regard, The International Law of Fisheries, was published in 1965, before the period under study. Another exception is R.M. M’Gonigle & M.W. Zacher, Pollution, Politics and International Law (1979). This book is, however, more a work of international politics than of international law.
the law of the sea. Scholars have tended to work alongside those in other disciplines, rather than collaborate in cross-disciplinary analysis. The result is that in the field of ‘ocean policy’, the writing of lawyers tends to be descriptive, in part because it is directed to a non-legal audience, and the writings of those in other disciplines generally do not have a sufficiently sophisticated conception of law to affect how international lawyers view their subject. The desire to be ‘relevant’ or to respond to particular practical needs has caused lawyers to neglect scholarly interdisciplinary opportunities that might have been pursued.

An area that provides some parallel with the law of the sea is that of international economic law. It, too, is an area of rapid growth and development in practice. Canadian international lawyers, relative late-comers to the field, initially were concerned with analyzing specific legal aspects of Canadian trade. Work in the area has often resulted from an interest in some domestic issue, such as foreign investment laws or, more recently, the national energy programme, both of which have international implications. This is preeminently a field in which the distinctions between national and transnational regulation, and between public and private international law, have been blurred. Early scholarship in this field, perhaps following its domestic source, ranged from descriptive to purposive, but there was little attempt at a systematic evaluation of the law in the light of specified goals or from a clearly international observational standpoint. Again, a national orientation is manifest.

Writing in this area has begun to show a greater concern for the political and economic environment of international trade, although Canadian interests and concerns are still a particular preoccupation. Generally, however, scholarship in this field lacks direction and purpose. The literature describes the international economic environment in which particular issues arise, but is less clear on the role of legal analysis in a field traditionally dominated by international economists. The considerable opportunities for interdisciplinary research in this area have yet to show significant results.

24 Involvement with other disciplines has expanded the range of interests of lawyers in this field, but not necessarily the way in which they approach their subject.

25 Nevertheless, studies by those in other disciplines have provided useful factual information or provided insights into problems that are important for international lawyers. The work of political scientists, fisheries economists, and geographers is significant in this respect.


27 See the papers on “The World Economy: Legal Dimensions,” presented to the Conference on “International Law Critical Choices for Canada 1985-2000” (June 1984) [forthcoming, Queen’s LJ].
Across other fields of international law, Canadian scholarship exhibits similar trends. Canadian international legal scholarship predominately elaborates doctrine — the articulation of rules and their clarification, on the basis of treaties, state practice, and judicial decisions — and applies rules to different circumstances. International legal problems are sometimes treated as if they were domestic legal problems and analyzed without sufficient regard to their actual context. This has led to a literature that characteristically seeks to describe and synthesize (sometimes in the light of stated purposes) but avoids the clarification of goals or the articulation of a global observational perspective. Although there is a substantial body of Canadian political science scholarship in areas of interest to international lawyers (peace and security, disarmament, international organizations), advantage has not been taken of opportunities for the development of interdisciplinary perspectives.

The charge that Canadian legal scholarship neglects comparative analysis can be less readily directed at international legal scholarship. By its nature international law must draw from the practices and doctrine of other states, and even descriptive legal analysis will be to some extent comparative. Language imposes limits in this regard and some scholars have attempted to make foreign scholarship in international law more broadly known in Canada. Within Canada, however, it might be queried whether common law scholars have sufficiently noted the work of their civil law counterparts. Interestingly, the civil law tradition does not appear to have had a different impact upon approaches and interests. Like their common law counterparts, international lawyers in Canada with a civil law background focus on matters of national interest and their writing also describes and synthesizes or evaluates law in the light of its purposes.

IV. INFLUENCES UPON THE DEVELOPMENT OF SCHOLARSHIP

The number of international lawyers in Canada is small, and the group actively engaged in research and writing is even smaller. Few within this group have specialized; the Canadian international lawyer has traditionally been a generalist. This has limited the opportunity for

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28 Professor R.St.J. Macdonald has been particularly concerned to do this. See, for example, "The United Nations Charter: Constitution or Contract?" in supra, note 5 at 889.

29 Civilian international lawyers seem to have had less difficulty than their common law counterparts in adjusting to the implications of Canada's independence by moving away from adherence to British practice. A case in point is the leadership of Quebec courts in establishing a Canadian doctrine of sovereign immunity restricted to non-commercial activities.
any individual to build up a substantial body of scholarship within a particular area (although there are notable exceptions).\textsuperscript{30}

The international lawyer occupies a 'fringe' status within Canadian law schools. In several civil law faculties where it is a compulsory subject, international law has a more secure position in the curriculum. Because international lawyers have to maintain teaching responsibilities in other fields as well, the opportunity for specialization is limited. Few, if any, Canadian academics have been able to devote their careers to international law and those entering the field often find that the demands of their other teaching commitments dominate. The interest of younger law professors in international law often falls by the wayside. Research is then directed to other fields.

Incentives for research in international law are limited. Only one institute primarily concerned with international legal research exists in Canada — the Institute of Air and Space Law at McGill. The Dalhousie Ocean Studies Programme sponsors research on the law of the sea as part of an interdisciplinary programme and the Institute of International Relations at UBC has promoted legal research on both the law of the sea and international trade law. More recently the Canadian Council on International Law has endeavoured to fund a research programme. For the rest, international lawyers must make do with individual research grants and the intellectual socialization that can be obtained from the annual meetings of professional societies in Canada and the United States.

Canadian international lawyers have on the whole been well served with outlets for the publication of their scholarly work. In addition to the domestic law journals, the Canadian Yearbook of International Law ensures that Canadian scholarship reaches a broader international audience. Ironically, the Yearbook, which in part reflects national interests and attitudes, can serve to reinforce the preoccupation of Canadian scholarship with Canadian issues.

In addition to Canadian academic international lawyers there is an active body of government international lawyers who have made a significant contribution to the Canadian literature on international law.\textsuperscript{31} This contribution is often (but not exclusively) descriptive, explaining or justifying Canadian policies or positions in light of international law, or explaining the development of particular principles that are important.

\textsuperscript{30} The preeminent exception is the work of Donat Pharand on the Arctic. Others associated with specific fields include Charles Bourne (international drainage basins), Leslie Green (humanitarian law and armed conflict), and Nicolas Matte (air and space law).

\textsuperscript{31} Many legal advisors to the Department of External Affairs and other lawyers in the department have published quite extensively. Particular contributions to the general literature have come from Alan Gotlieb, Alan Beesley, and Leonard Legault.
for Canada’s foreign relations. There is also a substantial interaction between government and university international lawyers and some movement between the two groups (and between these groups and the private practice of law). Few Canadian international lawyers have not had some direct professional involvement with government. This interaction, which is essential for an informed international legal academic community, may nevertheless contribute to the focus of Canadian scholarship upon topics of specific Canadian interest and affect the observational standpoint or perspective adopted.

V. INTERNATIONAL LEGAL THEORY

A particular deficiency in Canadian international legal scholarship others have identified is in the realm of international legal theory. But what is the ‘theory’ that the Arthurs Report found neglected in Canadian legal scholarship generally and which Macdonald and Johnston think is lacking in international law scholarship globally? The Arthurs Group defines theory as “research designed to yield a unifying theory or perspective by which legal rules may be understood, and their application to particular cases evaluated and controlled.”32 The more explicit the basic assumptions and the more interdisciplinary the inquiry, the closer theory comes to “fundamental research.”33

Macdonald and Johnston bemoan the fact that specialization and the “reactive” role played by potential theorists, coupled with the immensity of the field and the diversity of political and cultural factors at work, have deflected attention away from “major theoretical” research everywhere.34 Before assessing the current state of Canadian research and our projections for it in the areas of general and more limited theory, it is necessary to state more specifically what we consider to be some major issues which belong on the theoretical agenda.

The decentralized nature of the international legal system raises important questions. Even if it is no longer necessary to ask whether international law is really law, much research needs to be done on how international law is made and applied. What are the international functional equivalents of legislatures and courts and how do they work? How can a rule change be distinguished from a violation? The latter question is particularly important with respect to some issues in the law of the sea and international economic law areas. What factors influence state compliance or violation? (Case studies of crisis and non-crisis

\[\text{32 Supra, note 9 at 66.}\]
\[\text{33 Ibid. at 68.}\]
\[\text{34 Supra, note 8 at 3.}\]
decision making can be of assistance here.) What are the roles and limits of domestic courts in applying international law? (This question is of particular importance in the human rights area.) When are the decisions of such non-state actors as international organizations legally 'binding'? To what extent is consensus challenging consent as the basis of obligation in international law? Can a norm that is intended to be non-binding at its inception attain legal force? Can there be degrees of legality or 'informal' rules? What is the interrelationship between law and politics in the international system?

A second set of questions arises from the political, economic, and cultural diversity among states and raises the whole issue of whether universal international law really exists. For example, in the human rights area there are significant differences among states about the meaning of specific rights, about priorities to be accorded to individual as opposed to collective rights and political as opposed to economic rights, and in the resources they have available to secure rights. The task for theory is to establish an approach for reconciling these rights within a universal law or to postulate alternatives (for example, a series of regional laws governing states in similar situations). Even if such diversity did not exist, there would still be a need for theory to address issues of conflict and accommodation, such as between the individual and collectivity with regard to limitations on rights and priorities between rights. Other conflicts posing the same challenge for theory exist in the international economic law area (between the interests of capital-importing and capital-exporting states and generally between North and South) and in connection with the law of the sea (between coastal states and shipping states and between national and international regulation), to take only two other examples.

When Maxwell Cohen wrote in 1972 that no "first-class Canadian theorist (Percy Corbett excepted) has emerged to demonstrate a capacity for model-building and broad analytical thinking that would make a contribution not only for international law but for the theory of law in general," he was demanding a great deal. Applied to theorizing about international law, this assessment is shared by Macdonald and Johnston. In our view it is too harsh. It is true that no Canadian has formulated a comprehensive theory about law comparable, for example, to McDougal's contribution, and most Canadian theory has been developed in more narrow areas. Nevertheless, there has been some important major

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36 Ibid. at 949-50.
37 The reference is to Professor Myres S. McDougal and his policy-oriented jurisprudence.
Theorizing in Canadian international legal scholarship.\(^{38}\) The most important theoretical issue of the Cold War period of the 1950s and 1960s — finding a way to moderate the conflict between East and West — was predominant because it was central to the very survival of the international system. Edward McWhinney’s work identifying and ‘legalizing’ the informal conflict-limiting rules governing relations between the U.S. and the Soviet Union was the classic work on this issue.\(^{39}\) His development of the concept of informal rules not generated by traditional law-creating processes, but viewed as both authoritative and effective, can still be used to analyze the legal status of norms emanating from non-traditional sources — for example, U.N. General Assembly resolutions and the ‘soft’ law generated by a host of international organizations. McWhinney’s subsequent writings have maintained a focus on the law-creating and law-applying processes of international law.\(^{40}\)

Douglas Johnston has made a significant contribution to general theory in specifying the role of values in international law through defining such concepts as justice, equity, and welfare.\(^{41}\) Sometimes he has collaborated with Ronald St. John Macdonald, who has also contributed to theory in more specialized areas.\(^{42}\) No survey of general theorists would be complete without reference to Maxwell Cohen, whose breadth of focus and felicity of style are perhaps unparalleled in the field in Canada.\(^{43}\) Considering that theorizing has been traditionally the task of the academic and that the international law academic community in Canada is small at any given time and even smaller over the time required to develop the sophistication needed to support general theorizing (as potential theorists come and go), the record is not bad.

There have also been more limited efforts at theorizing, often generated by uniquely Canadian developments. Studies on government legal initiatives to protect the Arctic environment have entailed some

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\(^{38}\) By “major theorizing” we mean the Arthurs Group’s “fundamental research” and Cohen’s “model building and broad analytical thinking.”


\(^{42}\) See, for example, R.St.J. Macdonald, “The Relationship Between International and Domestic Law in Canada” in supra, note 3 at 88; supra, note 28.

speculation on differentiating the emergence of a new norm from the violation of an existing one. The Quiet Revolution in Quebec in the 1960s stimulated research on the status in the international legal system of one type of non-state entity: sub-units of a federal state. The threat of secession or sovereignty-association in the 1970s prompted scholars to look at the break-up of traditional units in the system and the establishment of new forms of association. This research was informed and in turn influenced by developments in Canadian constitutional theory.

On the whole, however, the output in the area of limited theorizing has not been impressive and many important issues have not been dealt with. Human rights is one such area. A comparatively high proportion of Canadian academics have written about the international law of human rights, but without providing much enlightenment about the theoretical issues of conflict and accommodation, commonality and diversity. Much of the research has consisted of little more than mere recitation of treaty provisions or decisions of international agencies — work often duplicated elsewhere and sitting on the 'no-scholarship' end of the spectrum.44 Since the adoption of the Charter of Rights there has been a shift to writing about using international norms to interpret Charter provisions. Yet rarely have these efforts questioned the appropriateness of this use or the role of these decisions in developing international law in the area.

In light of the American experience, it might have been expected that Canadian social scientists, especially political scientists, would contribute to theory. But here too the results have been disappointing. No 'Canadian' Hoffmann or Barkun has emerged.45 At worst there has been a tendency to engage in Austinian searches for a sovereign capable of exacting obedience. Finding none, the searchers have dismissed international law as an irrelevant force in influencing state behaviour because it lacks the formal attributes of domestic law. At best, a conservative view of international law has been adopted, consisting of a strict separation between domestic law and international law and between international law and the power realities of the international system. The subtleties in interpenetration (reflected in domestic courts applying international law and in the requirement of effectiveness as a component of law paralleling the need for authority as a component of political power) have been missed, with the result that the potential

44 It is small consolation that this work reflects a global trend. See, for further elaboration, J.E. Claydon, Book Review (1981) 26 N.Y.L. Sch. L. Rev. 1155.

for contributing to theory through applying the insights of another discipline has not been realized.\textsuperscript{46}

VI. THE FUTURE

In general we foresee little change in the prevailing trends in academic research in international law. The factors described will continue to hamper research on theory and force scholars into specialized areas. Because of the small size of the academic community and the increasing complexity and reach of international law, the resources of the 'ivory tower' will be insufficient to deal with many issues on the research agenda. Macdonald and Johnston foresee a trend toward interdisciplinary 'scientific' theory concerned with problem solving in particular areas. They predict that this work will be undertaken by doctrinal academic theorists in collaboration with lawyers operating in the diplomatic arena (usually within government) and with private commercial lawyers who need assistance to deal with an increasingly complicated international regulatory system.\textsuperscript{47} We see this role of non-academic lawyers as going well beyond collaboration with academics on theoretical issues to challenge the more general research primacy of the ivory tower.

In the international economic and telecommunications law areas the challenge will come from the 'glass tower'. Super-specialists in large and specialized law firms who have developed extensive and immediate expertise in dealing with these sophisticated issues will intrude increasingly into scholarly arenas. The research produced so far by these experts has been no less 'scholarly' than the work of academics, but most of it has been confined to continuing legal education programmes and consulting services.\textsuperscript{48} These traditional activities will be expanded to include more writing for law journals and in the form of monographs as law firms encourage their experts to participate in the 'educational' field. They will be supported by colleagues in related areas, by research directors, by juniors and articling students, and by sophisticated communications and research systems providing instantaneous access to information both here and abroad. Some key glass tower scholars will be former academics and government officials.


\textsuperscript{47} Supra, note 8 at 7-8.

\textsuperscript{48} The Arthurs Report, supra, note 9 at 108, notes a decline in the proportion of articles published in law journals by practising lawyers as compared with academics and surmises that the development of continuing legal education and the increasing specialization of legal practice can be expected to reverse this trend. This has probably already happened in international business and telecommunications law, although it is questionable whether any trend has been reversed.
A similar challenge may also arise in the human rights area, paralleling the American experience, through the collaboration of human rights activists and scholars in independent advocacy-oriented institutions.49

A decade or more ago there was reason for optimism about Canadian international law scholarship. New scholars were entering a dynamic field; there was promise of great things ahead. However, many of those newcomers have left and those who have remained have, with few exceptions, not fulfilled the early expectations. For example, there has been little serious interdisciplinary work although useful methodologies are available (for example, on the law and economics nexus). The trend toward ‘policy’ studies in the law of the sea, economic law, and war-peace areas is in part as a reaction to this failure, and it carries with it the risk that international law will be seen as peripheral to relevant inquiry. In recent years computer technology has made information more accessible and manageable, although there is little indication that academics are prepared (or able) to exploit the opportunity.

Although we foresee a trend toward greater diversity in the participants in international legal research, with legal academics no longer enjoying the position of predominance to which they have been accustomed, this shift will not meet all the research needs. In particular, the burden of interdisciplinary, policy-oriented, and theoretical research will continue to be placed on the shoulders of legal academics. There is, however, not much hope today that this burden will be discharged.

Preoccupation with doctrinal research will continue to be encouraged as a result of factors internal to international law analysis as well as external constraints. One of the most important internal factors — the uncertain content of much of international law — will significantly influence research approaches. Even if scholars shift to broader orientations, they will continue to be discouraged from this more demanding endeavour by the considerations previously mentioned (such as lack of central funding, and teaching and administrative burdens). To some extent these problems are common to all areas of legal research in Canada and solutions must be addressed at each level. However, the immensity of the international law field does pose unique additional problems.

In certain respects the state of international legal scholarship in Canada today reflects the seriousness with which international law is taken as a discipline in its own right. There is a need for greater recognition within the Canadian legal community of international law as a serious

49 One such organization, the International Human Rights Law Group, sponsored a publication which recently won an American Society of International Law award.
and demanding area of study and research. The responsibility for securing this recognition rests largely with academic international lawyers who must make colleagues and students aware of the increasing practical relevance of international law and of its significant interconnections with domestic law. The difficulty of this task, however, is compounded by the fact that the international lawyer in Canada has little visibility and is generally only a part-time participant in the field. Government international lawyers spend a good part of their careers in diplomatic work that is not legal in nature or in the domestic law field. Lawyers in private practice are less frequently involved with public international legal issues, but even those with a significant professional involvement in the field generally spend more of their time on domestic legal matters.

A 'part-time' legal community cannot provide the tradition of inquiry and commitment to the field necessary for sustained scholarship. The establishment of a well-funded research institute would do much to improve the quality of the product. Although the climate may be no more amenable to the creation of such an institute than when a similar suggestion was made more than a decade ago,50 the need is greater now. Notwithstanding the progress that has been made in the discipline of international law in Canada during the period under review, Canadian international lawyers need, one way or another, to establish their field on a firmer basis, both within the academic community and professionally, in order to provide a general environment more conducive to the development of international legal scholarship.
