Cases and Materials on the Comparative and International Law of Indigenous Peoples – for use at IDC, February-March 2011, class led by Professor Bryan Schwartz

IDC Chapter One:

Overview of the Materials

First, RELAX **The material in this casebook is not meant to be read cover to cover by students in a mini-course that meets only four times.**

I'll cover most of the material in class. You are welcome, of course, to read as much as interests you in more detail.

There are several sections, however, that I would ask you to read carefully:

This overview IDC 1.1;

The *Delgamuukw* case, IDC 4.1;

The *Haida case*; IDC 6.1;

The UN Declaration on the Rights of Indigenous Peoples, IDC 11.2;

ILA, Rights of the Arab Population in the Negev IDC 12.3;

Invisible Citizens, Israel Government Policy towards the Negev Bedouin, IDC 12.4

Why a printed casebook?

We seem to be moving to the era of electronic casebooks. But I am still a bit sceptical of whether students can absorb as much if the course is presented as a series of individual screens, and not printed off. It may be that I am a child of the paper age, but I still think that a codex has its advantages. You can flip back and forth. You can read it on a bus. You can form a mental map of the course, parallel to the physical lay-out of the book, in which you have a sense of how a particular passage fits into the reading, and how each reading its into the conceptual flow of the course as a whole.

So that is the point of the casebook. But....

What is the point of this course itself?

When I inquired at IDC a year ago as to what course students might enjoy, I was told: something that was decidedly different from their usual areas of study.

I have taught and practiced in material areas of law in Canada – constitutional, international, labour law, business and trade law, commercial law, and environmental

law, to name a few. But the area that I thought might be most exotic, from the perspective of a student in Israel, is the law of aboriginal peoples.

I said that I had considerable experience in both the academic and practical realms in the area of aboriginal law in Canada. I wondered, however, whether that had much practical relevance in Israel. I was told that the Bedouin people of Israel are asserting their rights as an indigenous people.

The question for this course, then, is what other states and the international community have been doing to develop the law of indigenous peoples, and then ask students to consider whether these lessons are actually relevant? If so, what ideas might be usefully adopted or adapted in Israel, and which ones are conceptually flawed or impractical? The materials are prepared with an open mind. **The aim of the course is not to preach "here's what other people do, you should to do it to". It is to explore**. It is to invite students to explore, with an open and critical mind, these questions:

- what are the uses and misuses of comparative exercises?

-what if anything, can Israel learn from the experience in Canada and several other countries with a long and detailed history of developing the law relating to their own indigenous peoples?

-what is the value and legitimacy of the evolving international law relating to indigenous peoples?

Here is the flow of the material.

Section 2: the Uses and Abuses of Comparative and International Law

In developing the one state, comparisons with law in other states might be useful in a variety of ways:

- for the purposes of enriching the vocabulary of terms and concepts and range of models;

-as an evaluator of options – the opinion of jurists or legislators elsewhere informs our sense of what is just and reasonable?

-as a database of social experiments – how do ideas elsewhere actually work in practice?

There can be drawbacks as well

-a little knowledge can be a dangerous thing - we can think we understand material from other legal system but be misled; a foreign idea viewed in isolation from its context can be easily misunderstood;

-we can fall into the trap of thinking that the law of the books is the same as how the law is applied – or ignored – in actual social practice;

-we can overlook problems of legitimacy – such as the need for democratic support in our own country before the law is changed - that is involved with borrowing ideas from other systems.

IDC 2.1 shows how a Canadian court could be simplistic (to be it gently) about being impressed by material from another jurisdiction. IDC 2.2 shows a Canadian court refusing, for detailed reasons, to follow an American precedent (that an accused has the right to counsel throughout an interrogation). IDC 2.3 and IDC 2.4 are excerpts from a lively debated in the Supreme Court of the United States over the use of foreign developments in determining whether it is "cruel and unusual punishment" under the U.S. Bill of Rights to executive a person who committed murder while still a juvenile.

Section 3: the Canadian Constitutional Framework

The Preamble of its original constitution, in 1867 – see IDC 3.1 - says it will be "similar in principle" to that of Great Britain.

There are some key differences.

The U.K. constitution consists of statutes and practices that could be amended by ordinary legislation or changes in political procedure adopted by practising officials. Canada had a "two tier" system: there has always been a body of "higher law" that is supreme over ordinary law. Originally, the "higher law" was British statutes relating to Canada's governmental system, which prevailed over ordinary Canadian statutes. Canada also has, like Australia and the United States, a federal system of government; there is a central order of government, and provinces, who are ordinarily supreme in certain areas of government, such as an education.

A few bits and piece of Canada's written constitution relate to aboriginal peoples. *The Royal Proclamation* of 1763, IDC 3.1, reflects the central policy of the British Empire – that the law of the United Kingdom was supreme; subject to that supremacy, aboriginal people continued to enjoy the right to continue using their traditional lands; aboriginal people could only sell those lands to the government, not to private operators.

Section 91(24) of the *Constitution Act*, 1867, gave the federal level of government primarily responsibility over aboriginal peoples. Over the years, the British government amended Canada's constitution in several ways affecting aboriginal peoples, including settling the land rights of the Métis (a ethnic group descended from both European and aboriginal peoples) when the province of Manitoba was created

(IDC 3.3) or modifying the treaty rights of aboriginal peoples in Western Canada (IDC 3.4).

In 1982, however, Canada engaged in a constitutional overhaul; IDC 3.5. The key elements included:

- a Charter of Rights and Freedoms – a statement of individual and minority rights that prevails over ordinary law;

-an amending formula – a set of rules for changing the higher law;

-s. 35, which "recognized and affirmed" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada".

Section 35 radically changes the view the Courts on aboriginal and treaty rights. They tended to adopt a more expansive interpretation of them, and to insist that these rights prevailed over ordinary legislation unless governments could provide a compelling reason for overriding them.

While it is not technically part of Canada's "higher law" – because it can be changed by an ordinary act of Parliament – the *Indian Act*, IDC 3.6 has been the most important framework document for aboriginal peoples in Canada. It is based on the model that the federal government is the protector of "Indian" people, who are their "wards". The *Indian Act* recognizes "reserves", where Indians collectively own their own land base, but where their rights to govern themselves and engage in commerce are very limited.

The Flanagan Report, IDC 3.7 proposes one dimension in which the *Indian Act* could be relaxed in order to promote economic development: private ownership of real property (land) could be permitted.

The authority of the Minister under *the Indian Act* to arrange for the education of children on reserves was disastrously misused in Canada in the middle of the 20th century. Government policy was to remove children from their families and send them to residential schools. The latter often aimed to destroy the child's cultural connection with his people in the hopes of making him a more productive member of mainstream industrial society. Many children were physically or sexually abused by adults working in the facilities. After a series of lawsuits sought compensation for victims (IDC 3.7) , the government of Canada worked out a settlement. It included compensation for individuals based on the length of their stay and extent of abuse, and undertook to create a "Truth and Reconciliation Commission" (IDC 3.8).

Section 4: Aboriginal Title and Land Use Rights

Section 4 deals with aboriginal title and rights in Canada. The *Delgamuukw* case (IDC 4.1) is the landmark case in all of aboriginal title and treaty rights in Canada. It

established that aboriginal title was automatically recognized by the common law based on historic use and occupation of land by an aboriginal community. It provided the right of the group to continue using the land in both traditional and modern ways. The Supreme Court also said there were inherent limitations on the rights; e.g., they cannot be sold to outsiders, but only to the government of Canada. *Delgamuukw* also affirms that the federal government of Canada has the authority to limit aboriginal title if it is pursuing a legitimate public interest, that it adequately consults with the group before it acts, and the infringement of aboriginal use is proportionate to the public good being advanced. *Delgamuukw* is also a landmark case in recognizing that the "oral history" of a group – its traditions based on from generation to generation without being captured in writing – can be an admissible and relevant source of evidence in modern litigation.

In other cases, the courts have recognized that in addition to title, a group can enjoy a "site specific right" – the right to continue using a particular area for a limited purpose (e.g. trees in a forest for ceremonial purpose). In *Marshall* and *Bernard* (IDC 4.2) the Court confirmed that the way in which a right was traditionally recognized can evolve, but cannot be fundamentally transformed if it is to be recognized in Canadian law. Traditional, pre-European contact, use of forests would not sustain a modern right to cut timber on a commercial scale. In *Sappier* and *Gray* (IDC 4.3) by contrast, the court recognized that traditional uses supported a modern aboriginal right to cut timber for "domestic purposes", such as building one's own house.

Powley (4.4) and *Blais* (4.5) are Supreme Court of Canada decisions that consider the extent to which land use and other doctrines concerning "Indians" can be applied to the Métis people.

The *Johnson v M'Intosh* case, IDC 4.6, is one of the famous decisions by Justice Marshall of the Supreme Court of the United States on Indian rights. It adopts an approach to aboriginal title that is similar to that currently applied in Canada. Doctrine in the United States is different in several respects from that of Canada. The rights of aboriginal peoples are not protected by "higher law" as they are in Canada since 1982; Congress retains vast authority over the land use and self-government rights of First Nations. U.S. law allows a smaller role for U.S. states than Canadian law does for provinces, but also has gone further in recognizing the continuing right of First Nations to political autonomy.

Section 5: Fiduciary Obligations of the Crown and Honour of the Crown

Section 5 deals with the "fiduciary obligation" of the Crown – the executive levels of government in Canada. Canadian case law recognizes that there is a broad political duty on the part of the Crown to protect First Nations. Legally enforceable duties can in specific circumstances, such as when the Crown is managing or selling the

land or assets of an aboriginal group pursuant to the *Indian Act*; *Guerin* (IDC 5.1) is the landmark case in this respect. The *Wewaykum* case (IDC 5.2) explores the distinction between political duties and obligations that are legally enforceable. Over the years, hundreds of claims by First Nations have arisen based on alleged fraud or mismanagement by Canada in its fiduciary role. These used to processed almost entirely by submitting a claim to Canada, where its officials decided the merits of the claim. Aboriginal groups sought for decades to obtain an independent tribunal that would provide a convenient forum for resolving these disputes. Finally, a Specific Claims Tribunal has been created; (IDC 5.4) and (IDC 5.5).

IDC Chapter 6: Duty to Consult

Section 6 concerns the duty to consult. In cases such as *Haida* (IDC 6.1) The Supreme Court of Canada, whereby whenever the Crown acts in a way that infringes the rights (proven or claimed) of an aboriginal group, its actions are only legally valid if it has first consulted and accommodated the protected interests of the aboriginal group. The Crown must provide the group with information, listen to its concerns, and address them in a reasonable manner. The duty to consult has had an enormous practical impact in Canada. The United States had also adopted the concept of a duty to consult (IDC 6.2). The Supreme Court of Canada has shown itself to be a strong advocate of recognizing (some might say creating) a right to dialogue in other contexts, such as interprovincial relations (including potential m ves by Quebec to become independent) and labour relations.

IDC Chapter 7: Treaty Interpretation and Application

Section 7 concerns treaties. The *Mikisew* case (IDC 7.1) , involving *Treaty 8* (IDC 7.2) illustrates how the Courts have tried to interpret historic treaties in a way that is sensitive to the original understandings by the First Nation side and promotes an ongoing balancing of interests. The *Moses* case (7.3) explores whether the generous approach to historic treaties still applies when an aboriginal group negotiates a treaty in modern times, and group is no long at a severe disadvantage, but instead has access to the courts, access to legal and other expert advice, and a leadership and community that is more familiar with mainstream language and culture. It reveals that the Courts may adopt a somewhat more legalistic approach in such circumstances.

IDC Chapter 8: Right to Self-Government

Section 8 is about self-government. There are few Canadian cases about the extent of the right to self-government in Canada. It is the policy of the government of Canada, however, to enter into self-government agreements with aboriginal communities, adapted to the specific wishes and circumstances of each one (IDC 8.1). The Westbank Agreement is one of the first to be adopted; Article 8.2 and 8.3 illustrate how detailed these agreements are as they attempt to balance the autonomy

of an aboriginal community with the continuing ability of federal and provincial governments to protect their own fundamental values.

Chapter 9: Tension Between Self-Government and Individual Rights

Chapter 9 explores a sensitive issue: the balance between allowing aboriginal communities to govern themselves without engaging in internal repression. In the United States, the Supreme Court has held that Indian tribes are a distinct order of government (*Worcester*, IDC 9.1) and that tribal governments are not directly limited by the *U.S. Bill of Rights* (IDC 9.2). The result was that Congress passed the *Indian Civil Rights Act* (IDC 9.3), which makes some – but not all – provisions of the *Bill of Rights* are applicable to Tribunal government.

Canada used to exempt *Indian Act* governments from the *Canadian Human Right Act*, a quasi-constitutional statute that assures equality at the federal law of government. The exemption was recently repealed; (IDC 9.7).

In Canada, the federal government – to some extent supported by the leaders of Indian communities- used to define Indian in a way that discriminated against women. Specifically, the child of a marriage between an Indian man and non-Indian woman did not have Indian status. Canada changed its laws in this respect in response to a report by the U.N. Human Rights Committee (*Lovelace*, IDC 9.5).

Providing rights to aboriginal groups can sometimes mean different and less favourable treatment for non-aboriginal persons or groups. In the *Kapp* case (9.6), the Supreme Court of Canada held that such treatment, to the extent that it constitutes "affirmative action", cannot be challenged under the equality provision of the *Canadian Charter of Rights and Freedoms*. The *Lovelace* case shows that federal and provincial governments do not have to treat all aboriginal communities equally; treatment may legitimately vary based on the different historically-based rights and on the modern circumstances of different aboriginal groups.

The *Adler* case shows that in Canada, the individual right to equality under the Charter for some groups and individuals (e.g., Jews in Ontario seeking public subsidies for religious schools of all denominations on the same basis as the Roman Catholic minority) sometimes yields to special rights for a group that was given special rights under the 1867 constitution.

IDC Chapter 10: Developments in New Zealand and Elsewhere

Section 10 deals with developments in other Jurisdictions besides Canada. IDC 10.2 suggests that courts in New Zealand have adopted a very similar approach to those

Canada, in relation to applying its historic treaty with the Maori (IDC 10.1). Britain had the largest colonial empire, so there are some common foundations in many states that used to belong to the empire, especially those that inherited the British common law tradition. (IDC 10.3) reviews the approach to aboriginal title that is emerging in the domestic courts of a wide variety of states.

IDC Chapter 11: International Law and Indigenous Peoples

IDC 11.1 is a review article that surveys the doctrines and questions that have arisen in connection with the international law concerning the rights of indigenous peoples. *The United Declaration on the Rights of Indigenous Peoples* (IDC 11.2, commentary IDC 11.3) is a major step in the development of international law; original objectors when it was adopted, including Canada (IDC 11.4) and the United States, have now accepted it, but are careful to insist that it reflects "aspirational norms" – what international lawyers call "soft law" – rather than settled and legally binding rules of international law. The meaning and legal status of various provisions of the Declaration will be the source of debate in political and legal forums for many years to come.

There are regional treaties, such as *the Organization of American States Convention on Human Rights*, that have already been used to successful litigate the rights of an indigenous people; The Organization of American States is currently developing its own Declaration on the Rights of Indigenous Peoples.

IDC Chapter 12: Land Rights of the Bedouins of the Negev in Israel

Section 12 provides some material on the rights of the Bedouin of the Negev in Israel. IDC 12.3 presents the position of the Israel Land Administration. IDC 12.4 is a review of the legal, social and political position of the group from the perspective of a minority rights advocacy organization. IDC 12.3 is a comparative exercise that specifically focuses on the relative situation of Bedouin populations by neighbouring states; it argues that Jordan has adopted a more enlightened and effective approach than Israel. IDC 12.4 presents a recent legal analysis that is sympathetic to the Bedouin perspective.

In reviewing section 12, students are invited to ask whether the concepts generated in other states, especially Canada, as reviewed in these materials are a useful source of perspective and potential solutions to the reconciliation of Bedouin and wider Israeli state interests.

As you read the material, you are invited to think about questions such as these:

Should Israel view the Bedouin of the Negev as an indigenous population? Or is the whole concept misguided in the context of Israel's history, ancient and modern?

Can Israel adopt or adapt ideas such from Canada such as:

-aboriginal title and site specific land use rights?

-allowing the use of oral history in proving such rights in court?

-establishing specialized tribunals to deal with one or more kinds of aboriginal issues?

-recognizing limited rights to self-government;

-developing a court-enforceable duty to consult and accommodate when important rights of an indigenous population is affected?

- recognize a right of the government to override the rights of aboriginal peoples if it is pursuing an important purpose and the limitation is proportionate?

-adopting protections for the Bedouin in a basic law?

-adopting a written constitution that cannot be amended by ordinary legislation, and including protection for the Bedouin in that law?

Does International Law provide useful guidance to Israel with respect to the Bedouin of the Negev? Should it adopt a law that implements the norms states in the United Nations Declaration?

IDC 1.1 - Table of Contents