Probable Effects
Practical Construction of New Legislation

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> The ideas of economists and philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. ...But soon or late, it is ideas, not vested interests, which are dangerous for good or evil.
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> J.M. Keynes, *The General Theory of Employment, Interest and Money* (383-84, Macmillan, London, paperback 1973)

> Ideas have a radiation and development, an ancestry and a posterity of their own, in which men play the part of godfathers and godmothers more than that of legitimate parents.
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> Letters of Lord Acton to Mary Gladstone (1905), quoted in G. Himmelfarb, *On Looking into the Abyss: Untimely Thoughts on Culture and Society* 82, Vintage Paperback (1995).

Introduction

Speaking at a similar conference in 1997, I set out a quote from an essay on the novel by Lionel Trilling. In that essay, he argues that for at least the last 200 years, the novel has been the best means to exercise the liberal imagination, to examine in depth and to propose means to deal with moral issues that inhere in all societies. The central issue since the beginning of the industrial society has been social justice, now institu-

Notes will be found on pages 50–52.

tionalized as the difficult choice among government transfer payment programs. The essential issue is to achieve an effective balance between equality of opportunity and equality of result or, as Okun characterized it, between efficiency and equality.[1] The problem, always, is to get the incentives right,[2] to implement programs that give necessary support to those in need without reducing their will to help themselves. In contemporary economic jargon, the issue is to induce people to do productive work and to avoid the moral hazard of becoming dependent on government handouts, now euphemistically described as rent seeking.[3]

Although a persuasive supporter of the need for transfer payments to achieve a reasonable degree of social justice, Trilling was well aware of the pitfalls, reminding us that:[4]

> Some paradox of our nature leads us, when once we have made our fellow men the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion. It is to prevent this corruption, the most ironic and tragic that man knows, that we stand in need of the moral realism which is the product of the free play of the moral imagination.

What Trilling means by the moral imagination is an approach to social change that is, as far as possible, free of dogma; reviews the historical record of past successes and failures; projects probable outcomes; and considers feasible alternatives that can apply to the policy issue.

To date, Canadian policy concerning aboriginal peoples clearly has not been developed with Trilling's caution in mind. Instead of real analysis of the issues, we have created an atmosphere of guilt-ridden villains seeking atonement for the wrongs done to aboriginal victims. In this brief paper, I will attempt to demonstrate that even if there is some truth to the above characterization, it is irrelevant to the work at hand *if* one assumes that the policy end is not to compensate alleged victims of earlier policies now seen to be harmful, but to enable aboriginal individuals to lead challenging and productive lives in aboriginal communities or elsewhere as Canadian citizens.

The "Aboriginal Problem"

What is the work at hand? Policy analyses concerning the "aboriginal problem" in Canada have been so incomplete and so ambivalent that no one can state authoritatively what the policy of Canadian governments is beyond achieving a "deal" that will engender "peace in our time." Probably the best articulation of the sentiments (as distinct from ideas) implied in the statements of Canadian political leaders is to repeat US President Lyndon Johnson's declaration of purpose in the

Special Message to Congress on the Problems of the American Indian, part of his Great Society program:[5]

> A goal that ends the old debate about "termination" of Indian programs and stresses *self-determination*: a goal that erases old attitudes of paternalism and promotes *partnership* and *self-help*. An opportunity to remain in their homelands, if they choose, without surrendering their dignity: an opportunity to move to the towns and cities of North America, if they choose, equipped to live in equality and dignity. [Italics added.]

Even if diluted in strength by many of the "halo" words of the 1960s, such as "self-determination," "partnership" and "self-help," the intended effects of the policy were clear and have been vigorously pursued—at least by Congress—to the present date.[6] Based as they are on extensions of the *Indian Reorganization Act* of 1934, the self-governance programs remain subject to the power of federal bureaucrats to maintain oversight of expenditures and, as a corollary, to influence strongly the means proposed to achieve program goals. In sum, notwithstanding repeated pressure from Congress and even from the President,[7] a knowledgeable and sympathetic analyst concludes that, so far, self-determination or, in other words, the transfer of considerable decision-making powers from the federal bureaucracy to the tribes "... has come to little."[8]

That is not to say, however, that there is reason to despair. The social problems are never clear-cut, the legislated programs are necessarily complicated, and the implementation and *follow-up* costs are enormous. But such legislative experiments do demonstrate the central point of this paper: that policy choices are not between negotiation and litigation but instead range over a broad spectrum between those poles, as demonstrated by US experience.[9] Either negotiation or litigation is essentially an abdication by legislatures to bureaucrats or to the courts, which in the short-run broadly diffuses responsibility and renders focusing accountability virtually impossible. In the long-run, however, as an inherent feature of the parliamentary appropriation function, legislatures must implement follow-up procedures to determine the effectiveness of expenditures on aboriginal programs however characterized or implemented.

Transfer Payments: A Chronology

As Trilling points out, no matter how sincere the convictions of politicians and their constituents concerning transfer payments based on treating our fellow citizens as "objects of our enlightened interest," pol-

icy will degenerate inevitably from interest, to pity, to wisdom, and finally, to coercion if the original transfer program does not succeed. To avoid that, we must *get the incentives right*. It seems unlikely we can do so by way of backroom, negotiated "deals," as distinct from reasoned and well-administered programs that are consonant with our Parliamentary tradition. Even a summary review of the history of transfer payment programs, knowledge of which is implicit in Trilling's statement, demonstrates that they are complicated, prone to failure and, as a result, required to be subject to continual legislative scrutiny.[10]

(1) During the mercantile period from 1536 to 1795, the *English Poor Law*, which was administered at the parish level, provided a safety net for all people in need, or indeed all the people if all were in need. This pattern was reinforced by the *Act of Settlement* of 1662, which largely precluded movement of people from one parish to another, effectively relegating the workers to a new form of serfdom.

(2) In 1795, this provision of the *Act of Settlement* was abrogated in order to give workers the mobility to take jobs in the new industrial mills, paving the way to formulation of a relatively free labor market.

(3) Concurrently, however, the *Speenhamland System* was implemented as a transition safety valve. But what it did was require the parish to supplement wages to maintain them at a fixed level. As a result all wages tended to fall below the minimum rate and the parish subsidized the difference. As a further result, labor productivity declined disastrously, reflecting the absence of any real incentive to work. The end result was a social and economic catastrophe.

In 1834, after enactment of the Reform Bill of 1832 (which largely eliminated the rotten boroughs to make Parliament more representative), the new Parliament in effect repealed the *Speenhamland System* and precipitately forced all workers into the unstructured, crudely operated labor market. Polanyi states that "Never in all modern history has a more ruthless act of social reform been perpetrated..."[11] The remarkable thing was that it did not engender a violent revolution.

The brutal shock of that event haunted for generations the daydreams of the British working class. And yet the success of this lacerating operation was due to the deep-seated convictions of the broad strata of the population, including the laborers themselves, that the system which to all appearances supported them was in truth despoiling them, and that the "right to live" [Speenhamland System] was the sickness unto death.[12]

Thus from the outset of industrial society, the thorniest policy problem has been the design, enactment, implementation and over-

sight of the effects of transfer payment programs. The *Poor Law* debate related to only the first and most traumatic of such policies. As reflected in Trilling's caution, similar and equally unsuccessful policies have frequently been implemented: the "pogey" system in the Canadian Atlantic provinces; the unemployment "insurance" system in Canada from roughly 1960 to 1992; the Great Society programs of President Johnson; and, of course, the welfare transfers to aboriginal people in North America since about 1950.

Aboriginal Policy: A Chronology

As if the central problem of designing incentives were not enough, to the aboriginal policy we add another equally difficult issue: the manner of governance of aboriginal communities. The issue has been simmering since the first Europeans arrived in the Americas. Again, the tortuous twists and turns of policy, which have been at least as traumatic to the aboriginal peoples as were *Speenhamland* and the *Poor Law* repeal to British workers in 1834, can be presented most emphatically in a brief chronology. The chronology touches on Spanish, American and Canadian policies. The issues are not only continent-wide but also universal. And, generally, the US has taken the lead in experimenting with new policies before they were introduced in Canada. As we shall see, these policies run the gamut, from recognition as "nations" through removal; reserves ("sanctuaries"); residential schools (assimilation by accretion); welfare transfers (block transfers to communities or specific transfers to individuals); termination (one-step assimilation); and self-governance.

(1) 1532-1579: Relying on legal advice, the Spanish Emperor concluded that since there was no war with any aboriginal peoples in the Americas, each distinctive community was entitled to be treated as a "nation."[13]

(2) 1778-1789: The US Continental Congress acknowledged Indian communities to be nations, even conceding by Treaty in 1785 to one nation, the Cherokees, the right to send a delegate to Congress.[14]

(3) 1789-1871: The era of the treaty making in the US was terminated by Congress because treaty-making was the sole prerogative of the Senate and thus precluded the House from exercising any decision-making power.[15] Treaty-making proceeded concurrently in Canada except most of British Columbia. The age of treaty making reopened with the *Alaska* settlement of 1971 and the proposed *Nisga'a* settlement of 1999.

(4) 1830-1879: In the US, this was the tragic period of Westward Removal, the forced emigration of the "civilized tribes" (Cherokee,

Choctaw, Chickasaw, Creek and Seminole) from the Eastern United States to Oklahoma.

(5) 1887-1934: Until 1879, both the US and the Canadian government, which tended to adopt US policy, treated the aboriginal communities as homogeneous, collectivist communities that had no concern for individual rights.[16]

(6) 1847: Congress authorized support payments to be made directly to households instead of block or earmarked payments to tribal leaders. The first objective was to undermine the authority of Indian leaders and so expedite assimilation; the second was to curb the growing bureaucracy of the Bureau of Indian Affairs.[17]

(7) 1887: Acceding to pressures from land-hungry homesteaders and, again, to accelerate assimilation, Congress enacted the *Allotment Act* (Dawes Act), which subdivided the reserve land into 360-acre blocks (twice the general homestead allotment), allotted one such block to each reserve Indian family and, in effect, confiscated any "surplus" Indian lands for distribution to non-aboriginals.[18] Each allotment to an Indian family was subject to bureaucratic trust constraints for 25 years, after which time the Indian title-holder could transfer ownership to any person. As a result, some 60 percent of Indian lands, the "surplus" lands and some Indian lands, were transferred to non-aboriginals. Canada did not adopt this policy—probably not because of Victorian virtue but because the Canadian reserves were not large enough to engender pressure for reduction.

(8) 1934: Congress enacted the *Indian Reorganization Act* ("IRA"), which repealed the 1887 allotment policy, reinforced the "nation" concept, encouraged economic development through tribal business corporations, and urged greater autonomy or self-determination. The major premise underlying the Act was that the Indian nations could prosper as collectivist societies and might even become a model for US society generally. The result was complete politicization—and hence bureaucratization—of all social and economic aspects, an approach that we know, with the benefit of hindsight, was doomed to economic failure.[19]

(9) 1953: Congress enacted a termination policy which, assuming specific standards were met, empowered a qualified tribe to vote to terminate and thus become immediately assimilated into the general population. This policy, too, failed. On seeing other tribes obtain further benefits from Indian status, terminated groups understandably reapplied for and, ultimately, regained that status.[20] Canada also toyed

with the policy but backed off, ostensibly because of its rejection by Canadian aboriginals but likely also because of the evolving bad experience in the US.[21]

(10) 1968: In light of President Johnson's Great Society declaration of 1964, building on the foundation of the *Indian Reorganization Act* of 1934, Congress has enacted several new, basic laws with a view to incrementally increasing autonomy at the tribal level and, as a result, increase tribal leadership, responsibility and accountability.[22]

(11) 1968: *Indian Civil Rights Act*

(12) 1974: *Indian Financing Act*

(13) 1975: *Indian Self-Determination and Education Assistance Act*

(14) 1998: Bill H.R. 1833 proposes to add to the 1975 Act two further titles: (1) Indian health services, and (2) a feasibility study of tribal self-governance compacts.[23]

(15) 1971: More than a century after the purchase of Alaska, the US Government entered into an agreement legitimated by the *Alaska Native Claims Settlement Act* of 1971 ("ANSCA"). Going beyond the admonitions of the 1934 IRA about encouraging business, the Agreement transferred about $1 billion and 40 million acres of land, some of it select timberland, to some 200 discrete community corporations, the shares of which were distributed among the approximately 50,000 aboriginal Alaskans.[24] Not surprisingly, depending on their initial resource endowment and level of management skill, some of these corporations succeeded and some failed.[25] It has been, however, a useful experiment and undoubtedly has influenced some Canadian settlements.

The foregoing chronology demonstrates that governments—and particularly the US Federal Government—have implemented, if not by design then at least impulsively, programs that almost cover the whole spectrum. In retrospect, it is easy to say mistakes were made. But when one attempts to read the historical record and to understand the action from the perspective of people advocating those programs, it is clear that more damage was done in attempting to do good than harm.

GAI/NIT Programs

One model missing from the spectrum is the guaranteed annual income/negative income tax (GAI/NIT). I proposed a trial program in a paper published in 1994, but the response was somewhat less than

overwhelming, either for or against. Like all such programs, it entails great risk of moral hazard, that is, making recipients so dependent on such transfers that the transition to self-help becomes difficult, if not impossible.

Clearly, it has several advantages. First, it can be introduced concurrently on a trial basis in several different social environments and can be modified incrementally to fit any particular circumstance. Second, the transfers are effected under one program and are completely visible. Third, when coupled with NIT, the GAI permits the targeting of transfer payments, clawing back any transfers from individuals and households that are demonstrably not in need. Fourth, if designed well and continually adjusted, a GAI/NIT program can provide the appropriate incentives to induce individuals to enter the work force and remain continuously employed. Fifth, it obviates the large bureaucracy required to allocate discretionary payments. And finally, it focuses more responsibility for economic management on individuals and households. Upon reflection, it appears the last two factors elicit considerable resistance to any GAI/NIT program. The existing bureaucracy, both native and non-native, has a vested interest in the discretionary system. As well, the focus on individuals and households depoliticizes a very large part of the revenue flow to aboriginal communities, implying a substantial reduction of the power now exercised by the band political leaders.[26]

The Quintessential Political Problem

The purpose of this chronology is not to prove what was right or wrong about past policies. Rather, it is an attempt to evoke some new ideas and establish a means to demonstrate that the "aboriginal problem" is not unique. Indeed, like all transfer programs introduced since the *Tudor Poor Law*, it is a quintessential political problem. As Jouvenal forcefully states:

> A problem is compromised of precise and known facts and can therefore be solved: for any arithmetical problem there must be a solution. But a political situation is not of that order: what makes it political is "precisely the fact that the frame of reference in which it exists does not permit any solution in the exact sense of that term. A true political problem arises only when the given facts are contradictory, i.e., when it is insoluble."[27]

If the issue is quintessentially political, can it ever be cast as a legal problem that lends itself to judicial resolution? Before posing that question to *Delgamuukw*, one must consider the nature, function and limits of law. Conceptually, law is "... a dynamic process, a system of

regularized, institutional procedures for the orderly decision of social questions, including the settlement of disputes."[28] That abstract concept embodies several essential elements of any legal system.[29]

(1) The rule of law, i.e. the impersonal universalized application of categories of substantive rules and standards to facts, largely ignoring particularities.

(2) The several sources of law, which include legislation, judge-made law and administrative rulings.

(3) Due process, meaning the right to reasonable notice of any legal proceedings and the right to submit a full defence before a competent, impartial tribunal in accordance with specified formal procedures.

(4) A first corollary of due process is that the tribunal admits only evidence that is considered credible.

5 A second corollary of due process arises in particular with respect to discretionary decisions made by public officials: they must be subject to a right of appeal or judicial review of administrative action, not just of the process but also of the correctness of the legal rule or standard applied, the adequacy of the evidence considered, the possibility of bias and even the fairness of the result relative to the treatment of other persons.

The first of these elements requires amplification, in particular the phrase "substantive rules and standards." In general, such rules and standards are the tests applied by the decision-maker to decide a legal question. Rules are straightforward. They are tests that, when applied, do not require the decision-maker to exercise any discretion, i.e. to make any judgment as to whether the law has been contravened. Standards are of an altogether different order: "The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the *purposes or social values* embodied in the standard."[30] [Italics added.]

Typical standards are "due diligence," "good faith," "reasonable care," and "best efforts." Each leaves to the adjudicator considerable discretion to apply his or her subjective values to the specific case in the belief they reflect community values, the factor that legitimizes such decisions. It is this scope of standards that necessarily admits different applications and that, as a result, gives rise to sharp differences, depending on the political or social values of the critics. Although there are many other possible categories, in this century there have been four schools of legal thought.

1. Legal Formalism (Analytical Positivism)

By the end of the nineteenth-century positivism, the idea that any discipline[31]—law, history, sociology—could be, by thorough analysis, broken down into its constituent parts and reconstituted to prove a specific hypothesis just like any natural science, tended to dominate legal theory. By the 1920s, this somewhat ingenuous faith in the natural science analogue became discredited. A particularly sharp, recent critique merits reproduction, partly because it is so clear and partly because it applies in a haunting way to the *Delgamuukw* litigation:

> … they [the social sciences] labour still under the burden of being false sciences. Their experiments do not provide any measurable progress in the manner of a real science. In place of real evidence they are obliged to pile up overwhelming weight of documentation relating to human action—none of which is proof, little of it even illustration. This sort of material carries the force of neither history nor creativity. What they are working on is circumstantial evidence. It is meant to create the impression of evidence by the force of weight.[32]

In sum, jurists came to understand well that broad, frequently used legal standards such as "reasonable," "good faith" and "due diligence" compelled a judge applying them "… to assess them in terms of the purposes or social values embodied in the standard."[33] Thus there can be no formula, however intricate, that can resolve legal issues.

2. Legal Realism (Pragmatic Positivism)

Responding to this insight, the doctrine of pragmatic positivism, or realism, evolved in the United States and, consciously or unconsciously, has influenced most legal thought since the 1930s.[34] The doctrine has best been summed up by its foremost advocate, Karl Llewellyn,[35] who emphasizes the dynamic nature of the law; the conception of law as an instrument, a means to an end and not an end in itself; skepticism of legal principles; standards and rules as pre-determining any decision a court makes; and evaluation of the law in terms of its practical effects.

3. Law & Economics

Although a topical theory, the law and economics approach to law has little relation to *Delgamuukw*, which basically concerns wealth transfers. Its approach is to test proposed legal policies by applying economic analytical tools such as cost-benefit analysis, risk analysis and efficiency measurement.[36] Had it been applied in *Delgamuukw* the focus would have

been a cost-benefit analysis of similar policies in Canada and other countries, first to determine if it is likely to be effective (presumably to integrate aboriginal peoples in the contemporary economy), and second, to try to measure the efficiency of transfer payments in achieving that end.

4. Critical Legal Studies (CLS or Post-Structuralism or Postmodernism)

A fourth, current and very controversial school of legal theory, Critical Legal Studies (CLS), is difficult to relate to the previous three, for even though it does not disparage rational arguments, it does reject most of the premises on which they are based. In its extreme form, it is a "denial … of the legitimacy of law itself, which is regarded as nothing more than an instrument of power."[37] Although sometimes nihilist in tone, for example in its rejection of liberal, realist theories, Turley states:[38]

> That is not to say CLS began as a negative movement. Far from it, CLS was, and continues to be, committed to shaping a society based on some substantive vision of the human personality, absent the hidden interests and class domination of legal institutions.

Reflecting its Marxist roots, CLS emphasizes a communitarian, classless sense of altruism as opposed to liberal individualism, which has resulted in hierarchical class structures, alienation and exploitation of some by those in power. The CLS proponents are particularly hostile to liberal doctrine.

> The liberal presents the "half a loaf" problem that relieves social pressure for change while basically retaining the original social structure and thereby preventing real social change. … In this way liberal legislation can be strongly symbolic even though it may do little to alleviate class conflict and exploitation.[39]

Postmodernism and the Supreme Court of Canada

Although possible, given the long exposure of some members of the Supreme Canada bench to the academic tempest concerning CLS, it is improbable that the Court's decision in *Delgamuukw* was written with CLS or postmodernism in mind. More likely, to paraphrase Keynes, they are merely decision-makers in authority distilling their ideas "from some academic scribbler of a few years back."[40] Still, the Supreme Court's decision certainly reflects reliance on CLS ideas: it is radical in the sense of ignoring, and in effect even proposing to uproot, existing institutions; it is clearly conscious of class discrimination; is egalitarian; and is clearly biased toward communal governance.

Before 1980—that is, before the influence of postmodernism became pervasive and before the advent of decisions declaring Charter rights—the Supreme Court of Canada probably would have been more inclined (as was Chief Justice McEachern, the original trial court judge in *Delgamuukw)* to acknowledge that the policy decisions required cannot be articulated as conventional legal standards and, in any case, are far outside the inherent limits of any court's capacity to do social policy analysis.[41] Parliament, therefore, should deal with the issue. The judicial process is lacking in several respects. In general, truly representative parties are not present;[42] a court has no resources to conduct broad contextual social and economic analyses of costs and benefits, as well as of third-party impacts, required to develop policy alternatives; it has no access to expertise other than the inevitably tendentious testimony of expert witnesses; it has no capacity to implement and administer the policy recommended; and, above all, it lacks means to do any post-implementation measure of the effectiveness of the program and to make obviously necessary adjustments. In sum, the Supreme Court, in *Delgamuukw* has seemingly charged boldly into the "quintessentially political" area of government transfer payments without the capacity to develop policy, implement it through a program, or adjust it as problems develop other than through continual litigation.

Bearing those limitations in mind, what did the Court actually decide in *Delgamuukw*? To abridge the analysis of the case, I summarize below (with cross references to the numbered paragraphs of the case report) the key aspects of the decision from the perspective of a parliamentary draftsman instructed to translate it, to the extent possible, into a statute.

(1) Aboriginal title to land" derives from common law and therefore presumably includes resources on that land.

(1) Aboriginal title is subject to the conditions set out in para 7 below, but nevertheless is *sui generis*, that is, in a class by itself as determined by the aboriginals proving their use and occupation of it. (paras 109-15).

(1) The nature of aboriginal rights vary along a spectrum from mere use rights to aboriginal title:

(1) activities integral to the aboriginal culture but connected only tenuously to land that therefore confer aboriginal *rights* but not aboriginal title;

(a) similar activities that are related to a particular piece of land that do not give rise to aboriginal title but confer an aboriginal *right* to use and occupy that land to perform those activities; and

(b) use and occupation of specific land from which aboriginals derive aboriginal *title*. (paras 138-139).

(2) Aboriginal title, which is *communal* and *inalienable*, is in effect a charge on the Crown's underlying title: it derives from use and occupation before the claim of British sovereignty, and aboriginal activities on it are not confined to activities integral to their distinctive culture but are subject to the conditions set out in para 7 (paras 11-15, 129, 140-59).

(3) To establish aboriginal title an aboriginal claimant must prove generally

(a) occupation before British sovereignty,

(b) if present occupation is relied on, continuity between present and pre-sovereignty occupation; and

(c) exclusive occupation. (paras 140-59, especially 143)

(4) Because aboriginal rights, including aboriginal title, are unique (*sui generis*), an aboriginal group claiming them is *not* bound by common law evidentiary standards, and, accordingly, oral history is admissible at least to prove current occupation has origins before the date of British sovereignty. (paras 82-84, 101).

(5) The existence and continuance of aboriginal title are subject to the three following conditions.

(a) Evidence that might strain the Canadian legal and constitutional structure is not admissible and, accordingly, may preclude proof of the existence of aboriginal title. (para 82).

(b) Lands held pursuant to aboriginal title cannot be used by aboriginals in a manner irreconcilable with the nature of the attachment (use, occupation activities) from which that title derives.

"Irreconcilable" does not mean merely a non-conforming use but a use that would destroy its use for the "attachment" factor from which the title derives. (paras 125-32).

(c) Either the federal government or a provincial government may infringe on aboriginal title for any purpose it justifies as of *compelling and substantial* value to the community as a whole, if the infringement does not breach the government's fiduciary duty to the title-holders.

In this context, *fiduciary duty* requires that the government consults the title-holders before infringing, act reasonably to minimize the infringement, and fairly compensate the title-holder for

> its loss.[43] And *"compelling and substantial"* purpose includes any basic social or economic activity of the overall community. (paras 165-68).

(6) Aboriginal rights, including aboriginal title, cannot be extinguished directly by provincial law or even indirectly under the *Indian Act*, s. 88. (paras 179-83).

(7) Although aboriginal title is communal and generally inalienable, an aboriginal title-holder may transfer the land to the Crown for valuable consideration.

What did the Court actually decide in *Delgamuukw*? Not much. Although it purported to do a contextual analysis, in fact the court focused on aboriginal title or rights to land and resources and then declared those rights in abstract terms, which may give some comfort to aboriginal land claimants but no guidance to policy-makers at any level.

To draw that inference is not to criticize the court but rather, by indirection, to commend it for dealing diplomatically with the issue without seriously obtruding into the area of quintessential politics. Like the lower courts in *Delgamuukw* the Supreme Court attempts to turn up the thermostat to expedite promised settlements with aboriginal people that have already festered too long.

Root Problem

The root problem is not the judiciary. It is the breakdown of governance systems generally. Demonstrating great prescience, Theodore Lowi published a book in 1969 decrying the degeneration of governance from voter representation to, effectively, interest group representation ("identity politics"), from thoroughly analyzed, widely debated, principled policy decisions to negotiated deals. As he forcefully states:[44]

> The problem is that the new representation embodied in the notion of interest-group liberalism is a pathological adjustment to the problem. Interest-group liberal solutions to the problem of power provide the system with stability by spreading a sense of representation at the expense of democratic forms, and ultimately at the expense of legitimacy. Interest-group liberalism seeks pluralistic government, in which there is no formal specification of means or of ends. In pluralistic government there is, therefore, no substance. Neither is there procedure. There is only process.

This trend is serious in the United States, but it cannot completely overcome the constraints constitutionally enforced by the division of

executive, legislative and administrative powers. Policy-making in the US is still dynamic, innovative and frequently bold, drawing substance from experience throughout North America.[45]

The problem is far more serious in Canada where, because of the lack of division of powers, actual power becomes increasingly centralized in the Prime Minister's Office. As a result, very major issues such as wealth transfers to aboriginal peoples can best be characterized as backroom deals. There is little useful, published policy analysis. There is virtually no legislative scrutiny. There is no effective parliamentary debate. There is only a deal to be pushed through a frequently protesting, sometimes recalcitrant, but largely ineffective legislative system.

Conclusion

This decline of governance has probably reached its nadir in relation to aboriginal settlements. The lack of effective, traditional governance is especially extraordinary when one considers that the estimated aggregate cost of settlements in B.C. alone will be $10-$12 billion in 1998 dollars.[46] And virtually all of that is in excess of the roughly $7-billion annual appropriation to the federal Department of Indian and Northern Affairs, some $4 billion a year of which is reallocated as block or earmarked grants to First Nations governments for local allocation.[47]

The costs of the present "policies" are enormous but undoubtedly would be acceded to if they resolved to resolve the "aboriginal problem" to achieve the objectives stated by President Johnson in 1964. To date, after examining the problems of some of the First Nations (Navajo, Samson Cree, Alaska Aboriginals), it is difficult to be optimistic about "deals" to force purportedly democratic governance systems on aboriginal communities. What is needed is greater exercise of what Trilling characterized as the liberal imagination. In Canada, however, that will be a monumental task, for it implies the need not just for improved policy-making but also for fundamental institutional change.

Notes

1 Okun, *Equality and Efficiency: the Big Tradeoff* (1975). But see W. Mitchell and R. Simmons, *Beyond Politics: Markets, Welfare and the Failure of Bureaucracy* 16-18 (1994), showing that to tilt the balance in favor of equality of result can have a corrosive effect on society. In 1964, at the outset of the US "War on Poverty," 367,000 Americans received food stamps at an annual cost of $800 million; by 1990 20 million people received food stamps and the annual cost had risen to some $13 billion. In 1994 the Republican congress enacted legislation that drastically reduced these transfers. To the extent they relied on them, transfers to US Indian recipients were reduced accordingly.

2 Economists in socialist countries, seeking means to induce individuals to be productive in state-owned industries or collective farms, become acutely aware of this problem. See E.H. Carr, *The New Society* 60 (1951), quoting Hawtrey who states "what differentiates economic systems from one another is the character of the motives they invoke to induce people to work"; see also J. Kornai, *Contradictions and Dilemmas in Studies on the Socialist Economy and Society* 124-30 (1986).

3 The Canadian examples are the various support programs ("pogey") to the Atlantic Provinces.

4 Lionel Trilling, Morals and the Novel, in *The Liberal Imagination: Essays on Literature and Society* 214-15, Doubleday Paperback ed. (1953). Examples are Dickens' *Bleak House*, Gogol's *Dead Souls* and Zola's *Germinal*.

5 See F. Cohen, *Handbook of Indian Law* 180-96 (1982 ed.).

6 See *American Indian Policy Review Commission, Final Report* (Task Force No.9) 44-46 (United States GPO, 1976). For a summary of current Congressional activities to implement the Great Society Program, see the website of the Department of Interior, Office of Self-Governance: http://doi.gov/oait/osgwww.htm. Some 206 Tribes, supported by appropriations of $180 million are now involved in actual or experimental self-governance programs.

7 See Executive Order 13084, Consultations and Coordination with Indian Tribal Governments (14 may 1998), which stresses recognition of the quasi-autonomy of Indian tribes as "domestic dependent nations" and requires that bureaucrats cooperate accordingly. This is available on Internet: http://indian.senate.gov/13084.htm.

8 See T. Anderson, *Sovereign Nations on Reservations* 147 (1995).

9 This is crooked thinking by use of a dilemma that ignores a continuous series of possibilities between the two extremes presented: see R. Thouless and C. Thouless, *Straight and Crooked Thinking* 140, Item 5 (Headway Paperback, 2d ed. 1990).

10 A famous analysis of the Poor Laws and their successors is in K. Polanyi, *The Great Transformation: the Political and Economic Origins of Our Time* 68-102, Beacon Press, Boston (1944, paperback ed. 1957).

11 See id. at 82 6 id. at 101. At 84 Polanyi adds that in light of these traumatic events "...The Poor Law discussion formed the minds of Bentham and Burke, Godwin and Malthus, Ricardo and Marx, Owen and Mill, Darwin and Spencer.... ...A world was uncovered the very existence of which had

not been suspected, that of the laws governing a complex society. ...The form in which the nascent reality came to our consciousness was *political economy.*" [Italics added.] Alexis de Tocqueville, touring England in 1833 and, characteristically, carefully observed events there, noted the perverse incentives created by *Speenhamland* and the *Poor Law*, and forecast collapse: see A. de Tocqueville, memoir on Pauperism (1935); A. Jardin, Tocqueville 242-46, Farrar Straus, Giroux, NY (1988).

12 See F. Cohen, *Handbook of Indian Law* 50-52 (1982 ed.). There are few words more Protean than "nation" and "self-determination": see the excellent short essay on Nationalism in Vol.5, *The Encyclopedia of Philosophy*, Macmillan Inc. NY (1972). Nevertheless, these terms have been used since the Spanish conquest, through Chief Justice Marshall's landmark decisions on the early 1830s up to the present date (see n.7, *supra*) as if they had some definitive meaning.

13 See F. Cohen, *supra* n.18, at 62.

14 See F. Cohen, *supra* n.13, at 106-07.

15 See T. Anderson, *supra* n.8, at 142-45, who emphasizes the aboriginal communities were anything but homogeneous. See also D. Riesman, *The Lonely Crowd: A study of the Changing American Character* 225-35, Yale Univ. Press, New Haven (ab.ed.1961).

16 See F. Cohen, *supra* n.13, at 130-32; T. Anderson, *supra* n.16, at 105-06. Commenting on the Samson Cree scandal, the Globe and Mail editors recommend as one solution direct payment of all band revenues to individuals: Globe and Mail, p. A16 (27 April 1999).

17 See T. Anderson, *supra* n.16, at 94-95, 111-34.

18 See F. Cohen, *supra* n. 13, at 147-70; see also T. Anderson, *supra* n.16, at 139-45, 153-58.

19 See F. Cohen, *supra* n.13, at 157, 185-87; see also the *American Indian Policy Review Commission* 20-21 (1976).

20 See P. Tennant, *Aboriginal Peoples and Politics* 149-50 (1990).

21 This is not illusion. Although tribal leaders are largely involved, in most cases, with one source of revenue, transfer payments, the assumption is that they must acquire those skills before they can successfully build self-help communities. In effect, *the new laws substitute ex post audits for ex ante bureaucratic control from Washington*. See the Department of Interior, Bureau of Indian Affairs Website for details of the extensive audit program.

22 This Bill, sponsored by Rep. George Miller can be accessed on Internet through Thomas, the Library of Congress site.

23 These shares were non-transferable for 25 years, a period that was extended in 1996, presumably because most of the corporations were not sufficiently stable to issue securities to the public by way of primary or secondary trades.

24 See Black et al., *When Worlds Collide: Alaska Native Corporations and the Bankruptcy Code*, 6 Alaska L. Rev. 73, 74-77 and 87 (1995).

25 Several years ago—but not in an aboriginal context—the Fraser Institute collaborated in an in-depth study of GAI/NIT program experiments actually implemented in Canada and the USA. Unfortunately, the results relating to the effectiveness of the incentive design were inconclusive.

26 B. de Jouvenal, De la politique pure 248 (1963), quoted in Ellul, Politicization and Political Solutions, in K. Templeton (ed.), *The Politicization of Society* 211, 237 (1979).
27 J. Houghteling, *The Dynamics of Law* (1975).
28 See W. Friedmann, *Legal Theory* 422-29 (5th ed. 1967).
29 Kennedy. Form and substance in Private Law Adjudication, 89 Harvard L. Rev. 1685, 1688 (1976).
30 See W. Friedmann, n.28 supra, at pp. 275-91; and G. Himmelfarb, *On Looking into the Abyss, Untimely Thoughts on Culture and Society,* at 131-61. (Vintage Paperback 1995).
31 John Ralston Saul, *The Unconscious Civilization* 68 (Anansi Paperback, 1995).
32 See Kennedy, n.29 *supra*.
33 See W. Friedmann, n.28 *supra* at 292-311.
34 K. Llewellyn, Some Realism about Realism—Responding to Dean Pound, 44 Harvard L. Rev. 1222 (1931). See also Jones, An Invitation to Jurisprudence, 74 Col. L. Rev. 1023 (1974).
35 See R. Malloy, *Law and Economics: A Comparative Approach to Theory and Practice*, esp. pp. 2-12, 48-58 (1990).
36 G. Himmelfarb, *On Looking into the Abyss* 132-33 (Vintage Paperback 1995). *See also* R. Malloy, *supra* n.36, 76-85.
37 Turley, The Hitchhiker's Guide to CLS, Unger and Deep Thought, 81 Nw. U.L. Rev. 593-95 (1987), quoted in Malloy, supra n.36, at 77.
38 Malloy, Law and Economics, *supra* n.36, at 81-82.
39 J.M. Keynes, *The General Theory of Money, Interest and Employment* (383, Macmillan ed. 1973). The rhetoric of Keynes, directed at economic "madmen" is much diluted, but his idea seems most appropriate in the circumstances.
40 See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).
41 The Supreme Court acknowledged it did not have even the desirable aboriginal parties before it (para 185). It did not even consider the effects on third parties directly and adversely affected by hard transfer decisions.
42 This extends beyond common law in jurisdictions, such as Canada, where there is no constitutional protection against property expropriations where a legislature takes property and expressly denies any right to compensation.
43 T. Lowi, *The End of Liberalism* 62-63 (2d. ed. 1979).
44 Ironically, Senator Inouye, Vice Chairman of the Senate Committee on Indian Affairs, highlights as a model of First Nation governance the experience of the "Samson Cree Nation in Canada: see Speech to the Administration's Conference on Building Economic Self-Determination in Indian Communities (5Aug. 1998), web site http://indian.senate.gov.ecocon.htm. In Canada the Samson Cree Nation has been publicly excoriated as being politically corrupt (Globe and Mail, p.A16, 27 April 1999) and criticized by the Auditor General as financially out of control.
45 See the report Financial and Economic Analysis of Treaty Settlements in British Columbia (16 March 1999), prepared for the BC Government by Grant Thorton Management Consultants.
46 See 1999 Report of the Auditor General of Canada, c.10: Web Site http://www.oag-bvg.gc.ca/domino/reports.nsf/html.

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