

Archiving Force

Ethics and Consignation

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The “archive” can be understood as the source and origin of the common law's force and power. To what extent does the received notion of the archive and its temporal and hierarchizing action determine the capacity of the law to address historical injustice? R v Van der Peet demonstrates that a specific understanding of time overdetermines the tests that define Aboriginal rights and acts to limit their recognition. Delgamuukw v British Columbia adjusts evidentiary rules to accommodate the difficulties faced in Aboriginal rights claims, while simultaneously suggesting Indigenous oral histories are less oriented towards truth in a dogmatic logical positivist sense. These shortcomings, and the demands of reconciliation and decolonization, demonstrate the need to question acts of consignation and suggest that a just response to Indigenous rights claims requires reconfiguring the received colonial representations of both time and the archive.

I Introduction

During my articling year, I was sent to visit the Carnegie Building on Blanshard Street in Victoria, British Columbia. I was surprised to discover that the Carnegie Building was an actual Carnegie library, now serving as an archive for historical documents listed by the Attorney General in various legal actions. Once a public space, this library transformed into a secured repository for documents deployed in the battle to limit Indigenous claims to their traditional lands. I vis-

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ited the archive to view various forest development plan maps. These maps were all listed by the defendant, BC Ministry of Forests, in their documents for the Tsilhqot'in title action, but in the digital trial document database all were conspicuously absent, presenting instead only a blank 8.5 x 11 sheet reading "map too large for imaging" or, in cynical translation: "nothing to see here — please move along". I was in this secure repository in search of maps that were "too large" — maps essential to determine the extent of infringement on the traditional territory of a First Nation seeking justice. This moment, and this archive, had me thinking of maps and space; specifically that this concept, this sign, of "archive", contains within it a certain idea of space, an inside–outside (sometimes separated by bloody walls), and of time, that may be determinative of our ability to address historical moments, historical injustice, or ongoing and imminent rights claims.

To begin again: I start with the proposition that the "archive" might be understood as the source and origin of the common law's force and power. It is the concept of "iterability" that provides the structural underpinnings that support the common law as something rational, constant, and authoritative. Judges, presumably, look to the archive of the common law for a broad set of defined, and relatively stable, principles that are applied to the specific claims before them. The "stability" of those principles is based, in part, on the concept of the common law as something written, affixed to a substrata, and preserved as a constant; as a thing not easily modified or changed because of its presence in space — a physical specimen. The existence of an archive of the common law provides the rationale for the common law's capacity to perform justice.¹ Of course, the common law also professes a capacity to adapt and change with new circumstances — to (I write with some irony) evolve. The common law might then be represented as always pulled in three directions: towards the archive of the past, towards the present moment of a "new" — and thereby "just" — decision as it applies to the specific case at issue, and to the future, to those questions of justice that remain to be asked and answered.

In his essay, "Force of Law: The Mystical Foundations of Authority,"² Jacques Derrida turns his critical gaze to the field of law and asks several questions about the origins of the force of law, in the process exploring the tension between the dichotomy of "law" and "justice". "Force of Law" participates in a critique common to much of Derrida's work: a critical attack on the tendency in the western philosophical tradition to search for origins, for places and spaces of beginning.³ For Derrida, this drive for fetishized originary moments is caught up in a tradition that has tended to imbue those moments with over-determinative powers and that fails to recognize their deep ties to metaphysical con-

1 Adele Perry cogently argues that the colonial myth of creation of British Columbia effectively steered the capacity of the trial judge in *Delgamuukw v British Columbia* in interpreting and responding to the archive of Indigenous history and laws argued before him; see Adele Perry, "The Colonial Archive on Trial: Possession, Dispossession, and History" in Antoinette Burton, ed, *Archive Stories: Fact, Fictions, and the Writing of History* (Durham, NC: Duke University Press, 2005) at 325–350.

2 Jacques Derrida, "Force of Law: The Mystical Foundations of Authority" in Gil Anidjar, ed, *Acts of Religion* (New York: Routledge, 2002) at 230–298.

3 See, for example, Jacques Derrida, *Of Grammatology*, translated by Gayatri Spivak (Baltimore: Johns Hopkins University Press, 1976) at 6-25 and Jacques Derrida, *Limited Inc.*, translated by Samuel Weber, 6th ed (Evanston: Northwestern University Press, 2000) at 88–97.

cerns — even while laying claim to the most rationalist of discourses.⁴ As is suggested by the subtitle, Derrida looks to Montaigne's famous attack on the notion that the state's legal powers are inherently just:

Now the laws maintain their credit, not because they are just, but because they are laws. This is the mystical basis of their authority; they have no other... Whoever obeys them because they are just, is not, as he should be, obeying them for a just reason.⁵

Derrida elaborates on Montaigne's thought by looking back to the imagined originary moment of a state's law-making powers and asks whether there can ever be a “just moment” for their instantiation.⁶ Derrida asks how we are to “distinguish between the force of law of a legitimate power and the allegedly originary violence that must have established this authority and that could not itself have authorized itself by any anterior legitimacy, so that, in this initial moment, it is neither legal nor illegal — as others would quickly say, neither just nor unjust.”⁷ Any looking towards the moment at which a state assumes the power to enact laws, to give those laws legitimacy through the application of force, is caught by the originary violent nature of state birth. More to the point, there is not actually any “moment” at all that can be looked to as the moment of commencement of a set of laws that are just; that is, free of violent imposition. The law itself always contains an aspect of force; the law has no meaning as law unless it can be enforced, or, at the very least, contains the threat of force and state power.⁸

Applicability, “enforceability,” is not an exterior or secondary possibility that may or may not be added as a supplement to law. It is the force essentially implied in the very concept of *justice as law*, of justice as it becomes law, of the law as law [*de la loi tante que droit*].⁹

Derrida further adds that “there is no law ... without force ... whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive — even hermeneutic...”¹⁰ We would risk a grave and wilful blindness should we fail to fully appreciate law's force, and the violence which legitimates the law by making its enforcement possible. What intrigues is the idea that the authority of law rests on an imagined anteriority — again, a reliance on an imaginary originary moment that never was, or never was free from violence, and has provided the hermeneutic basis for interpretation of its purported archive.¹¹

4 See *Of Grammatology*, *supra* note 3.

5 Michel de Montaigne, “On Experience” in *Essays*, translated by J.M. Cohen (New York: Penguin, 1993) at 353.

6 Force of Law, *supra* note 2 at 242.

7 *Ibid* at 234.

8 Consider the famous apocryphal quote from Andrew Jackson that “John Marshall has made his decision; now let him enforce it”, in response to the legal decision of *Worcester v Georgia*, 31 US (6 Pet.) 515, 8L ed 483 (1832).

9 *Supra* note 2 at 233 (translation in original).

10 *Ibid*.

11 Perry demonstrates this hermeneutic violence in the reading of “history” deployed by the trial court judge in *Delgamuukw*. Perry, *supra* note 1 at 343.

If the archive provides judges with the field of action for their hermeneutic authority, and, perhaps, a justification for force, the archive is also directly implicated in the foundational consolidation of state power. In her discussion of Derrida's *Archive Fever*¹², Carolyn Steedman points out the way state power is invested in archives:

There is no need to return to the Greek city state, nor to the archon and his house cluttered up with municipal documents, in order to know that the modern European public office came into being in order to solidify and memorialize first monarchical and then state power: the House of Savoy established an archive in Turin in the eighteenth century; Peter the Great did the same at St. Petersburg in 1720, Maria Theresa in Vienna in 1780...¹³

Archives act to both consolidate and legitimize state power, and Steedman evokes specific archives, with specific moments, places and spaces of commencement. Her reference to the Greek city-state is a response to Derrida's opening of his most sustained discussion of the archive. Derrida exhumes the word *arkhe*, the Greek word for both the government and the place of government, which also means “beginning, origins, or first place”, and notes that this word:

coordinates two principles in one: the principle according to nature or history, there where things commence — physical, historical, or ontological principle — but also the principle according to the law, there where men and gods command, there where authority, social order are exercised, in this place from which order is given — nomological¹⁴ principle.¹⁵

Derrida also traces the roots of the archive to the Greek *arkheion*: “initially a house, a domicile, an address, the residence of the superior magistrates, the archons, those who commanded.”¹⁶ The archons, because of their position of authority and their power to make laws, became the keepers of official documents. These multiple etymologies allow Derrida to break open the word “archive” as a concept¹⁷ and consider some of the meanings that lie resident there. They also give notice that his discussion of *this* word, “archive”, is also a general discussion of *the* word, of “the originary violence of the word”¹⁸; there is always a violence in language's reduction of the plenitude of being through its metaphoric process. Words, having a certain spatial component, reduce the

12 Jacques Derrida, *Archive Fever*, translated by Eric Prenowitz (Chicago: University of Chicago Press, 1996).

13 Carolyn Steedman, *Dust: The Archive and Cultural History* (New Brunswick, NJ: Rutgers University Press, 2002) at 69.

14 Derrida is evoking the classic binary of “nomos”, meaning law and order and rationalism, and “physis”, meaning nature and the natural order, in preparation for his deconstruction of the archive as presenting a radical failure of culture, of nomos, that has resulted in this mal d'archive, this archive of evil that is the archive of the 20th century.

15 *Archive Fever*, *supra* note 12 at 1.

16 *Ibid* at 2.

17 Although Derrida will trouble the idea of a concept, the concept of a concept: *Archive Fever*, *supra* note 12 at 33.

18 *Of Grammatology*, *supra* note 3 at 106.

metaphoric activity that constitutes language itself;¹⁹ the archive, through a secondary process, does further violence (a) through consignation (the gathering of the multiple under the one) and (b) by a limiting of access to state power to the order of the judicial. Derrida foregrounds the role of the archive in structuring both the knowable world (the world we receive through language) and the operation of power; the archive becomes a point of intersection for both power and privilege — a point of intersection that contains, at least in a vulgar sense, an aspect of “space.”

Much of *Archive Fever* is taken up with questioning the “inside/outside” binary that adheres in this notion that the archive contains space. Derrida calls: “where does the outside commence?” and responds: “this question is the question of the archive.”²⁰ But if Derrida is troubled by this binary, this overwhelming binary which is caught up in the long history of oppositions delineated between the perceiving mind and the real, Derrida nonetheless makes what might be read as an uncharacteristic declaratory statement²¹ in support of this spatial component: “*There is no archive without a place of consignation, without a technique of repetition and without a certain exteriority. No archive without outside*”.²² In populating this concept of archive, Derrida evokes Freud's tentative formulation of the death drive, and its “techniques of repetition”, that he illustrates as caught between the two poles of radical destruction and of construction, a self-constitution in the face of the radical finitude of death.²³ Derrida draws a line of connection between the Freudian drive and this archival fever that is both constructive and destructive. Archiving gathers together signs and erases through the process of consignation, a process driven by an awareness of the proximity of ultimate forgetfulness. We might suggest that the self-constitution of the state or of state power is at stake in this “anarchivic” activity. Derrida writes that “the archive takes place at the place of the originary and structural breakdown of memory,” evoking a certain *necessity* of the physicality of the archive where memory begins and ends.²⁴ I would like to suggest that this exteriority of the archive, exterior to you and to me, which seems a very simple proposition or assumption, works to determine how the common law responds

19 *Ibid.*

20 *Archive Fever*, *supra* note 12 at 8. The use of “call and response” throughout this paper is meant to underline the necessary externality of the other and the inside/outside of the archive as implicated in both collective and individuating experiences.

21 I say “uncharacteristically” in that Derrida rarely strays from reminding us of the primary lesson of phenomenological thought, that: “... between my world and every other world there is initially the space and time of an infinite difference, of an interruption incommensurate with all the attempts at passage, of bridge, of isthmus, of communication, of translation, of trope, and of transfer which the desire for the world... will attempt to pose, to impose, to propose, to stabilize... there is no world, there are only islands”. Derrida, 2003, unpublished, cited in J Hillis Miller, “Derrida Enisled” (2007) 33:2 *Critical Inquiry* 248 at 265–67.

22 *Archive Fever*, *supra* note 12 at 11 [emphasis in the original].

23 Derrida writes: “... if there is no archive without consignation in an *external place* which assured the possibility of memorization, or repetition, or reproduction, or of reimpression, then we must also remember that repetition itself, the logic of repetition, indeed the repetition compulsion, remains, according to Freud, indissociable from the death drive. And thus from destruction. Consequence: right on that which permits and conditions archiving, we will never find anything other than that which exposes to destruction, and in truth menaces with destruction, introducing *a priori*, forgetfulness and archiviolithic, into the heart of the monument”. *Archive Fever*, *supra* note 12 at 12.

24 *Archive Fever*, *supra* note 12 at 11.

to historical injustices, those rights that are understood as having a quality of the past to them — those that have been consigned to the archive.²⁵

This archive, which has a certain exteriority that brings to mind Carnegie libraries, boxes of dusty documents, and AS Byatt's *Possession*²⁶, is not the only concept of the archive that might trouble the common law. In *The Archaeology of Knowledge*, Michel Foucault writes of the archive that it:

... does not constitute the library of all libraries, outside time and place; nor is it the welcoming oblivion that opens up to all new speech the operational field of its freedom; between tradition and oblivion, it reveals the rules of a practice that enables statements both to survive and undergo regular modification... [i]t is *the general system of the formation and transformation of statements*.²⁷

Foucault further refines his archive as “that which gives to what we can say — and to itself, the object of our discourse — its modes of appearance, its forms of existence and co-existence, its system of accumulation, historicity and disappearance.”²⁸ The archive is not articulated here as a physical enclosure but as a broad grid of discourses that are enclosed by “the border of time that surrounds our presence.”²⁹ Foucault’s “image” of the archive is dependent on time for its articulation, because it is the set of discourses and practices in place in the moment of a specific historical context that determines what statements and discourses may potentially arise — or disappear. He urges us to test this notion of the archive, to see if this description of the archive can “elucidate what makes it possible, map out the place where it speaks... test and develop its concepts.”³⁰ Although Foucault believes it is easier to describe the archive of a period the further away in time one gets from it, he wants our understanding of the archive to “approach as close as possible to the positivity that governs it” in order to “illuminate... the enunciative field of which it is itself a part.”³¹ What such testing achieves is to place us in a new field, beyond the historic and bordering on the new, an experiment and experience that might “deprive us of our continuities” and “break the thread of transcendental teleologies.”³² Of course, the archive, as determinative of what can or may be said, plays into the spatial grid of both mental and physical control enunciated by Foucault’s studies of discourse in its panoptic power — there is always space at work in Foucault because there is always otherness, which never arises without an outside. Nonetheless, it is this horizon of time, of a particular historical moment, that constitutes this archive and that in turn constitutes the realm of possibilities of what can be said or thought — at this moment, here, and now. Our questioning of the archive might destabilize the “transcendental teleologies” within which we

25 Perry notes that the trial judgment in *Delgamuukw* appears to be a response to a perceived threat to the state, writing that the judgment “is rooted in a profound if implicit recognition of Indigenous claims to settler lands and an utter inability to cope with the implications of this knowledge”. Perry, *supra* note 1 at 343.

26 AS Byatt, *Possession* (London: Chatto & Windus, 1990)

27 Michel Foucault, *The Archaeology of Knowledge* (London: Routledge, 2001) at 130 [emphasis in the original].

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 *Ibid* at 131.

apprehend the operation of time that, partly, governs the operation of the archive (as we are now able to describe it).³³

Both philosophers are deeply concerned with the opposition of inside/outside and the role it might play in an originary differentiation that sets meaning-production in motion. Derrida, too, is concerned with the time of the archive. He notes that “the word and the notion of the archive seem at first, admittedly, to point toward the past, to refer to the signs of consigned memory, to recall faithfulness to tradition.”³⁴ But Derrida asserts that the archive more accurately points towards the future; it is prepared to answer the question of “what will have been.”³⁵ The archive is “a question of the future, the question of the future itself, the question of a response, or a promise, and of a responsibility for tomorrow.”³⁶ Part of Derrida's aim, like Foucault's, is to open up the concept of the archive to a realm of possibilities, to not close this concept, to not “presuppose a closed heritage”;³⁷ Derrida wants the “archive” to remain an “impression” so as to retain the possibilities it might offer as an interpretive device.³⁸ It is this question of the future that remains open, which causes a tremendous ethical burden to take root in this place called archive. If the archive arises at the place of the structural breakdown of memory, and is where the violent process of consignation finds its space of operation, and if the archive authorizes the hermeneutic activity that justifies state force, we would do well to heed the call of Rabbi Yosef Yerushalmi when he asks: “Is it possible that the antonym of 'forgetting' is not 'remembering', but *justice*?”³⁹ And if the archive, as the repository of cultural memory and the source of state power, is implicated in “remembering as justice” we must ask how to adjust its operations to a just orientation. That is, how do we aver certain transcendental teleologies in an attempt to remember well?

II Thesis

So — to begin again. We have two versions of the archive before us (or perhaps behind us): one that is overdetermined by its space, or by our conception of it as an inside/outside dichotomy, a space subject to all sorts of restrictions, operations and conjunctions of power; a second that is circumscribed by a horizon of time that does not merely control discourse but overdetermines the possibility of all statements and utterances. Both are implicated in setting in motion the play of differences that disperse us in the world; two horizons, space and time, through which and by which we, as subjects, are thrown. So, to take up the judgment seat, I ask to what extent these things that shelter in the shadow of the term “archive” determine the capacity of the law to act justly when it turns its eye to historical injustices. If there is no space without a time for that space to

33 Val Napoleon critiques those teleological tendencies and the impacts they have had on the treatment by the court of Indigenous laws, noting that the “the western legal process filtered and altered the *adaawk* thereby creating a distorted legal truth about oral histories that now pervades the Aboriginal rights discourse.” Val Napoleon, “Delgamuukw: A Legal Straight-jacket for Oral Histories?” (2005) 20:1 CJLS at 123–155.

34 *Archive Fever*, *supra* note 12 at 33.

35 *Ibid* at 36.

36 *Ibid*.

37 *Archaeology*, *supra* note 27 at 130.

38 *Archive Fever*, *supra* note 12 at 33.

39 Yosef Hayim Yerushalmi, *Freud's Moses: Judaism Terminable and Interminable* (New Haven: Yale University Press, 1991) at 117, cited in *Archive Fever*, *supra* note 12 at 77.

extend itself in, and no time without a space or place of commencement, how does the common law, this creature of authority that derives its authority and force from space and place, and that issues degrees and judgments over specific complaints arising at specific moments in time, articulate justice for those specifics which appear, in the application of state force, to occupy an awkward relation to time and space?

To explore these questions, I turn to the Aboriginal rights decision of *R v Van der Peet*⁴⁰ — aware, as always, of the force of consignment at work in this term “Aboriginal rights” that so succinctly displays a violence in the gathering together of signs, in the blithe erasure of hundreds of distinct communities, laws, practices, customs, histories and individual subjects (and how can we begin to speak of such things at all with a specificity which is just?). I think many of the comments that I will shortly begin to make are broadly applicable to many claims involving historical injustices, but it is in the context of Aboriginal rights claims where judicial reasoning exemplifies this gravitational pull of space and time. *Van der Peet* shows the court struggling with questions of time and the archive: Where does the archive reside? To what extent are the rights of First Nations enclosed and restricted by the space of the archive? To what extent are those rights restricted by a focus on pre-contact times? How must these rights be expressed in order to be recognized in a meaningful way that acknowledges certain practices now and into the future?

Lamer CJ opens *Van der Peet* with an immediate appeal to the common law archive, looking to the previous decision of *R v Sparrow*⁴¹ for the “framework” for interpreting Aboriginal rights. He sets out this schema:

First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been extinguished. Third, a court must determine whether that right has been infringed.⁴²

We can look at the temporal qualities at work in this, apparently, straightforward and linear framework. First, look at the numbers and ordering of the procedure. Here are a set of steps to be following in a specific order, none to be performed out of order, outside the time of the reasoning of this frame. The first step leaves open the question, “What is an Aboriginal right?” The second step, recognizing the possibility of extinguishment, raises a number of temporal divisions. It looks back to the first step where a certain “time” of Aboriginal rights is at work to determine whether the practice under dispute will qualify as an Aboriginal right; it raises the spectre of those halcyon pre-1982 days when a right could be extinguished through Government action; and it considers that precise moment at which extinguishment ostensibly became a creature of the past. The third step appeals to the present moment, and brings into play another doctrine, the test for infringement, which will ask another series of ordered questions to be applied to the case currently before the judge and, presumably, perform a just outcome. I would like to suggest that this servile adherence to the doctrinal framework has something to do with an intimate relation with a certain

40 *R v Van der Peet* [1996] 2 SCR 507, [1996] SCJ No 77 [*Van der Peet* cited to SCR].

41 *R v Sparrow* [1990] 1 SCR 1075.

42 *Van der Peet*, *supra* note 40 at para 2.

kind of time, a time exemplified by these numbered steps. A clearer picture may arise from Lamer CJ's definition of an Aboriginal right.

When addressing the scope of an Aboriginal right, Lamer CJ writes: “Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible.”⁴³ So, no definition anterior to explanation; no definition of rights without an appeal to the historical set of circumstances that: (a) gave rise to those rights; and, (b) lead to their constitutional protection. Again, we are faced with two temporal moments that interoperate to define rights and Lamer CJ ties them together thus:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.⁴⁴

The extent of the archival material that Chief Justice Lamer gathers together in support of this forceful assertion is impressive. He parses the French version of section 35(1), quotes extensively from the US *Marshall* decisions, looks to the Australian *Mabo* decision, and lists a long series of quotations from legal scholars including Brian Slattery, Patrick Macklem, and William Pentney.⁴⁵ The forces of the archive are gathered in a supportive battery behind Lamer CJ's definition — his “simple fact”. Again, there is a temporal nexus at work: the rights arise because of this moment of arrival of Europeans (and not, for example, due to the continued occupation of this territory by Europeans); the rights are supported and authorized by the temporal activity of “participating in distinctive cultures... for centuries”; and, of course, the rights are recognized in the moment of affirmation springing from section 35(1). I mean merely to point out that it is the temporal nature, the historical situation of Aboriginal rights in a past moment, which prevails as their source of being: the moment of their commencement. This historicising of the moment of these rights carries over into all aspects of their characterization. Although Lamer CJ recognizes the danger of a “frozen rights” approach,⁴⁶ it is clear that the rights are archived; only “those practices, customs and traditions that can be rooted in the pre-contact society of the aboriginal community in question... will constitute aboriginal rights.”⁴⁷ Chief Justice Lamer suggests that the frozen rights approach will be defeated by the “concept of continuity” that connects a present practice with an earlier form. As will happen, he appeals to the “evolution of practices, customs and traditions into modern forms”⁴⁸ in support of the connecting tissue of linear, progressive time. This is a conflicting moment in the reasoning, given

43 *Van der Peet*, *supra* note 40 at para 3.

44 *Ibid* at para 30.

45 *Ibid* at paras 19, 35–41: This dependence on contemporary authority might suggest a certain anxiety about the sufficiency of the historical archive, and that this dependency on moments of beginning requires the support of the “outcome” of this historical situation in more contemporary moment. It might reflect an effort to “approach” the archive in its present moment of articulation. That is, the historical moment of origin of the right is an *insufficient* explanation to its contemporary form.

46 *Van der Peet*, *supra* note 40 at 64.

47 *Ibid* at para 62.

48 *Ibid*.

Lamer CJ's earlier claim that "aboriginal rights cannot... be defined on the basis of the philosophical precepts of the liberal enlightenment."⁴⁹

I include an extensive quote below because it illustrates the way in which the temporal situation of Aboriginal rights, and the court's understanding of the evolutionary function of time, overdetermines Chief Justice Lamer's reasoning; he asks how Aboriginal rights should be defined and responds:

In her factum the appellant argued that the majority of the Court of Appeal erred because it defined the rights in s. 35(1) in a fashion which "converted a Right into a Relic"; such an approach, the appellant argued, is inconsistent with the fact that the aboriginal rights recognized and affirmed by s. 35(1) are rights and not simply aboriginal practices. The appellant acknowledged that aboriginal rights are based in aboriginal societies and cultures but argued that the majority of the Court of Appeal erred because it defined aboriginal rights through the identification of pre-contact activities instead of as pre-existing legal rights.

While the appellant is correct to suggest that the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights, the position she would have this Court adopt takes s. 35(1) too far from that which the provision is intended to protect. Section 35(1), it is true, recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal.⁵⁰

Here we have a direct plea from the appellant not to place these rights in the archive, not to make a "relic" of them. The inadequacy of the Chief Justice's response to this plea is highlighted by his performance of acquiescence: "the applicant is correct to suggest". But, in fact, in "simple fact" even, he fails to hear her at all. Instead, he places the words in her mouth that "the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights". It is such a strange moment and one cannot help but wonder why Lamer CJ inserts this call of the appellant, to which he has no response, into his judgment. This passage merely performs the plea for a living, vibrant, and present right — quickly packaged up and shipped back into the past, wrapped in this sign "Aboriginal". "It must not be forgotten," enjoins Lamer CJ, as if the threat of the future of Aboriginal rights might efface this important memory of the word under which these rights are consigned. Elsewhere Chief Justice Lamer quips: "As academic commentators have noted, Aboriginal rights 'inhere in the very meaning of aboriginality.'" This quote from Macklem and Asch is specifically directed by the original authors to a version of inherent rights rather than rights contingent on such legislative instruments as the *Constitution Act, 1982*. Here, "Aboriginality" performs the consignment principle par excellence — its gravitational pull draws Aboriginal rights into its meaning, and takes on the task of representing those rights in all their differences, specificity and multiplicity.

49 *Ibid* at para 19.

50 *Ibid* at paras 16, 17.

It is also a sign that has been, by Lamer CJ, located irrevocably, even irretrievably, in a distant past, however subject to the processes of “evolution”. In Foucauldian terms, we might see this as a failure to engage the present archive, illustrating an attachment to a historical moment rather than an attempt to engage with the powerful effects and enunciative possibilities of the present. Or, we might see this as an exemplar of the Derridean archive's power to erase and efface the potential plenitude of being and becoming through the violent action of consignment.

We might, following Foucault's suggestion, agree that Chief Justice Lamer's definitions stem from an archive that governs the historical moment of the case, and that governs what it is possible to say about Aboriginal rights in the context from which he speaks — although the content of Justice L'Heureux-Dubé's dissent in *Van der Peet* might call into question such an assertion. There is, nonetheless, just such an exemplification of a structural taking-hold of enunciative possibilities in Lamer CJ's discussion of the “purposive approach” to constitutional interpretation. Chief Justice Lamer sets out the reasoning behind the purposive approach, taken from Dickson J in *Hunter v Southam*:

... because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the Constitution must be interpreted in a manner which renders it “capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”⁵¹

Of course, this growth and development over time is restricted by the call of the archive because it demands the court look at a right “in the light of the interests it was meant to protect” — that is, to those interests previously determined to be at stake at common law.⁵²

I turn, now, beyond the limits of Chief Justice Lamer's archic jurisdiction towards the dissent of Justice L'Heureux-Dubé. The dissent inhabits a curious place in the archive. It provides an alternative set of reasons that lead to differing conclusions, sends a different path down to us than the decision that holds hermeneutic sway; it articulates another set of reasons that might have been enunciated, suggests a different set of enunciative possibilities excluded by the force of the majority. In doing so, the dissent reveals the illusion of the “limits” or horizon of majority reasoning. This place of the dissent has yet to be fully mapped.⁵³ From this place, L'Heureux-Dubé *J translates* the archiving of Aboriginal rights undertaken by Lamer CJ. Her version of the historical occupation and social practices of First Nations is not characterized by Eurocentric historicity:

Aboriginal people's occupation and use of North American territory was not static, nor, as a general principle, should be the aboriginal rights flowing from it. Natives migrated in response

51 *Van der Peet*, *supra* note 40 at para 21 citing *Hunter et al v Southam Inc* at 155.

52 *Ibid* at para 3, citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344.

53 Although the work of Marie-Claire Belleau and Rebecca Johnson in their paper “Judicial Dissent: Early Reflections on Emotion, Reason, and the Passions of Law” in Marie-Claire Belleau & Francois Lacasse, eds, *Claire L'Heureux-Dubé à la Cour suprême du Canada, 1987-2002* (Québec: Wilson & Lafleur, 2004) raises some interesting possibilities about the role of affect in dissent reasoning.

to events such as war, epidemic, famine, dwindling game reserves, etc. Aboriginal practices, traditions and customs also changed and evolved, including the utilisation of the land, methods of hunting and fishing, trade of goods between tribes, and so on. The coming of Europeans increased this fluidity and development, bringing novel opportunities, technologies and means to exploit natural resources...⁵⁴

The arrival of Europeans in the space of Aboriginal communities is characterized as just one of a number of experiences, movements, and catastrophes that stretch out over an extended temporal horizon oriented both to the past and to the future. L'Heureux-Dubé J attacks the Chief Justice's choice of examining specific traditions, customs and practices, as well as his desire that they have pre-contact status. She renders explicit the force of consignation at work in his reasons when she writes "s. 35(1) should be viewed as protecting, not a *catalogue* of individualized practices, traditions or customs, as the Chief Justice does... the emphasis should be on the significance of these activities to natives rather than on the activities themselves"⁵⁵. L'Heureux-Dubé J opts to describe Aboriginal rights "at a certain level of abstraction and generality" in order to open up a broader space for recognizing continuous development and change. The "dynamic right" she advocates "recognizes that distinctive aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved... as they have changed, modernized and flourished over time, along with the rest of Canadian society."⁵⁶ She appears to continue to embrace a linear and teleological version of time, while rejecting the activity of archival (spatial) consignation. Is such a move possible? Allowed, even? And, if so, what authorizes it as such? Is it that she generates a description of rights at a level of "abstraction and generality" that remains undecidable and imprecise — anterior to archiving those rights?

I would like to suggest that Justice L'Heureux-Dubé's great carefulness with the risks at stake in the historicizing of rights flows from her location of Aboriginal rights in place and space. Although Chief Justice Lamer's interpretation also has this spatial component, his description of the content of those rights is much more firmly based in a set of temporal relations (to European settlers and the current Canadian context). L'Heureux-Dubé J ties that content much more closely to the spatial origin:

The traditional and main component of the doctrine of aboriginal rights relates to aboriginal title, i.e., the *sui generis* proprietary interest which gives native people the right to occupy and use the land at their own discretion, subject to the Crown's ultimate title and exclusive right to purchase the land...⁵⁷

Of course, she modifies this origin, writing that: "the concept of aboriginal title does not capture the entirety of aboriginal rights."⁵⁸ Nonetheless, it is a title invested in land that ultimately gives rise to rights about certain land uses "such as

54 *Van der Peet*, *supra* note 40 at para 113.

55 *Ibid* at para 157 [emphasis added].

56 *Ibid* at para 179.

57 *Ibid* at para 115.

58 *Ibid* at para 116.

aboriginal rights to hunt, fish or trap.”⁵⁹ The difficulty is that L'Heureux-Dubé J's characterization remains one of “proprietary interest”, that may circumscribe these rights with all of the concerns of property and the proper contained within the liberal enlightenment archive. If the “great dissenter” partly rejects the teleological lure of linear time as a mode of restriction and containment, she still embraces the violent principles of consignment exemplified by the force that draws multiplicity and variability together in the “proper” — the tireless effort to “seize upon a plenitude of presence” and to reduce the metaphor to a limited nomenclature.⁶⁰ If her reasoning moves intimately towards an archive of the present moment by performing on the edge of a threshold of new possibilities for enunciation, its promise will remain enclosed by its orientation to a response to space, to property, to “what will have been” — to the always already enforced enclosure of space by the common law that depends on the reducibility of metaphor for its truth-seeking capacity.⁶¹

The consideration of these two approaches to Aboriginal rights helps us draw the two horizons of space and time closer together. Chief Justice Lamer's definition of Aboriginal rights, which emphasizes the time of those rights, seems to enforce a strict closure or limit. If the archive, in its temporal aspect, plays a role in overdetermining Lamer CJ's judgment, it might be seen as providing a series of walls or doors in time that run in a single direction and through which heavy evidentiary burdens must pass. There is a threatening irretrievability about rights locked in this vault of time. However, if we see the moment of Chief Justice Lamer's judgment as falling under a systemic archival control of the possibility of his utterances, we are nonetheless faced with the judgment of the same moment, L'Heureux-Dubé J's judgment, which suggests a wider range of possibilities within that same temporal horizon. Lamer CJ's judgment might be said to fall prey to a certain kind of temporal force, which is archived by the common law, and from which falls the very narrow readings of Aboriginal rights that we see today. That temporal force, in the text of the *Van der Peet* decision, is consigned to the archive of the common law from which it emits a violent force for the restriction, disallowance, and limiting of Aboriginal rights; that is, a force of consignment.

Time and Generosity

In *Neuropolitics: Thinking, Culture, Speed*,⁶² William Connolly explores the interactions between thinking, culture, and politics, and attempts to provide some strategies for ethical behaviours that resist fundamentalist drives and promote deep pluralism in a world where speed, and differentiated zones of time, seem to have overwhelmed the slow deliberation necessary to the democratic process. One of the strategies Connolly proposes is to break apart received notions of time. He sets up three possible views of time: 1) the “cyclical image of slow time adopted by many ancients”; 2) “progressive, teleological and linear

59 *Ibid.*

60 *Of Grammatology*, *supra* note 3.

61 I am suggesting that the drive towards property ownership has its roots in a property of language — that is, the violent erasure of plenitude in an attempt to reduce that plenitude to the singular; the same drive at work in the force of the “proper name”. See *Of Grammatology*, *supra* note 3 at 102–140 and Jacques Derrida, “Passions” in Werner Hamacher & David Wellbery, eds, *On the Name* (Stanford: Stanford University Press, 1993) at 3–34.

62 William E Connolly, *Neuropolitics: Thinking, Culture, Speed* (Minneapolis, University of Minnesota Press, 2002).

conceptions of time”; and 3) a “rift as constitutive of time itself, in which time flows into a future neither fully determined by a discernable past nor fixed by its place in a cycle of eternal return, nor directed by an intrinsic purpose pulling it along.”⁶³ In explicating his three categories of time, Connelly looks to a popular quote from Friedrich Nietzsche's *Thus Spake Zarathustra*:

“Behold this gateway, dwarf!” I continued, “It has two faces. Two paths meet here; no one has yet followed either to its end. This long lane stretches back for an eternity. And the long lane out there, that is another eternity. They contradict each other face to face; and it is here at this gateway that they come together. The name of the gateway is inscribed 'moment'... do you believe, dwarf, that these paths contradict each other eternally?”

“All that is straight lies,” the dwarf murmured contemptuously. “All truth is crooked; time itself is a circle.”⁶⁴

As Connelly notes, it appears that Zarathustra “supports a linear conception of determinism against the dwarf's cyclical picture of eternal return,”⁶⁵ which would seem a strange disjunction for readers of Nietzsche, the philosopher of the eternal return. Connelly's reading is that that which returns eternally is the “dissonant conjunction of the moment.”⁶⁶ He offers the interpretation that at “every moment, the pressures of the past enter into a dissonant conjunction with the uncertain possibilities of the future.”⁶⁷ This reading of the “rift in time” opens us up to an understanding of the present moment in which “a surprising rift may emerge, ushering microscopic, small, large, or world historical shifts into an open future unsusceptible to full coverage by a smooth narrative, sufficient set of rules, or tight causal explanation.”⁶⁸ Connelly exhorts us to embrace the “rift in time” in order to develop an ethical generosity between constituencies that have been limited by the “progressive, teleological and linear conceptions of time”; such a generosity would exceed the judgments accumulated from perceived “objective norms”—that is, unacknowledged power structures that interfere with deep pluralism or just outcomes.⁶⁹

What is it about progressive, teleological and linear conceptions of time that lack generosity and limit ethical action? The common law is said to have a capacity to “change and adapt over time”—to evolve—and this word and its variants haunt the common law's archive and its characterization of itself. We do not need to dig deeply into the archive of the word “evolution” to see the violent way it has operated, its deep involvement with the projects of colonialism, and its continued expression of a dialectic that subsumes all opposition to a forward movement that insists on a perfectible goal (that is, fundamentally, a

63 *Ibid* at 144.4.

64 *Ibid* at 144.4–144.5.

65 *Ibid* at 144.5

66 *Ibid*.

67 *Ibid*.

68 *Ibid* at 144.4.

69 Mariann Nicolson's 2005 Masters thesis on the Kwakwaka'wakw concept of time demonstrates the important work needed to demonstrate diverse conceptions from those directly affected by the court's decisions on Aboriginal rights: Mariann Nicholson, *Moving Forward While Looking Back: A Kwakwaka'wakw Concept of Time as Expressed in Language and Culture* (MA Thesis, University of Victoria, 2005).

Christian dialectic). Even Justice L'Heureux-Dubé problematically evokes the term: “aboriginal culture is... a characteristic that has evolved with the natives as they have changed, modernized and flourished over time.”⁷⁰ The archive of the common law on Aboriginal rights is rife with dark shadows cast by the “teleological” time of evolution, whether in then-Chief Justice McEachern's truly barbaric appraisal of pre-contact Aboriginal culture in the trial level decision of *Delgamuukw v British Columbia*,⁷¹ the continued disparagement of the oral histories required to prove Aboriginal rights as lacking the capacity for “truth” and iterability supposedly assured by the written archive of the West,⁷² or in the archiving and restriction of Aboriginal rights through a process of consigning them to the past. The interaction of this connection between the conception of time embraced by the common law and questions of generosity can be illustrated by a brief consideration of the nexus of the spatial and the temporal archive in the Court's responses to Aboriginal oral histories in the rights claims context.

In *Delgamuukw*, the Supreme Court of Canada performs an act of supposed generosity by recognizing the evidentiary difficulties faced in Aboriginal rights claims and asserting that greater weight be given to Aboriginal oral histories in adjudicating a rights claim — essentially creating a hearsay exception for the admission of oral histories. Lamer CJ writes that “laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with” to prevent an “impossible burden of proof” from arising for “non-literate” cultures.⁷³ Lamer CJ looks to that “useful and informative description of aboriginal oral history”⁷⁴ in the Report of the Royal Commission on Aboriginal Peoples:⁷⁵

The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human-centred in the same way as the western scientific tradition, for it does not assume that human beings are anything more than one — and not necessarily the most important — element of the natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.

70 *Van der Peet*, *supra* note 40 at 119.

71 *Delgamuukw v British Columbia*, [1991] 79 DLR (4th) 185 at 209.

72 See, for example, the “opinion” offered by Dr. Alexander von Gernet in the trial level decision in *Mitchell v Canada (Minister of National Revenue)*, 134 FTR 1, 1997 CanLII 5266 (FC).

73 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 66 BCLR (3d) 285 [*Delgamuukw*] at para 87.

74 *Ibid* at para 85.

75 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996).

One wonders how “equal” the footing may be when Chief Justice Lamer has also reiterated that the “difficulty” of oral evidence is that “[c]laims to aboriginal title are woven with history, legend, politics and moral obligations”⁷⁶ (unlike western history?) and that these aspects are “tangential to the ultimate purpose of the fact-finding process at trial — the determination of the historical truth.”⁷⁷ What the court does here is set up the oral archive as different from the written archive and therefore less oriented towards the “truth” — indeed, the quote seems to imply a genuine incapacity for the truth. It also sets up those oral histories as concerned with a time that is non-linear — implying that, pre-contact, there was no history as we know it for Aboriginal peoples. We are presented with oral histories as lacking a spatial component of the archive, which is believed to provide stability and “objective truth”, wedded to a conception of time that is opposed to the received conception of time at common law; indeed, a time that seems to be dependant on the arrival of the written archive to set in motion a “history” in which social progress and evolution is possible. Cases following the Supreme Court of Canada decision in *Delgamuukw* have insisted that First Nations provide proof that their oral evidence is reliable by showing evidence of formalized litanies, and rules regulating unchanging repetition; in fact, the courts have asked that oral histories be made to look very much like the archive of the common law while continuing to treat them as historical evidence rather than as law.⁷⁸ Despite claims to generosity, to a willingness to consider the “Aboriginal perspective”, this generosity has been severely limited by a delineation of Aboriginal rights based on a constructed image of their archive, and the Court's understanding of progressive, linear time.⁷⁹

The problem that persists is that this progressive, linear notion of time, into which evolution and the common law so swiftly fall, is a deeply attractive lure. Indeed, Connelly invokes Henri Bergson's suggestion that our operational perception orders conscious events in such a way that the connective tissue of memory enacts linear causality where memory

... has retained from the past only the intelligently coordinated movements which represent the accumulated efforts of the past; it recovers those past efforts, not in the memory-images which recall them, but in the definite order and systematic character with which the actual movements took place, in truth it no longer represents our past to us, it acts it...⁸⁰

In Bergson's account, our consciousness, forced to deal with an overwhelming array of objects available to perception, more easily forgets those things that fall below the surface or do not fit easily into our progressive understanding of time.⁸¹ Connelly wants us to concentrate on those moments and events that

76 Lamer CJ quoting Dickson J in *Kruger and al v The Queen*, [1978] 1 SCR 104 at para 109.

77 *Delgamuukw*, *supra* note 73 at para 86.

78 See, for example, the incredibly restrictive guidelines set out by McLachlin CJ in *Mitchell v MNR*, [2001] 1 SCR 911, 2001 SCC 33. For a more hopeful response, the first pages of the trial decision in *Tsilhqot'in* demonstrates the gravitational force of an Indigenous concept of time on the late Justice David Vickers's judgment. See, for example, paras 22–25 in *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700.

79 See Napoleon, *supra* note 33 at 151–152. Napoleon points out that if Indigenous law is treated as evidence to prove the Aboriginal title test developed by the courts, rather than as law in its own right, the court will miss likely the mark.

80 Connelly, *supra* note 62 at 168.8.

81 *Ibid.*

might call into question the linear or teleological image of time. He admits that in doing so we might experience a “surge of anxiety” that may be connected to “faith in a salvational god or to the sense that life is meaningless unless the possibility of steady progress is projected forward.”⁸² Such an anxiety might very well trouble the common law when judges are asked to question the images of time and the archive that support their truth-seeking function. The linear version of time might be “useful and ethically laudable much of the time” but it “might also conceal something that needs to be drawn into [our] thinking.”⁸³ Connelly's work suggests that we can construct an ethical sensibility imbued with affect through a greater awareness of the possibilities and contingencies of genealogical interconnection that do not portray immediately perceptive causal relations.⁸⁴ The outcome of such work is to modify our experience of time so that we become more sensitive to modified ideas of “meaning, ethics and causality” — opening up our sense of time as “becoming”, as time rife with possibilities for change and a future that is radically disconnected from an overdetermining past but which attends closely to subtle movements of becoming.⁸⁵

To begin to accept the rift in time as constitutive of time is to accept that the perceptible past is not unutterably determinative of the future — so time becomes open to radical shifts in the means by which meaning is invested, or rights characterised. One might hope that this appreciation would inject into the common law a self-awareness of the violence that maintains in acts of consignment, and begin to un-knot a sense of time that makes certain rights inaccessible because of their temporal location.⁸⁶ But opening the temporal locks of the archive is not enough. We need also to situate the space of the archive in the world; not to continue its image as a place of authority and state power, but to see the physical archive as radically connected to and involved in the ongoing project of justice-making and lived experience. To paraphrase Deleuze and Guattari: “the [archive] is not an image of the world...[I]t forms a rhizome with the world; there is an appalled evolution of the [archive] and the world, but the world effects a reterritorialization of the [archive] which in turn deterritorializes into the world.”⁸⁷ What is required, as Derrida suggests, is that we archive the notion of archive as maintained in a separate place of privilege because “what is no longer archived in the same way is no longer lived in the same way.”⁸⁸ Post-Truth and Reconciliation Commission report, post-Missing and Murdered Indigenous Women and Girls Inquiry — we cannot in good conscience continue to live in the same way. As the lawyer and academic Doug White has described it: “Any culture that has done these things to another people, has done something terrible to itself.”⁸⁹ Foucault might assert that the moment we can write of the archive as an archivable notion, this project has al-

82 *Ibid* at 165.6–166.7.

83 *Ibid* at 166.7.

84 *Ibid* at 168.9.

85 *Ibid*.

86 See Napoleon, *supra* note 33 for a discussion of the impacts of the absence of such self-awareness.

87 Gilles Deleuze & Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia*, translated by Brian Massumi (Minnesota: University of Minnesota Press, 1987) at 11.

88 *Archive Fever*, *supra* note 12 at 23.

89 Douglas White, Address (Speech delivered at the *First Nations, Land, and James Douglas: Indigenous and Treaty Rights in the Colonies of Vancouver Island and British Columbia, 1849-1864* conference, February 25, 2017), [unpublished, paraphrased by author].

ready occurred — because it is now possible for us to speak of this potentiality; we would, therefore, already be entering a stage where the archive is dispersed and where the potential exists to question an image of time that permits and encourages the consignment of lived rights to an absurd historical vault.⁹⁰ Such questioning challenges the common law courts, in their exercise of state power, to look beyond the imagined financial apocalypse prophesied to result from attempts to remember and recognize past injustices, injustices that adhere in the present moment. It calls out to the courts to affirm the promise of an unknown future of vibrant potentiality where a pluralistic judicial process might respond very reasonably pursuant to a logic that substitutes justice for memory.

90 It might be argued that the intensive and valuable work on Indigenous law methodologies, curricula, and interpretation currently unfolding at law schools across Canada is a demonstration of that archive freeing itself from its island under its own responsive force. It may represent the possibility of that archive re-territorializing into the world in ways that, in this timely moment, offer a corrective to past mis-readings.