

LAND, LAW AND LANGUAGE:
RHETORICS OF INDIGENOUS RIGHTS AND
TITLE

by

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Abstract

For good or ill, settler Indigenous relations in settler colonies around the world are being framed by longer and more complex texts. This renders the study of language more important than ever, especially as the frameworks and perspectives of Aboriginal people are increasingly given their due; it also raises the question about other strategies for resistance and redress, such as the role of the arts, politics, culture and media. This thesis explores these issues with respect to assumptions and debates about language and meaning, about language and culture, and about legal and literary language in a selection of genres in which natives and newcomers in British Columbia and Aotearoa/New Zealand mediate their claims about land, about government, and about what counts as legitimate knowledge. No longer is it correct to enforce paradigms of Western justice, nor to essentialize or exoticize Indigenous cultural production. But what is taking their place and how do particular rhetorics of language and of difference structure these legal and literary genres in this particular "contact zone"?

That language is used in ways to serve situations is fundamental to rhetorical genre theory; that subsequent interpretations of this language use may serve subsequent often quite different situations is also of interest, and part of the action of genre. As a hermeneutical concept, genre can mediate between discourse and sentence levels of analysis in ways that keep audience effects in mind. But in the case of these genres both speakers and audiences can be polarized, dispersing intentions, uptakes, and effects. Theories of rhetoric and genre, which are my conceptual foundation, need amendment to account for this. Generating a more nuanced account of genre helps me develop a category of genres called contact genres: those genres in which rhetorical situations may be profoundly differently construed and yet they maintain their stability in order to address and dissolve colonialism's culture.

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Dedication

This thesis is dedicated to my grandmothers Blanche and Florence; my aunts Hazel and Helen;
my sisters Dianne and Maree, and our mother Vera—women whose love is always
acknowledged but whose labour was often not.

And to my daughter Judy.

With heightened appreciation and love for you all.

Introduction **Treaties as Rhetorical Genre**

In determining the question as to whether ex. 8 is a "Treaty" within the meaning of s. 87 of the Indian Act of Canada the golden rule of construction is to be applied, viz., that the grammatical and ordinary sense of the word is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the statute in which case the grammatical and ordinary sense of the word may be modified so as to avoid that absurdity, repugnance and inconsistency, but no further. (*R. v. White and Bob* 1964)

Certain principles apply in interpreting a treaty. First, a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. Second, the honour of the Crown is always at stake; the Crown must be assumed to intend to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions must be resolved in favour of the Indians and any limitations restricting the rights of Indians under treaties must be narrowly construed. Finally, the onus of establishing strict proof of extinguishment of a treaty or aboriginal right lies upon the Crown. (*R. v. Badger* 1996)

These excerpts are chosen to represent the range of topics of this thesis, which has at its core a concern with language. It asks about what political and legal actors on all sides of the debates on Aboriginal rights and title think they are doing when they gesture toward language use and meaning. And it does this through the theoretical lens of rhetorical genre theory. In the first excerpt, from a mid-twentieth century court case, the author is concerned with protecting the literal meanings of legal texts from "absurdity, repugnancy, and inconsistency," positing a language that has the ability to escape the rational control of its users; the second betrays a more comfortable acceptance of ambiguity, and also an acknowledgement that processes of interpretation themselves are not disinterested. Justice, this second entry in essence says, does not reside in the meanings inherent to the language of historical texts, nor in the intentions of their writers, it lies rather in the contexts of interpretation in the present day. Indeed, we are witnessing an increased awareness in legal discourse of the role of language and interpretation,

as judges increasingly invoke and debate theories of interpretation in their judgments. In most recent times, in fact, they often do so by drawing on and quoting key thinkers from academic contexts. What was once if not a tacit process then a simple one of ascertaining the obvious has become an increasingly more explicit object for judicial reasoning.¹

This thesis explores how assumptions and debates about language and meaning, about language and culture, and about legal language operate in some of the genres in which Natives and newcomers have mediated and are mediating their claims about land, about government, and about what counts as legitimate knowledge. How do particular rhetorics of language and of difference structure legal and literary genres in this "contact zone"? It also proffers its own claims about how language makes meaning in situations of contact, to further and amend the theories of rhetoric and genre which are its conceptual foundation. The calls to finalize once and for all "the Indian land question" in British Columbia, or to bring to an end once and for all the work of the Waitangi Tribunal in Aotearoa New Zealand provide backdrops to the site-specific investigations that follow; these calls from the public sphere—"...when, oh when, will Maori Treaty of Waitangi claims be settled finally, once and for all?"²—are interesting accompaniments to ongoing hopes for successful intercultural communication, mutual understanding, and resolutions of differences. Indeed, despite calls for "once and for all" solutions, the number and complexity of genres in the contact zone of settler indigenous relations seem to paradoxically be on the increase, suggesting a need to explore them from new perspectives. The sheer lengthiness of treaty documentation, for example, has increased over the

¹ Québec Inc. v. Quebec (Régie des permis d'alcool), [1996] 3 S.C.R. 919 is a recent example, a case which sought to define the meaning of "quasi-judicial" for the purpose of a liquor licensing dispute, and which engaged at length on "The interpretation method" drawing from academics such as Martha Nussbaum to do so.

² Garth George: "History Repeats When It Comes to Claims." *NZ Herald*. 09 Jul. 2009. Web. 10 Feb. 2010.

last century and a half from the three articles of the Treaty of Waitangi and the two paragraphs of each of the Douglas Treaties in British Columbia, to the thousands of pages of research and reasoning undertaken by the Waitangi Tribunal (over one thousand claims have been addressed) and, at the time of writing, the seven completed “agreements in principle” plus one completed treaty between the governments of Canada and British Columbia and the members of BC First Nations, which average about two hundred pages each. Admittedly, present day situations are complex, and many economic, political, legal, and environmental contingencies must be addressed. But how does the language used, its form and content, impact and invoke the trust of the various signatories and the people they represent (including all inhabitants of the postcolonial nation state in question)? Does the language used heighten trust, or does this increase in verbosity not only signal a lack of trust, but also engender more *distrust*? Are today’s treaties and agreements the antidote to the conflictual and unjust relations of the past? These larger questions motivate the following studies of particular genres in their rhetorical contexts of production and reception, which include the Douglas Treaties of 1850-54; the antecedent text upon which they were based, the Kemp Deed of 1848, signed by the New Zealand Company and the Ngai Tahu of the South Island, the numbered treaties of Canada, and the 1761 treaty with the Mi’kmaq of Atlantic Canada, the Delgamuukw court case in British Columbia, and Aotearoa New Zealand’s 1840 Treaty of Waitangi.

This project is embedded in a history of the study of language and law that recognises how determining *rights* in many legal settings has become a matter of determining the contextual and contingent meaning of *words*—often in economic contexts (e.g. Richard Dawson, Jean Baudrillard, Norman Fairclough) and racially fraught ones (e.g. Patricia Tuitt, Sidney L. Haring). Similarly, Kenneth Burke points out how in any situation “one is simply interpreting with the only vocabulary he [sic] knows,” a vocabulary which is in turn subject to

shifts in orientation based on “serviceability” (*Permanence* 21). That language is assembled in ways to serve situations (Giltrow *Academic* 23) is fundamental to rhetorical genre theory; that subsequent *interpretations* of this language use also serve subsequent often different situations is now acknowledged in the more recently developed field of critical legal studies. These acknowledgements in turn make serviceable in my study methods of discourse analysis (Michel Foucault; Norman Fairclough), rhetorical analysis (Kenneth Burke; Stanley Fish), integrational theories of language (Roy Harris; Michael Toolan), and genre theory (Ann Freadman; Janet Giltrow; Donna Kain; Carolyn Miller), which in the field of discourse and writing studies in Canada is demonstrating how genre as a hermeneutical concept can mediate between discourse and sentence levels of analysis (Coe, Lingard and Teslenko), often to throw light on contexts of cross-cultural mediation (e.g. Giltrow “Public”; Paré).

The following chapters include analyses of colonial correspondence and treaties from the nineteenth century, and court transcripts and indigenous literatures from the twentieth century, all of which were chosen for their relevance to land settlements, disputes, and treaty-making processes in my two postcolonial contexts. Thus, through this “roster of genres” (Holquist xvi), I seek to develop a cross-culturally and linguistically theorized understanding of treaties in their contexts, both in the nineteenth century and as they continue to be written, ratified and reread today. The genres I chose for analysis are somewhat adventitious, and the view is not complete or broad from each chapter’s individual perspective; rather than a top-down application of a well wrought hypothesis I have focused on concepts or problems that emerged in specific sites to develop a claim about how genre theory needs to be amended to account for cross-cultural dynamics. While the first chapter develops a key definition of “contact genre” that threads through the thesis and thereby categorises treaties and other texts in settler colonies, this

introduction seeks to outline the rhetorical- and genre-theoretical paradigm, suggesting that it could usefully be amended when applied to situations of cross-cultural contact.

Coming to terms with rhetoric and genre

To take a rhetorical genre approach to treaties and their contexts of interpretation—here including courtroom discourses, judicial opinions, and literary texts—is a way to say that these texts’ constitutive legal or literary premises, meanings and implications are not objectified but rather contextualized and contingent within and upon social communities of practice. This implies that their formal elements are discussed only with recourse to the situational contexts in which the texts under consideration are spoken/written and heard/read by thinking and feeling members of social groups with collective memories and habituated practices.

Kenneth Burke captured this social understanding of the structured shape of texts in two related codas in his rhetoric: the first is in his treatment of form, captured in the quote “*Form in literature is an arousing and fulfillment of desires*” (*Counter* 124); and the second is when he bases his understanding of persuasion in *identification*. As can be seen from Burke’s use of the gerund “arousing,” *form* takes on a dynamic quality, relevant not only for its gesture toward the physical shapes and grammatical structures of texts but also for the ways these elements shape both desires for, and meanings within communicative action. Giltrow et al. access “meaning” in their definition of form, too, by relating it to content, saying:

...“form” refers to what we have in mind when we sense both an overall shape *and* a recognizable wording. [From a rhetorical genre perspective] “form” points mainly to the dimension of genre which is linguistic ... and material... . This definition of form does not permit form to be separated from “content”; instead it sees content and form as fused. (“Glossary” 272)

There is a dynamism between this fused form and content, and social action. Giddens' structuration theory, which, simply put, posits that structure is both the cause and the result of human action and agency, is another way to capture this dynamism, and this has also been invoked to develop the new conception of genre. Carolyn R. Miller, for example, argues from Burke's idea of form that a "rhetorically sound definition of genre must be centered not on the substance or the form of discourse but on the action it is used to accomplish" ("Genre" 151), then, further along in her thinking, draws from Giddens' work to link form more securely to action; she cautions:

I do not mean by my emphasis on Giddens' notions of structure and structuration to revise my claim that genre is social *action* to a claim that genre is social *structure*. I would still maintain that structure, or form, is a constituent aspect of action and that action is primary. ("Rhetorical" 72)

The second coda I am attributing to Burke can be summed up with the key term *identification*, which amends Aristotle's persuasion—using words to get people to do things in a unidirectional cause and effect way—with the idea that persuasion actually entails the finding of common ground at the level of identity formation: speakers and listeners find common ground, identities shift and align, and language is the motivating instrument. Burke writes:

[Rhetoric] is rooted in an essential function of language itself, a function that is wholly realistic and continually born anew; the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols.
(*Rhetoric* 43)

From this starting point audiences are moved to a course of action that includes, now, shifts in ways of thinking and the formation and/or solidification of a (temporally) stabilized community.

Burke's is a "rhetoric of motives," in which motive is social, or, as Giltrow puts it, is "not just what speakers intend audiences to experience but what speakers also experience" ("Burke" 4).

A reconceptualized rhetoric, therefore, is at some distance from typical, lay understandings about unnecessarily elaborate or exaggerated, self-congratulatory or phony stretches of discourse. It has within its realm of interest more than just those aspects of oral performance by examiners, lawyers and those in the witness box, and more than only the written flourishes of judges in their judgments, or authors in their literary texts. This new rhetoric is in keeping with the rhetorical nature of law and literature, of conversations, of academic and other institutional discourses. In keeping with mid-twentieth century understandings about the nature of identity, no longer seen primarily in terms of the singular, unique person as a locus of reason, identification can be seen to be less of an event—an identifiable happening in time and space—and more of an ongoing, diffuse feature of participation in discourse. Burkean terminologies bring with them a sense of "the range of rhetoric" itself as broadened to include the "wrangle" of human affairs as a movement between the individual and the group, and between the "factional" and the "universal" (23), to include how meanings are made in other forms of life, such as science, religion and philosophy.

Rhetoric for Burke—as for Aristotle—is both the use of persuasive resources and the study of those resources (*Rhetoric* 36). Like much of twentieth-century rhetoric, to varying degrees it reflects a humanist tradition, with its implicit measures if not to "improve" human interaction and communication, then as a "heuristic" for looking at communication that helps "us not distort the facts, but to discover them" (Fish 479). In embracing rhetoric as a methodological lens and a critical practice, one confronts the question of the existence of a non-rhetorical ground against which rhetoricity can be measured, a truth from which rhetoric distracts us, against its alternative, which is that rhetoric is all there is. Stanley Fish notes that

those who affirm the latter position often find themselves reasoning back around towards the first one, especially if they embrace rhetoric as a critical practice. In working to expose the contingent and therefore challengeable basis of whatever presents itself as natural and inevitable, thus “loosening or weakening structures of domination and oppression,” one must by default have some idea, some belief, about what is good for humankind: “By repeatedly uncovering the historical and ideological basis of established structures (both political and cognitive), one becomes sensitized to the effects of ideology and begins to clear a space in which those effects can be combated; . . . becoming aware that everything is rhetorical is the first step in countering power of rhetoric and liberating us from its force” (*Doing* 496).

The new rhetoric reached this status as critical practice as a result of twentieth-century studies that sought to bring rhetoric to bear on some phenomenon or in some domain where it was previously considered irrelevant or unwarranted. Kenneth Burke’s application to sociological concerns such as anti-Semitism and behaviourism, and to “those areas where sociological and literary speculations overlap” (*Grammar* 523), which was his way of seeing literary texts, would be examples. So would Chaim Perelman’s and Lucie Olbrechts-Tyteca’s *The New Rhetoric: A Treatise on Argumentation* which brings rhetoric to philosophy.³ The standard distinction in this latter case was to say that the object of philosophy was/is to reason about the real, while the object of rhetoric was to develop arguments about the preferable or the probable, which is to say that a rhetorician could only *appeal* to logic, whilst a philosopher could exercise logical operations upon self-evident premises. But this was in the day when philosophy was in the business of seeking out and building upon metaphysical truths. The new rhetoric proposed by Perelman and Olbrechts-Tyteca seeks to fill the theoretical void between

³ Stephen Yarbrough, however, argues that Nietzsche was “the first to proclaim the rhetorical character of philosophy” (17).

this philosophical reasoning about the real that rests on a foundation of self-evident truth, and an old rhetoric that has as its ultimate goal the assent or adherence of an audience in situations where access to the real is compromised by lack of information, or by the intellectual deficits of the audience. Now it is understood that in all argumentation—about the *real* or the *preferable*—there is an orientation towards having one’s arguments accepted or adhered to by an audience,⁴ and this is the criterion for putting all argumentation in the realm of rhetoric.

The contributions to scholarship under consideration here have paved the way for a rhetoric of language itself—a rhetoric that sees *language as symbolic action*, and not as a system of symbols. Ultimately, therefore, virtually any language use can be analysed from a rhetorical perspective, rendering text types as rhetorical genres, defined as typified responses to recurring situations within communities of practice. What compels attention now is how rhetorical theory can be applied to discourse in circumstances where linguistic and cultural differences derogate from the typical assumptions of shared frameworks for communicative action. One perilous aspect of genres in the contact zones of settler colonies such as Canada and Aotearoa New Zealand is their histories of forced assimilation and education, leaving indigenous actors little choice but to participate in dominant discourse structures, and to use the genres of British law to make their claims for land, rights, and reparation. To adapt a point made by Judith Butler about injurious terms, sometimes we embrace injurious *genres*, because at least they constitute us socially (104). If this could characterize many of the genres embraced by Aboriginal people—in

⁴ For Perelman and Olbrechts-Tyteca the validity of anything that might be called *real* actually rests on the adherence of what they call a “universal audience.” This is the closest they think it’s possible to get to a universal truth in the domains of science and philosophy. For arguments concerning the *preferable*, on the other hand, the audience is narrower, “some particular audience, though it may be a large one” (66). I fail to see the logic of having the term “universal audience,” given their own arguments summarized above, although one could argue that what might be described as Euro-American modernism, and its associated primary ontological and epistemological assumptions constructs audiences of a fairly uniform type on some issues.

that they use dominant genres to further their aims and claims while paradoxically risking assimilation—then I seek below to understand this rhetorically.

It is with these concerns in mind that I posit a category of genre which I call “contact genre” to understand the continuing debates and negotiations about redistribution and justice in settler societies as primarily discursive operations within contact zones, which as Mary Louise Pratt posits are rife “with perils and possibilities”(7). But while rhetorical genre theory conceptualizes genres as the means for facilitating rhetorical and social action within communities, I originally asked: if genres are understood as a community's way of making knowledge about itself and the world in order to further social goals, thus constituting sociality discursively, what happens when a genre is used by two or more communities at once, to further their separate or even contradictory goals? Pratt says of "contact zone" that it is her

attempt to invoke the spatial and temporal co-presence of subjects previously separated by geographic and historical disjunctures, and whose trajectories now intersect. By using the term "contact" I aim to foreground the interactive, improvisational dimensions of colonial encounters so easily ignored by diffusionist accounts of conquest and domination. A "contact" perspective emphasizes how subjects are constituted in and by their relations to each other. It treats the relations among colonizer and colonized . . . not in terms of separateness or apartheid, but in terms of copresence, interaction, interlocking understandings and practices, often within radically asymmetrical relations of power. (7)

I am particularly interested in the degree to which understandings cannot "interlock" (even though *practices* may) because interlocking understandings, while indeed an important basis for a genre claim (Miller “Genre”), would have been quite difficult in the contact zone in which

documents like the Douglas Deeds were written and signed. Pratt tells of the unknown Andean who wrote a letter to the King of Spain—in which he rewrites the history of conquest from an indigenous perspective and seeks some new form of collaborative government (1-6)—used a mix of indigenous and imperial genres in a process she calls “transculturation” (6). This attempt at collaborative understanding, which Hanks would call an “intertext,” seems not to have been effective in protecting Aboriginal interests. Nineteenth-century deeds and treaties on the edges of empire were also often improvisational, and instigated on the part of the colonists in the absence of full understandings of the legal implications even by the standards of the day (Epstein). Far from stating intentions in clear and plain language, translated where necessary, as some sort of guarantee that both parties “were fully aware of the terms and consequences of the contract they entered into” (Culhane 51), there were numerous ambiguities on both sides; others have already pointed out that these ambiguities were probably variously exploited and for contrasting reasons: Europeans to deal as expediently as possible with the presence of indigenous people in their march of colonial expansion, and indigenous people to elicit some sort of concession in a situation in which they sensed they had little power (Arnett; R.C. Harris 22). With the possible exception of Culhane’s, none of this research explores this process with a focus on the rhetorical or linguistic means by which these ambiguities are exploited.

In focusing on situations in which genres render ambiguity, in which genre categories are less clear and their boundaries are troubled in some way, and which display their less homogenous features and identities, my work follows others who have asked similar questions. Donna J. Kain points out how important it is to study genres not so much because they are straightforward and stable, but because of their complexity and instability. She studies a group of ten or so professionals from a variety of fields collaborating on guidelines for implementing building and access stipulations of the American Disability Act at their university. What is

special about this genre is its non-routine and non-recurring nature, bridging as it does various disciplines. “Shared recognition” (from Russell) as a basis for genre is not a given in this context, but rather must be developed, she says (376-377). Furthermore, participating in this genre may even inhibit communication (378).⁵ Anthony Paré considers cross-cultural motives in Inuit social workers' reports about their clients, which positioned them as doubly—sometimes conflictually and sometimes strategically—situated. Paré concludes that the relationship between genre and identity plays out in linguistic choices and constraints confronted as the social workers write up their reports in institutional genres. They are often able to subvert the power and ideology of the genre, but “it is not easy”; he writes:

The Inuit workers continue to struggle with the “professional” identity demanded by their recording routines, although they have created alternative methods of practice—methods developed within their own cultural and rhetorical traditions. . . . They learn to play the linguistic market, and by subtle rhetorical force can initiate action helpful to their clients. But resistance or subversion is not always possible, especially for [those] in the shadow of more powerful disciplines. (68-69)

It is not a new story to point out how marginalized groups are often left with no choice but to adopt the language of the dominant society in order to fight their oppression (Griffiths and Tiffin), or to be left using the imperial laws that oppressed them in the first place (e.g. the Indian Act in Canada) as the only possible course for redress (Harring). The new story, which Paré

⁵ Kain points to Herndl, Fennell, and Miller’s study of documentation underlying the *Challenger* disaster as one in which a genre is studied for its problems of *reception*, but her study looks at the *creation* of a text. The document being created is an uptake of a legal text (the Disability Act), which itself is designed primarily to accommodate *legal* uptakes; however the implementation committee in her study is aiming to create a document for those who are to turn the Act into physical architectural structures, constituting an inter-generic uptake to draw from Freedman’s terms. (See below).

begins to tell here, is how this happens in institutional settings at the pragmatic level of language and genre, genres being the discursive routines in which power, ideology, and identity are embedded. Cross-cultural situations such as the one Paré describes are unique opportunities to display the otherwise tacit ideological workings of a genre, including how the boundaries are set around what is intelligible within it.

Ann Freadman calls the processes via which the boundaries of a genre are displayed *uptakes*; inter-generic uptakes (between rather than within genres) are those in which meanings, speech acts, and for her “sentences” in the judicial sense, undergo translation or transmutation in order to be intelligible in another discursive formation. Her example draws from the situation in which a sentence becomes a hanging, shifting the jurisdiction from the judicial to the penal realm. In chapter one below I show how uptake translated a deed (a transfer of property from one owner to another) into a treaty (an agreement between two nation-states). Freadman writes: “uptake selects, defines, or represents its object” (48). Her important contribution to genre theory is to fill out Austin’s work on uptake and jurisdiction. Indeed, my research revolves around defining jurisdiction—via Lyotard and via Austin—in cross-cultural contexts, here including the mandates of the colonial office, the Crown’s consuls, governors, the Hudson’s Bay Company and the New Zealand Company, as well as the conventions and protocols governing each indigenous group. As a result, there is mediation across several jurisdictional boundaries.

Meantime, in linguistic anthropology, genre has been a useful concept in studies of speech or ordinary language and was applied to indigenous groups of North America by those such as Franz Boas, whose objects of study were described variously as myths, tales, or folktales. Boas noticed slippages and diffusions of “themes and motifs” between and within these groupings, which speaks to how genre is less than adequate as a formalist category and more usefully seen as responsive to situation, and endlessly amenable to change through

repetition. In this field “genre” has been defined as an “orienting framework for the production and reception of discourse” (Briggs and Bauman, drawing on Hanks, 142-3). William F. Hanks draws from Bakhtin to point out how “the actuality of discourse changes with its repetition, and social evaluation is always subject to revision. . . . Because they are at least partly created in their enactment, then, genres are schematic and incomplete resources on which speakers necessarily improvise in practice” (681). This incompleteness is key; in terms drawn from New Rhetorical Genre Theory (NRGT) it allows for “shared recognition” (Russell) that is not totalizing, and it allows for genre’s “stabilized-for-now” temporality (Schryer). But is it enough to explain cross-cultural uptakes? One could argue there would be no genre, no functioning text, no social action without some form of shared recognition, but the question would remain, as I ask in Chapter One, to what degree were the participants recognizing the same thing, and can a genre claim still be made without ascertaining or even assuming shared recognition? If such a genre claim can be made, how common is this actual lack of shared recognition as a social action of particular genres? Conversely, is it a feature of all genres, in that what I am talking about is a matter only of degree?

Russell states “[p]articipants' shared recognition of the typified actions that a genre operationalizes is the key to distinguishing one genre from another,” but also argues that one text can function as more than one genre. His example is the text of *Hamlet* as used by actors, as studied by a philologist, and as read by literary critics, each of which constitutes a separate realm of participants and a separate social action. Only on odd occasions could one person be a part of these separate activity systems. But at the level of language it is hard not to see these three *Hamlets* as interanimating each other, even apart from the fact that criticism, performance, and philological analysis could all be a part of one person’s activity system. Russell’s point complements Derrida’s (which is reiterated by Cohen) that there is no mark of genre, or, as

Cohen's argument goes, members of a genre need not have a single trait in common.

"Classifications," he writes, "are empirical, not logical. They are historical assumptions constructed by authors, audiences, and critics in order to serve communicative and aesthetic purposes" (210).⁶ Interpretation cannot be a way to identify genres, because interpretations are historically situated and "genre-bound" (212). Whilst much of Cohen's concern is with literary genres, below I show how particular interpretive contradictions transpire in legal genres in the contact zone, but suffice it to say here that cross-cultural contexts seem to be particularly alive with the classificatory activity Cohen talks about, as the work of Dell Hymes and others shows. (The chart below sketches out the various contributions informing the concept of genre developed below, bringing together these contributions from literary, rhetorical, and anthropological traditions.)

The linguistic anthropological contributions from Hanks, and Bauman and Briggs have helped me defamiliarize my own understanding of genre, to prevent it from becoming the "old hat" that one forgets one is wearing (Giltrow and Stein). They help me realize how, in situations where a genre comes into being to meet if not mutually exclusive then at least mutually opaque goals of groups, it is a highly—and perhaps contentiously—rhetorical situation. So, while one could argue there would be no genre, no functioning text, no social action without some form of "shared recognition," the defining characteristics of a colonial era land deed seem to have been the separate and unshared traditions of antecedent genres, the different languages from which understandings evolved, the power imbalances, and the differing desires and expectations in terms of outcomes; add to this a history of disparate contexts of cross-cultural communication

⁶ And from Derrida: "A text's participation [in a genre] never amounts to belonging" ("The Law" 230).

that variously set the scenes for these interactions.

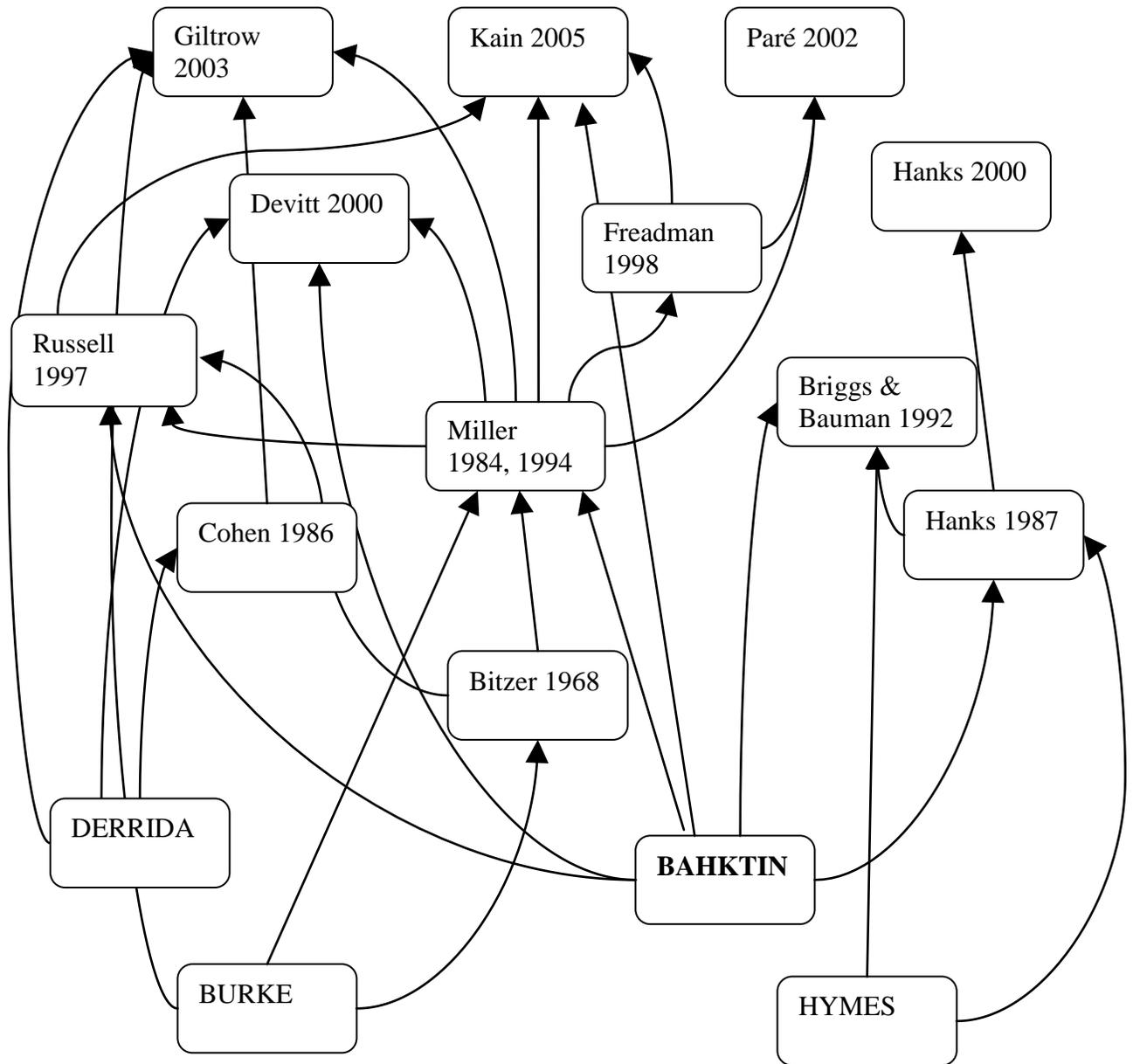


Figure 1 Chart of genre influences

It could be said of treaties or other contact genres that they exist only by virtue of the failure of assimilation, of the doctrine of *terra nullius*, of attempts at extermination, and of racial theories that deemed Indigenous peoples less than human. In contrast, on some abstract level, treaties could be considered the prototypical contact genre, with the ideal case being equal

power relations, mutual benefit, and trust in the future, mutually translatable into clear and concise language(s) that is illocutionary in its enactment and perlocutionary in its promise. In practice, of course, none of these conditions apply: despite decades in the so-called postcolonial era, an ideal postcolonial future has not been achieved, the dominance of Eurocentric (White/male) perspectives in institutions leave power imbalances in their wake, and global transnational corporate capitalism renders all public-sphere relationships as on some level economic and hierarchical. Such inequality and injustice incite discourse; they are exigencies in rhetorical situations, to use terms from Lloyd Bitzer.

But as I show below, drawing from integrational linguistics and relevance theory, language is an imperfect instrument, and meanings are only ever approximations. Language is rich because of these very same imperfections (see R. Harris *Language* 50), as terms are dialogized according their histories of use, assembling collocations and connotations in genred interactions. And it is language that distinguishes humankind as, as Kenneth Burke said long ago, the only symbol using (and abusing) animals. Symbol systems are our link to past and future scenes and actions; they constitute a necessary “screen” with which the immediate plethora of images and sensations—those indeterminate and non-verbal data unnecessary to the immediate social goal—is filtered out. These “terministic screens” reduce the myriad sensory inputs to a useable form, thus enabling human communication. They also contribute substantially to frameworks for participation, as values and norms are sedimented within them. Because of their power, it is worth addressing some of the terms that get bandied about in the rhetoric of texts and treaties discussed in the chapters below.

Treaty terms

Certainty As a high level term that all parties to the rhetorics of treaty negotiations (Indigenous peoples, governments, and corporations) have been able to rally around, talk about certainty is a terministic screen that renders current debates as less concerned with the justice of dealing with the past, for purposes of just reparations, than with being able to make guarantees about the future. “Certainty” fits into a category that Burke would call “ultimate terms,” one of two linguistic pathways via which rhetorical identification happens (*Rhetoric* 59) (the other one is through form, discussed above). In BC the term certainty is increasingly entering into public debates and institutional discourses. In the annual reports of the British Columbia Treaty Commission, for example, the incidence of the term itself peaked in the years 2003 and 2004, corresponding to the election of the BC Liberals and the development of the (now capitalized) “New Relationship” with First Nations.

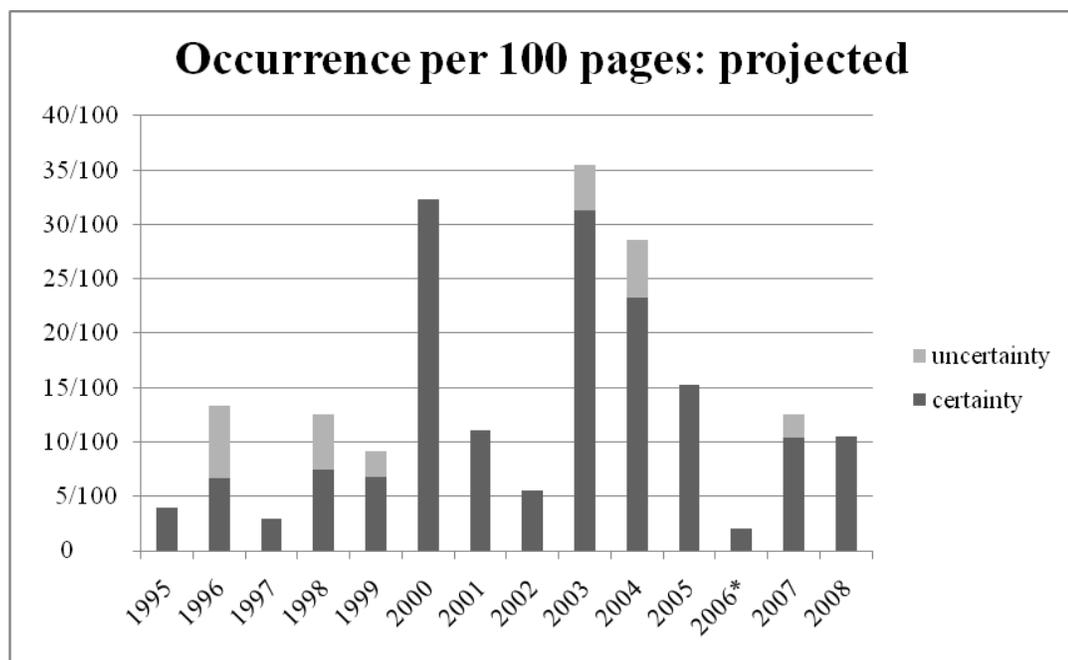


Figure 2 Occurrence of "certainty"/"uncertainty" in BCTC Reports

*2006's report was unusual in that it consisted of “six perspectives on treaty making” from individual First Nations leaders. The term, it seems, didn't have as much currency to them as it did for others involved in writing the reports.

The discourse of certainty is spoken in other parts of Britain's former empire, wherever indigenous land claims are exerting their power in legal domains.

Certainty is a value in law too, especially, indeed, in cases to do with property ownership: the certainty attached to fee simple title stabilizes and protects the integrity of market economies (Epstein 6); furthermore, as a term relevant to legal interpretation, it is intrinsic to the link between words and their (supposedly fixed) meanings, and in law's investments in the idea that only when legal texts are (for whatever reason) not clearly readable and easily applied are the vagaries of interpretation entertained, separating the declarative and interpretive roles that are judges' options in reading the law. Certainty in law comes at the opposite end of a continuum at which flexibility is at the other end; certainty in legislative language leaves less room for judicial discretion (Maley 17-31).

Law and legal language—linguistic routines and meanings—provide a terministic screen through which indigenous rights and title are understood and negotiated, and this is the focus of much of what follows. Suffice it to say here that inherent in both legal and political domains is an understanding of language as telementation (the idea that language captures and transports intact and intended meanings from speakers to audiences) and language as a fixed code (the idea that language is an unchanging mechanism in which meanings reside, regardless of context) (Harris), both of which undergird the certainty of the law.

Trust To the degree that certainty implies a trust in the future, or an assurance that material conditions will come about or be in place, trust is a related concept and a terministic screen. And to the degree that trust is a communally shaped emotional connection to propositions in discourse (S. Miller), trust is a necessary concept for genre studies. From a language theory

perspective, trust is, in the words of Michael Toolan, “fundamental to matters of language and communication” (“Trust”). It is the unstated precondition of Grice’s co-operative principle whereby participants in communication are trusted to be concise, truthful, orderly and relevant (27). Trust also underlies an interlocutor’s decisions to give up the floor to another’s narrative, offering their confidence that the other’s contribution—a diversion from the back and forth of regular dialogue—will be relevant, meaningful, and worth their time and attention (Pratt *Literary*). This trust is given both when the turn at talk is a short account of what happened yesterday, or a full-length novel to which is given sustained but solitary attention, although in the latter instance our trust comes from a confluence of social and institutional mechanisms in the publishing industry that constitute a “selection and ratification procedure” (Pratt *Literary* 118; see also S. Miller 107). As founded upon communally shaped experiences of emotional connections to the persons and propositions behind and within a text of any sort, including our adherence to arguments or even scientific and philosophical knowledge, trust, or “trust in texts,” is a pervasive prerequisite of language use in a literate (print) culture such as our own, which Susan Miller says dates back to “the ancient assumption that trusted persuasion joins a socially legible moral disposition to commonplace proofs whose tenor ‘everyone knows’” (51). In other words, trust is not an individually modulated emotion springing from within, but rather an emotion temporally inscribed by a community’s traditions; it is not necessarily consciously articulable, but is known tacitly and guides one’s assent to all manner of propositions, arguments and appeals (and, importantly, not only ethical or emotional ones). For Miller trust is a rhetorical concept, and rhetoric is founded upon emotional assent and social legibility.

Unlike certainty, which seems to venture out of the bounds of a genred definition because of its status as an ultimate term and lacks contextual definition, understandings of trust, if we are to draw from Miller’s work, can be genre-bound. It links the lifeworld with the textual

world as a sociological and a hermeneutical concept. According to social theorist Guido Möllering, we receive trust; and we give confidence. Trust is an expectation about the future, and out of our control. Although correlated with risk taking, relationships, cooperation, and social capital, trust cannot be defined through these terms. He writes:

This means purely observational studies of trust are strongly limited. Actions and associations that appear trustful (and could be seen as functional outcomes of trust) are not necessarily the result of favourable expectations but, possibly, of functional equivalents to trust, for example power (see Luhmann 1984). (415)

The input side of trust is a person's interpretation of a situation; the output is their expectation about the future, which is only "momentarily certain" (407); in between there is a suspension, as uncertainty and ignorance are bracketed off from consideration. "Suspension" is Möllering's preferred term over Simmel's "leap of faith," or a Giddens' "leap to commitment" (411). Möllering wants to acknowledge that "good reasons" are not the only requirements to develop trust, nor is blind faith. He quotes a definition from Lewis and Weigert:

Trust is a functional alternative to rational prediction for the reduction of complexity. Indeed, trust succeeds where rational prediction alone would fail, because to trust is to live as if certain rationally possible futures will not occur. Thus, trust reduces complexity far more quickly, economically, and thoroughly than does prediction. Trust allows social interactions to proceed on a simple and confident basis, where, in the absence of trust, the monstrous complexity posed by contingent futures would again return to paralyze action. (410)

These authors understand trust, as does Miller, as involving both rational thought and emotional feeling, and as more a sociological than psychological concept (Möllering 410). What Miller adds, as mentioned, is that feeling itself is contingent on the discourse available to express it, so

that both feeling and trust are (linked) features of all engagement with discourse, all political identification, and all epistemological enquiry.

What follows this thinking about trust is an important caveat: the chapters below have nothing to say about whom to trust, or how indigenous settler relations *should* be conducted, or how treaties and other genres should be written in order to be trustworthy; if anything I rather marvel at the roles the careful use of language and good cross-cultural communication skills are expected to play in reaching some sort of certainty, justice, and finality. I don't disagree that carefully worded documents and good communication skills are (trust)worthy goals, but I am interested in how, rather—in the process of engaging in and creating discourse—treaties become the “containers” for so many hopes and solutions.

Contact As will be explained more fully below, contact for me derives its significance from its use in linguistics and from Pratt's understanding of contact zones. But “contact” has ideological connotations that can be uncovered by passing it through a rhetorical lens, connotations that evolve mostly through its association with the idea of first contact, especially as ascertained in legal contexts, and in the popular imagination. Legally speaking, Aboriginal peoples are caught between changing too much and not changing enough, since so-called first contact. Changing too much renders them assimilated or having lost their connection to their ancestral lands; not changing enough renders them too attached to outdated traditions and unprepared to enter into modern organizational modes of law, government, and business. John Borrows talks about this in terms of mobility: indigenous peoples, he says, are caught between being too settled and too

unsettled as they argue their cases in the courts.⁷ Contact, as it is taken up in law, is therefore a dangerous term, although as a social phenomenon it is in reality an ongoing, relational, interactional feature of indigenous life that predated and postdates the actual instances in historical time that figure so prominently in legal arguments.

Nations, peoples, communities The naming of First Nations is also a terministic screen. For example when these groups are referred to as “communities,” it associates them with the need for “socio-economic repair,” to the exclusion of reparations of “cultural-symbolic injustice” (Woolford 30). This translates the lifeworld of First Nations placing it on a level comparable to that of local community or municipality. Similarly, “minority group” emphasizes the symbolic injustice done to First Nations, and often in the context of a rhetoric of equality in a multicultural Canada. Compare this to, simply, “First Nations”—coming from the 1996 RCAP—as a political, not racial, entity. Recognizing such politics of naming, the following discussion uses the terms indigenous or indigene, Aboriginal, First Nation, Maori, first peoples and Indian variously, depending on the immediate context. Each term has received attention elsewhere (e.g. Maaka and Fleras 29-32), and my stance is that readers are with me in recognizing that these choices are not neutral, but are rhetorical and motivated, as is all language use. I pick up and repeat the terminologies of the genres I am analyzing, unless such a usage detracts from my own attempts at meaning making, or the usage may be derogatory to some groups.

Lastly, I should say I have no principle of consistency when using terms from the Maori or other languages in the pages that follow, but I have shied away from using macrons or

⁷ "Physical Philosophy, Mobility and Indigenous Peoples," a workshop held Friday, October 23rd, 2009, Saint John's College, UBC.

other pronunciation cues, and I do not consistently italicize “foreign” words. Nor, by doing this, am I attempting to arbitrate what has entered “standard” language; I am only using the terms that have become familiar to me, and are therefore part of my lexicon.

Shared rhetorics of rights and title

Others have made excellent contributions in the form of well reasoned and engagingly theorized monographs on treaties in my two sites that specifically engage with matters of language and communication: Andrew Woolford's *Between Justice and Certainty: Treaty Making in British Columbia* and Richard Dawson's *The Treaty of Waitangi and the Control of Language*. Woolford, as mentioned, points out that regardless of the fact that degrees of trust and certainty will ebb and flow in treaty-making contexts, it will remain the case that “[n]o document, no matter how many legal experts are employed, can overcome all the vagaries of textual interpretation and societal change” (163). Dawson, in the meantime, outlines the current debate as a conflict between two overarching concerns, the justice of dealing with the past and the certainty desired for a better future. Certainty relies on the values of common sense, pragmatism, and minimal disruption, but this might impinge the justice of recognition and redistribution required because of past wrongs. Dawson recognises the role of language in all of this, and how, in the past as well as in the future, determining rights is a matter of determining the meaning of words. He pays particular attention to how economic forces ultimately shaped this process in Aotearoa New Zealand.

The thrust of this thesis is to broaden the current view of treaties and their contexts to include and find explanatory links between continents and periods, across legal and literary texts, and using the perspective supplied by recent work in rhetorical genre studies. As the

current treaty process in BC may illustrate, genres associated with the treaty process (including treaty writing and treaty reading) seem to be held to a higher standard for accomplishing socio-political goals; they are asked to do more communicative work, perhaps, than they are able to do. They are, by my own definition developed below, invoked and designed to do the impossible, to find common ground without diminishing difference, without, in other words, assimilation.

The boundaries and content of any genre are determined in practice, in other words in the iterations and uptakes of utterances and texts; thus I determine the nature of treaties as a genre in their uptakes in other genres, focusing on legal, paralegal, administrative and literary ones, although much could be learned from media uptakes and those of other scenes (a project for further study, but see also Sarah de Leeuw). Such a wide purview is useful because of how the topic of indigeneity and Aboriginal relations imbues all sectors of society in both Canada and Aotearoa New Zealand. Indeed, the shared history and reciprocal influence is constitutive of these nation states.

These historical beginnings are hard to locate, but notwithstanding the dangers of invoking *contact* as a key term in the process, I will hazard a principle in my search for beginnings of locating the moments when Aboriginal peoples and colonial powers first began to use legal genres (widely construed) to further their independently construed aims and claims in situations of contact. This would be in keeping with a rhetorical understanding of genre and with my category of "contact genres" developed above and below. Thus the beginnings pertinent here are the textual and oral records of contact, or those genrefied memories dating back in North America to events such as the oral covenant chain linking the Five Nations of the Haudenosaunee to the Dutch, made material in 1664 in the form of the two-row wampum belt

with the British (Walters 80-81), and in NZ to the discursive events leading up to, including, and following the Treaty of Waitangi.

Legal beginnings include the 1763 Royal Proclamation which is seen by some as having first recognized Aboriginal title in English common law. Indeed, some have argued that in North American contexts the proclamation consisted of a treaty itself, instantiated with the Haudenosaunee by virtue of the fact that it was discussed and explained to them in the late seventeenth century (J.R. Miller). This rhetorical card has been played successfully in numerous court cases, but others believe it is worth keeping in mind that originally it was not so much a gesture of equality towards Indigenous people of North America as it was a way to gain control over the delegation of lands by restricting their rights to make land deals directly with colonists without the permission and control of the sovereign and its delegates. The same can be said of the Treaty of Waitangi, whose second article makes a similar provision, restricting settlers from buying land directly from Maori. Such rights of preemption should have raised red flags even at the time; although they could be seen as protecting indigenous peoples from shady dealings, it essentially created a monopoly on land sales and allowed for profiteering as land offices bought cheap and sold high (Weaver, *Great* 133-141; Epstein 6).

The underlying title to the land purportedly belonged to the Crown by right of discovery; and Aboriginal people were, as stated in 1823 by Marshall in the landmark judgment in the US, *Johnson V. McIntosh*, “admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it” (qtd. in Mainville 13). Thus, as Brian Slattery points out, the problem with seeing the Royal

Proclamation as asserting Native land rights is its tacit assumption that English common law superseded the customary law of the various Aboriginal groups (114). But a reliance on customary law also has its problems, given that it also relies on the long history of a group who have since been subjected to strategies of assimilation through alienation from lands, traditions and languages; relying on it can further disadvantage groups who no longer have access to their traditions. Customary law can as a result be difficult to nail down; as well, it can lead to assumptions of "frozen rights," which was an issue in the Delgamuukw testimony (see Chapter Three).⁸

In terms of present day and future concerns, Canada and New Zealand, along with Australia in particular, share a socio-political context on a number of fronts, the most pertinent here of which are identified by three characteristics (from Pearson): "aboriginalisation"—the resurgence of the identities and politics of indigenous peoples; "ethnicification"—the adoption of homogenizing ethnic frameworks by immigrant groups that, although they formerly may have been used as tools of exclusion from the benefits of civic membership, are now invoked for the opposite purpose; and "indigenization"⁹—the increasing identification of the offspring of settler groups as rooted in the settler colony as opposed to hearkening back to roots in the mother country. The latter of these "citizenship processes" can function both as an acceptance of, even a celebration of, the first two, but also as an erasure, as expressed in the sentiment

⁸ One preferred solution in Canadian courts has been to recognise the *sui generis* nature of aboriginal rights and title, meaning that these rights have developed a uniqueness alongside and in cognizance of colonial law and government. This relegates aboriginal customary law as internal to a nation, while rooting the basis for aboriginal title in "the common law of aboriginal rights, which applies to all First Nations, regardless of their size, social organization, stage of technological development, or customary laws" (Slattery 119). Slattery's argument is that the Royal Proclamation is central to laws of aboriginal title today, not because it initiated a legal framework to counter that which came before, but because it brought to a textual head the customary and common law that had developed over the period since first contact, until (potentially) Canada's 1867 Constitution Act.

⁹ Not to be confused with "indigeneity," which is a "politicized ideology for challenge, resistance, and transformation" (Maaka and Fleras 14) adopted by aboriginal groups often in global context.

“we’re all Canadians, Australians, or New Zealanders” here (Pearson 1005). Such shared paradigms and cross-fertilization in the established scholarship sets my stage for developing a theoretical model for contact genres that both transcends national boundaries under the heading of indigeneity and attends to local contexts by the very virtue of a new rhetorical concept of genre.

The transcendent nature of the category of contact genres is reflected in the shared rhetorics of rights and title that also have their expressions in the more public domain, for example in the form of two popular books published around the same time, which address similar issues and use similar rhetoric. In New Zealand, Pat Snedden published *Pakeha and the Treaty* in 2005, which bears a notable resemblance to Canadian John Raulston Saul’s 2008 *A Fair Country: Telling Truths about Canada*. Both are written for a lay non-indigenous audience: Saul addresses the reader to say “We are a métis civilization”(3); Snedden gives Pakeha New Zealanders reason to “celebrat[e] our collective mana” (81). Both promote to lay audiences a more favorable stance toward treaties as the foundational method for ongoing harmonious relations, and promote the idea of a national identity founded upon relationships (including conjugal) with Indigenous peoples.

Another, more conspicuous connection that transcends national boundaries in the political domain was the formation of the World Council of Indigenous Peoples in 1975, two years after the *Calder* case in Canada recognized aboriginal title as preexisting and surviving contact, and the same year that the Waitangi Tribunal began its work in New Zealand acknowledging the Treaty of Waitangi as the basis for claims made by Maori. A long history of English law in both places buttresses indigenous rights and this mixes variously with local conditions and indigenous histories.

What unites all legal traditions, it could be said, is the way in which law is transformed through codification, which takes the settling of disputes from origins of high context dependency—wherein oral utterances are spoken in face to face contexts by authorized speakers—has given way to low context dependency, in which the written text now stands in for the oral utterance, creating wills, contracts, treaties etc. (Gibbons 5, citing Tannen). In medieval times a threshold used to literally change hands in a property transfer, contributing material symbolization to an oral framework in which rigid linguistic routines (sedimented in performative verbs and words such as “hereby” [see Tiersma, *Legal*]) did the rhetorical work that a deed does today.

The law itself as an institution seems to have originated in the fact that ordinary and mundane ways of talking were inadequate to the task of settling increasingly complex disputes and/or organising just outcomes when orderliness in social behaviour and organisation broke down. Speaking of Western law, for example, Atkinson and Drew say: "The existence of special legal rules of evidence and procedure can thus be regarded as the product of continuing and determined efforts to find principled solutions to identifiable practical problems posed by ordinary discourse" (8). Anthropologically, we could speculate that this is a condition of culture itself, that larger more complex social groups develop increasingly more complex ways of using their symbol systems in order to harmonize social relations, and this could have characterized a significant difference between Western and Indigenous legal traditions.

But there are always dangers of making too much or too little of cultural difference and this too is a theme to which I returned at various stages of my research. Making claims about legal language is a rhetorical gesture in itself, especially when comparisons between traditions are made. In this context they are often based on a vilification of Western legal systems and a romanticisation of traditional indigenous law. Bruce Miller points out how this can miss both

the ways in which Western traditions are conciliatory and restorative, and the ways in which Native systems are socially fragmented and even violent. He acknowledges the “internal differentiation” of aboriginal justice systems (11), and the way difficulties such as these have been on the one hand necessarily elided to promote solidarity and sovereignty, and on the other hand promoting what Nader calls a “harmony ideology” (in B. Miller 13) which creates problems of its own; according to Miller, “politically progressive movements aiming at removing indigenous communities from the domination of the state rely on radically conservative representations of their own society and culture, representations themselves built on misleading binary oppositions with white society” (11).

Similarly, there are also problems with how the codification of Aboriginal law is perceived, which Miller juxtaposes as the “rigid and unyielding” written law versus the “unwritten and flexible” (14) Indigenous oral legal tradition. This, I go on to argue, is a language ideology, and the oral-literate divide is a thread in the chapters below as I note how both too much and too little can be made of this divide. Miller’s concern, in the meantime, is that in twentieth-century North American contexts, “sound byte” versions of customary law based on oral traditions are invoked to serve pressing aboriginal rights issues in ways that might not serve future concerns: “communities will be stuck with these in later years when the political issues have shifted and new representations are needed” (16). It is worth noting that David V. Williams is similarly uncomfortable with the idea of Maori language entering into law, saying “there is a distinct danger that the meanings and values attached to Maori concepts, when used in an iwi or hapu contexts, will be distorted and amenable to manipulation by others when used in the official discourse of the state legal system” (qtd. in Dawson 162).

These authors are taking note of the rhetorical consequences of language use in legal contexts; they are acknowledging the rhetorical nature of law itself. The rhetoric of language

and law maps onto both colonial sites, as does the rhetoric of recognition and reconciliation. For example, Woolford suggests, drawing from Habermas's "justice through communicative processes," that although there exists no universal normative standards against which substantive justice can be measured, argumentation does "provide ... a universal *procedural* means for reaching an agreement" (20, italics in original).¹⁰ He suggests negotiators need to interact in a communicative not a strategic way, looking to find common interests rather than promoting their own (21), but one could wonder how communication could be anything other than strategic, especially given a rhetorical understanding of genre that does not idealize communication or demonize rhetoric.

While Woolford distinguishes between affirmative and transformative strategies regarding reconciliation and reparation in Canada—the former maintaining the status quo (despite the rhetoric of respect built in to the multiculturalist framework) and the latter requiring radical even constitutional change—these too have their parallel in discussions about the future of the Treaty of Waitangi in Aotearoa New Zealand, again illustrating the rhetorical connections between these two sites. The latter takes form in Richard Dawson's conclusion that strictly economic solutions—affirmative in Woolford's sense—fall short. Those whose contributions he values, on the other hand, explicate the ways in which "the language of conventional economics" (181) can never reflect the nature of Maori understandings of the treaty, nor provide an ethical direction for the future. What Woolford describes as affirmative, Dawson describes as "formalist"—an approach that also celebrates the status quo as the way to provide recompense

¹⁰ Woolford cites Charles Taylor for an example of a more particularistic view, who sees the harm coming to individuals or groups for whom "recognition" is refused: "conflict resolution should be sought more through the recognition of differences than through an assumption of commonalities" (22).

for Maori; it does so by acknowledging the wrongs of the past, but maintaining faith in the current system to right those wronged.¹¹

The key affirmation linking these discussions in each locus seems to be that concerning property rights; it is the stability of the market in property that undergirds the Western capitalist economy. Indeed, it is hard not to assume that by “certainty” in each of these national contexts actors really mean according to risks they are willing to take, based on economic models, which are in turn based on laws about property rights. And property rights are, as Weaver reminds us, “a common—in fact paramount—theme in colonization” (*Great* 52). Historically, interests in land were ceded in one of three ways: “the right of discovery (terra nullius), the right of conquest, or the surrender of sovereignty by treaty” (Weaver, *Great* 135). Even conquered populations theoretically retain property rights (Weaver, *Great* 135), so there was no escaping that Native interests in land needed to be dealt with. Although not invoked officially and permanently in NZ and Canada, as it was in Australia, the ideology of terra nullius could be said to have been a symbolic resource in the minds of all settler colonists and many of the officials back in England, rooted in the doctrine of discovery and bolstered with the vernacular image of the white man finding lands that no other white men had known about.

¹¹ Jane Kelsey, on the other hand, warns against the “deradicalisation” of the Maori movement in these quick economic solutions, and characterizes them as small short-term victories which “contain the seeds of long-term defeats” (in Dawson 165). Dawson also summarizes contributions from Moana Jackson and Annie L. Mikaere, who argue for an ideal that changes the rules of the game by “including Maori participation in the re-construction of the rules” (173). Lastly he cites Martin O’Connor who is the most ambitious in terms of formulating a new perspective for the future, describing the current situation as “not one of ensuring just compensation but rather as one of the social norms for determining the ‘distribution of sacrifice’” (in Dawson 179). Sacrifice, then, needs to be seen as an “ineluctable reciprocity ... in the sense of gift and counter-gift and of the individual and entire social group given over in a ‘symbolic exchange’” (in Dawson 179).

Chapter summaries

Four main instances of contact are relevant to the studies represented by the four chapters below: Chapters One and Two look at how James Douglas and the colonial powers he represented interacted with the First Nations of Vancouver Island in the mid nineteenth century; Chapter Three observes what happens when the British Columbia court system comes into contact with the oral histories and traditions of the Gitksan and Wet'suwet'en in the Delgamuukw trial; and Chapter Four attends to how Cree author Yvonne Johnston comes into contact with her collaborator Rudy Wiebe, as well as to how Maori and Pakeha read “contact” within two fictional narratives written by Maori authors, all in contemporary contexts.

Given the diverse trajectories of each of the four chapters, the goal of this thesis can be best stated as discussing and exploring the treaty genre from what I will here loosely call a language approach. “Language” here stands for the three levels of analysis—linguistic, genre, and discourse—and the interplay between them. In chapter one, the object of my focus at the lower, linguistic level is the legal profession’s preoccupation with the language of early deeds and treaties and other texts in this activity system. Understandings of what “language” is and where “meaning” lies shape debates about indigenous rights and sovereignty. For a concise example consider the debates about the Treaty of Waitangi in Aotearoa New Zealand, and one special difficulty posed by the fact that it has two versions, one in Maori and one in English. The Maori terms for sovereignty (*rangitiratanga*, which meant “kingdom” in mission Maori) and governance (*kawānatanga*, which was a transliteration involving “*kawana*” which was the Maori term for “governor”) have posed special problems for interpretation in current debates, because of the Maori position that they maintained the former and relinquished only the latter (Dawson 213-214). In short, a Maori reading posits that they agreed to the idea that the British would govern, but they did not agree to submitting to Crown sovereignty; sovereignty was to be

retained by the chiefs. According to the English version, however, the Maori agreed to be governed *and* ruled. This example is cited here because it includes all of the issues invoked by debates about interpretation: translation, transliteration, the intentions of both parties both past and present, and the close attention to the meanings of words. The answer to this dilemma, however, is not in correct translations of words.

The first chapter engages with such issues in the interpretation of deeds written in early British Columbia that are relevant to current claims of British Columbia's First Nations, thus linking processes of interpretation to an understanding of contact genres. It lays the genre-theoretical framework for my thesis using the Vancouver Island Douglas Deeds of 1850 – 1854 (of which there are fourteen), and the set of deeds upon which they were explicitly based, i.e. those used to acquire lands from Maori in the South Island of Aotearoa New Zealand (Tennant; R.C. Harris, *Making*). The resettlement (R.C. Harris, *Resettlement*) of both Aotearoa New Zealand and Vancouver Island happened at about the same time during the mid-nineteenth century via similar colonial institutional arrangements, providing an opportunity to observe in detail the continuity of a contact genre across these national borders. These deeds used to “purchase” indigenous lands for settlement in both Aotearoa New Zealand and British Columbia contained almost identical legal wordings (apart from the names and the places), and were mutually sanctioned by the Colonial Office, however their trajectories through decades of rereading differed radically, to the point that the Douglas Deeds are now referred to and considered as the Douglas Treaties, relevant to Section 35 of the 1982 Constitution Act, which recognizes “existing aboriginal and treaty rights.” If a genre is, as Carolyn R. Miller (“Rhetorical”) argues, a cultural artefact, this site offers a window on what can happen to a genre in these disparate zones of cultural contact, conflict, and (mis)translation (Pratt, *Imperial*). I offer a nuanced account of these singular texts and their uptakes in knowledge-making

contexts in each country at various points in the twentieth century—contexts that were increasingly giving voice to indigenous rights and concerns.

Genre theory is used to question these early and present documents and to develop my definition of contact genres, focusing on theories of legal interpretation. I find that, despite a more general trend, noted by scholars in language and law, that more literal interpretations serve conservative interests, political disparities—activist/egalitarian, versus conservative/oppressive—made no difference to the particular ideology of language invoked in interpretive moves made by each “side.” Legal actors, for example, drew attention to the meaning of the term “fisheries,” as protected by the Douglas Treaties in a case about the Tsawout’s fishing rights. The Tsawout had an interest in the term referring to a “geographically defined” area as well as a practice, whereas those who wanted to build the Saanichton Marina were invested in fisheries meaning just the activity of fishing and not the location. Both sides relied on the idea that words have fixed meanings to argue their sides. I am interested in the possibility that, despite statements to the contrary, the philosophies of interpretation invoked by actors in legal and political contexts (e.g. plain, universal meaning versus contextual, contingent meaning) are less salient than political contexts of interpretation. I argue that this compulsion toward the micro-interpretation of the language of documents in the presence of larger shifts in legal-political landscapes is, drawing from Giltrow (“Genre”), “in the domain” of this genre, which provides counter-evidence to the claims made by others that looser, more figurative, interpretations often accompany liberalized ideologies (see, for example, Gibbons 31). Both literalism and liberalism, as ideologies of language, are rhetorical resources for all, regardless of political persuasion. In New Zealand literalism as far as their own language is concerned bolsters Maori claims for sovereignty. In Canada, literalism both supports and detracts from Tsawout fishing rights.

In Chapter Two, I bring to these same texts a methodology more akin to material history, in that I “read” the physical traces of the concrete texts themselves. Revisions, interventions, handwriting, etc. are also analyzed to speculate on the discourse practices of the times—asking who read, who wrote, who used and what for, and who revised and why, and how does this evidence match up with other accounts. That a written record needed to be kept in these processes of land acquisition reflects not only the colonial compulsion to create a written record, but also implicitly posits that Aboriginal peoples had more of a hand in the legal processes of land cession than they actually did. The chapter also looks at the way that utterances and phrases concretely entered the texts of the Douglas Deeds through processes of iteration and reiteration in the colonial correspondence carried out to deal with the “Indian Land Question,” seeing in the quotidian work of writers and scribes the material basis for intertextuality.

Chapter Three looks at what happens when aboriginal genres enter a Canadian courtroom, specifically when the oral history and traditions of the Gitksan and Wet’suwet’en were elicited and cross-examined in the Delgamuukw trial (1987 -1991) in British Columbia. The pattern of interaction in courtroom examination and cross-examination consists of the fairly rigid performance of questions and answers, monitored closely to ensure brevity and relevance, which are the “institutional requirements” (Maley 40) of the courtroom. The method of this chapter most closely resembles a coarse-grained conversation analysis, and considers as notable anything that deviates from the standard closed-question-short-answer pair of courtroom exchange; these include, for example, when a closed question is answered with another question, or with a short answer followed quickly with an explanation (e.g. “yes, but”). I also analyze answers for their reliance on implicature, and for the repetition (mirroring) of particular phrases in terms of control. I draw on previous studies of each of these features to compare and develop a claim in relation to whether these deviations are anything out of the ordinary in terms

of what other studies have noted in other cases. Are the phenomena described evidence of cultural difference or are they best explained in terms of genre alone? Similarly, I ask does the admittance of hearsay under exceptions to the hearsay rule—which is obviously pertinent in cases where the only access to traditional knowledge is indeed just that—take the forms that are typical of courtroom discourse, as described in previous research? In short, I ask, if Canadian legal genres are to be considered as contact genres, then what does “contact” look like at the level of sentence-level pragmatics?

In true rhetorical fashion, I venture not one conclusion but two, because I want to make a point about how findings (mine, but potentially others that look for “difference” and perhaps “vulnerability” of aboriginal witnesses in these contexts) can be used. In one section I draw attention to how the Gitksan and Wet’suwet’en practice of spreading eagle down to settle a dispute finds its way into each of two elders’ testimony. On the one hand one could argue that these elicitations render Aboriginal legal tradition valid in Canadian law (because it is invoked, indeed, by both counsel and cross-examiner), setting a precedent and, if not through citation per se, then certainly through intertextuality, rendering this aboriginal practice as a true illocutionary legal speech act which has perlocutionary effect in a now bicultural law; on the other hand one could consider its pragmatics as merely a narrative report of a speech act—with no perlocutionary effect in Canadian law. Eagle down is not, after all, being spread in a bicultural legal context, and therefore one could also argue that it is merely spectacle: elder aboriginal witness testimony as the primitive “other” in the face of the complexity and logic of European law. John Raulston Saul—with his claim that Canada has a Métis culture—may argue the former, while Val Napoleon—who sees oral histories at “straight-jacketed” in Canadian courts—might argue the latter. I am not taking issue with either, but rather showing how making empirical observations in a context in which cultural difference is an issue is difficult to do in

anything that might be considered a politically neutral way. I personally could share in both Saul's optimism and Napoleon's caution and concern, and I mention them here in order, perhaps, to make more of a gesture toward neutrality than may otherwise be possible (even by staying silent on these topics).

In this chapter I do not argue with the fact that aboriginal witnesses are vulnerable in many legal settings, if only simply by virtue of the fact that courtroom discourse is a "powerful" mode of speech that renders many unsuspecting witnesses as "confused, surprised and affronted" (Maley 40) and therefore easily disadvantaged. Many studies have documented this in cross-cultural (Walsh), class related (O'Barr and Conley), and gendered (Razack) situations around the world.¹² My own analysis stops short of drawing such conclusions in favour of a more preliminary investigation of interactional strategies based on a close linguistic pragmatic reading to show micro-negotiations of power and control over the narrative that evolves over the course of testimony.

In Chapter Four I focus on three literary works that topicalize land claims, treaties, protests, political resistance to colonialism, and moves for self-determination from Aboriginal perspectives. The particular topics of sovereignty, land claims and access to resources in both NZ and Canada provide the content with which to assess the trajectory of this literary/political genre, further interrogating the place of the indigenous narrative as a genre in the academic literary canon and in other socio-political scenes of utterance. In "The Literary Speech

¹² Speaking of aboriginal witnesses in Australia, Eades reiterates a point made by Abrahams that "simply by asking questions (any questions) . . . we have committed an unconsidered ethnocentric act, for we have assumed that all people pass on information as we do" (241). She points out how in Australian aboriginal cultures question-asking is not a method for eliciting information of a substantial nature (for which it would be considered too direct), but rather only to solicit "orientation information" (240). To seek out substantial information, aborigines typically make a statement of what knowledge they *do* have, and wait for their interlocutor to add to that information (presumably by inferring their intention).

Situation” Mary Louise Pratt presents an understanding of literary speech events by placing them in the same framework as any extended narrative in conversation: like many of the stories we tell in conversation, literary speech acts in the form of novels etc. are presented as spectacles, not necessarily relevant to current contexts, nor necessarily as new information (thus deviating somewhat from Grice’s Maxims). Pratt provides one bridge between literary genres and the framework in which I consider the genres of the other chapters; Amy Devitt provides another. Although literary genres might primarily (in English Studies at least) be looked upon as unique texts valued for their singularity, while typical genres for rhetorical studies are those less unique everyday texts, she argues that their meanings can all be seen as relationships within “the rhetorical triangle of writer/reader/text and the embeddedness of those relationships within contexts of culture” (699). Although it is not necessary to arrive at a unified theory of genre (697), rhetorical genre for my purposes in chapter four can help explicate the functional and pragmatic (Devitt 701) rather than the aesthetic aspects of literary texts in the contact zone. Thus this chapter looks at literature’s possibilities in postcolonial and cross-cultural contexts. While the previous chapter looks at the ways orality and the nature of various languages and dialects are valorized in socio-legal and political contexts, this one notes a parallel, though different, discussion going on in literary studies. Here “language” stands for discourse, and it is discourse—colonial, postcolonial, and neo-colonial—that threads together the language approach of this whole dissertation, disciplined as it is by the field of “English.” It is the claim of this last chapter that efforts to increase the size of the audience through marketing and commodification of Indigenous narratives risks losing something of their integrity as open texts (Eco) and a corresponding loss of postcolonial potential (Tuitt).

A note on disciplinarity

I have resisted labeling this work interdisciplinary. Although I have read on the topic of indigenous legal traditions in Canada (Borrows; Daly; Mills) and Aotearoa (Frame and Meredith), I have done no primary research in these areas. Some may say this is a shortcoming of the thesis and I will take that criticism standing up. My disciplinary context is English in general, and discourse and writing studies in particular, although I will concede that what has somewhat arbitrarily separated this discipline's concerns from, say, anthropology is that fact of writing: once oral traditions are written down they magically enter the discipline of English; until then, they are in the purview of anthropologists, folk theorists, and the like. But law is a form of life in the Wittgensteinian sense, and as such requires the study of both oral and written forms.

Also on the question of interdisciplinarity, I side with Stanley Fish who makes the point that disciplinarity is an unavoidable consequence and result of the "immanent intelligibility" (Olson 31) necessary for meanings to be construed in academic contexts. Does this thesis have any implications or relevance in the field of law, or for indigenous activism? Perhaps so, but it is not my place to promote it as such. To cite Judy Segal, research in the humanities does not have to be applied in order to be useful; it can rather contribute to what she calls "prior questions"—those speculative and more theorized questions that might not emerge if research was engaged in for primarily utilitarian reasons. Her example, from the rhetoric of health and medicine, is to say that before asking questions about cosmetic surgery ("is it safe?"; "should it be covered by health insurance?"), a rhetorician can ask "how are people persuaded to see themselves as improvable by cosmetic surgery in the first place?" (228). In my work, rather than ask "what is the best way to write a treaty, or negotiate a settlement?" I ask questions along the lines of "by what means are people persuaded that carefully worded treaties will solve conflicts over land

and resources?"; or "what assumptions about language (how it works; what it does) are operating in these post-colonial negotiations?" These types of "prior questions" are firmly rooted in the discipline of discourse and writing studies, and this is where I see my work residing.

Why another thesis on treaties?

Many long man and woman hours are going into the formulation of current treaty documents, considerably more than went into them in the decades and centuries gone by. So, is it true that the problems are more complex than they used to be, and will this increased effort and expertise going into these documents bring clarity and closure to long-standing issues? Or is there some missing ingredient, such as trust, that cannot be achieved through legal language? Is certainty in treaty making the way to bring an end to what Harvey Briggs calls the "administrative circumscription" that has haunted aboriginal people in Canada ever since first contact, as Native people have been over-policied, over-policed, and over-researched? I cannot attempt to answer these questions, but rather approach treaties from a language theory perspective, and ask how much work producers and users of these documents can expect them to do, in the face of the instability of language and meaning, even when using the language of justice, or "just" language.

Another answer to the question—why another thesis on treaties?—is to resort to the language theory itself to say that I'll leave that up to readers to negotiate in the space between us—between them, and me, and the other authors and speakers I draw upon—as the text proceeds. This is where meaning resides, after all, whether we take the perspective of Bakhtin's dialogism, of Stanley Fish's "interpretive community," or of integrational linguistics, which sees

meaning as resting in the merging of past linguistic experience and current “communicational requirements” (R. Harris 22).

Part of the space of meaning I am negotiating is the space between the scholarly tradition that both *is* and is *not* my inheritance: I am a white middle-aged woman from a working-class background and the first in her family to pursue a doctorate. Similarly I am drawing on traditions and epistemologies that both *are* and are *not* the inheritances of those Aboriginal thinkers I am hearing and reading. As members of diverse social groups, we have all found ourselves variously positioned on the peripheries and in the centres of academic institutions, on both sides of bargaining tables, in witness boxes, in print, and at conferences. Positionings are multiple and complicated, and I don’t mean to reduce them. I do attempt, rather, to attend to an important dictum, described by Marie Battiste and others, to “engage an ethical space”¹³ for a research dialogue between Indigenous peoples and Western researchers. Although this is not research undertaken to benefit any aboriginal community directly, it does offer a turn at talk in a “dialogue about intentions, values and assumptions” in the research process (Uhlick 7). It is, as well as all the other things a thesis is (a site of new knowledge production; a contribution towards the author’s educational capital), a gesture across the cultural divide, in the contact zone of Indigenous studies in the academy. It behooves me, therefore, to be more explicit about the benefits and conditions of its production by engaging in what Antonio Gramsci called an inventory:

The starting point of critical elaboration is the consciousness of what one really is and is ‘knowing thyself’ as a product of the historical processes to date, which has

¹³ <http://www.usask.ca/education/people/battistem/wipce.html> [ACCESSED Nov 8th , 2009]

deposited in you an infinity of traces, without leaving an inventory ... therefore it is imperative at the outset to compile such an inventory. (324)

My inventory would include how my own family, on each of my father's and mother's side, sustained themselves and built a resource for succeeding generations by farming lands in Aotearoa New Zealand that are the traditional territories of the Ngāi Tahu in the South Island and the Ngāti Hine of the North Island respectively. I have since made Canada my home, and have thus enjoyed and benefited from having my feet firmly planted in each of these beautiful countries for extended periods of time, reaping the rewards of a dual citizenship that is predicated on the colonial trespasses that figure in the chapters below. Writing this thesis has brought more fully into view my own family history as well as the histories and politics of the first peoples of both lands through their oral traditions and histories, and their contemporary artistic, legal, and epistemological contributions. I have tried to keep all of this in mind to foster my own best possible stance towards a range of texts, finding benefit in thinking about them one by one, under the heading of "genre."

Historical globalization has meant that the rhetorics of recognition, reparation, and reconciliation in each location overlap, involving cross-national and cross cultural uptakes in legal, political, and academic settings. Along with the recent United Nations pronouncements on the rights of Indigenous peoples, and with the increased dominance of English as the lingua franca in many parts of the world, the genres in which these rhetorics are operationalised will undergo more transformations, perhaps along the lines of increasing convergences rather than the opposite. It may mean that England's univocal pronouncements about how to deal with the "natives" in their colonies around the world in the eighteenth and nineteenth centuries will be responded to in the twenty-first century with more united voices from the margins speaking

back to the colonial centre, such that the cross-cultural contact that has been my focus will become increasingly that between Indigenous nations themselves.

Chapter One **Colonial Texts in Postcolonial Contexts: A Genre in the Contact Zone**

The formulation, interpretation and implementation of treaties in British Columbia take up thousands of hours of time, produce millions of pages of text, and cost billions of tax dollars. As an academic study on treaties as genre, the current thesis can be seen as a part of these investments—part of what some have derisively termed the “treaty industry,” but part too of what others see as necessary and overdue efforts toward redress in light of historic and systemic injustices forced upon indigenous peoples worldwide. This is not to ignore or completely discount the “treaty industry” argument; given that I profess to undertake a genre analysis of treaties, any such analysis must necessarily attend to the wider social action of the genre under study. This thesis is part of the entrenchment of disciplinary specialties and the building of

academic careers, and is part of the genre system (Bazerman) in which treaties operate.¹⁴ Just as much of the twentieth-century anthropological research on Native Americans in the U.S. grew up around the American Indian Movement and their land claims (see Ray 2003), much the same is happening in academic contexts in Canada and elsewhere, where teams of researchers engage in, historicize, and analyse arguments for and against the repatriation of land and the self-determination of First Nations, Métis, Inuit, and non-status Indians, and where each of many disciplines defines itself in part through its performance on these “treaty” stages. The present chapter emerges from this context in analysing the social action of the treaty as text, as symbol, as mode of behaviour, as political and legal entity, and as historical artefact—in short as genre.

To say, as is often said in treaty talks in present day British Columbia, that to sustain a relationship through a treaty is to find “common ground,” is already to make some assumptions about language and communication, even before issues of cultural difference come to the fore. These assumptions—about how meaning inheres in language, and about clarity and fixity—form the basis for the role of treaties in current socio-legal contexts. Once cultural and linguistic differences are considered, the picture becomes even more complex. Thus the phrase “common ground” is problematic, but also, I hope, a fitting acknowledgement of what exactly is primarily at issue here: the ground upon which a population thrown together by diverse circumstances walks, a ground that sustains us all today.

Both personal interest and academic intersections provide me with a rationale for observing in detail the continuity of the treaty genre across two national borders. My two homes—Aotearoa New Zealand and British Columbia, Canada—are two colonies that were

¹⁴ “Genre System” refers to the “full history of speech events as intertextual occurrences, but attending to the way that all the intertext is instantiated in generic form” (Bazerman 99). But I’m not sure if Bazerman would concur with the idea that this chapter on treaties and the treaties themselves belong to the same genre system, given his seeming requirement that genre systems have a degree of mutual recognition of belonging that may not be present.

closely linked in the timing of colonization, and by the tutelage of the colonial office (Tennant; R. C. Harris). Indeed, the many similarities in their histories of indigenous rights and title have often inspired comparative studies (e.g. Ray; Pearson). In the current chapter, which traces the genre of colonial treaties in the histories of the two locations just mentioned, I look at the Vancouver Island Douglas Treaties of 1850-1854 (of which there are fourteen), and at the set of deeds used to acquire lands from Maori in the South Island of Aotearoa New Zealand on which the Douglas Treaties were based (Tennant; R.C. Harris). My analysis feeds into the development of a definition of the concept of genre, one that draws from the previous half century of new rhetorical genre theory, and then takes into account the contact phenomena of the colonial and postcolonial encounter as well as this useful but perhaps dangerous notion of common ground.¹⁵

In legal and historical studies authors certainly address the important question of the readings and re-readings of colonial deeds and treaties (see for example Dawson, Walters, Ray, Waitangi Tribunal). Others consider the impact of indigenous oral and literate traditions and practices, in New Zealand (MacKenzie) and Canada (Chamberlin). And at a related site, Christopher Bracken has analyzed the bureaucratic archive around potlatching in *The Potlatch Papers* from the perspective of critical and post-colonial theory. But my study of such colonial texts as genre—a term which for Anne Freadman (“Anyone”) captures both the initial utterance and its uptake (40)—will provide a mid-level of analysis between such macro or discursal concerns and the micro techniques of linguistic analysis. Overall, I am aiming for a nuanced account of singular texts like Pratt’s and Bracken’s, to include uptakes in legal, political, and scholarly “knowledge making” contexts in each country and at various points in the twentieth century—contexts that were increasingly giving voice to indigenous rights and concerns.

¹⁵ Gayatri Spivak warns us of “the danger of what *is* useful” (*Outside in the Teaching Machine* 10).

Using a rhetorical view of genre that widened its currency via the publication of Carolyn R. Miller's "Genre as Social Action," this chapter provides an opportunity to examine texts that push the limits of their genre category. The definition of genre captured in Miller's title and developed in the scholarship since links texts to social contexts to help account for the fact that despite the attention given to the formal features of treaties—careful wording of texts, the use of translators to effect "good" communication, and legally sanctioned institutional arrangements—these regularities were not as salient as were local, political, legal, cultural and geographical (ir)regularities in determining the action of the genre. I also ask if current understandings of genre can accommodate the cross-cultural negotiations that define the circumstances of dealings between settlers and indigenous people in the past and today. Each application of rhetorical genre theory tests that theory which in turn leads to modifications to accommodate the new data; this project offers challenges not before encountered.

After providing some more detailed historical and theoretical background, I start by exemplifying and analysing the hermeneutical strategies used in legal and other contexts, which link words, sentences, and documents to fixed meanings, laws, and text types. Next I use Speech Act Theory, because the status of a written deed or treaty is sealed via signatures that stand in for the "hereby" of a legal speech act (and here the interanimations of the term "act" among the various forms of life—law, government, and theatre—are themselves telling). Moving from word to speech act to genre, I next consider how current genre theory might account for the difficulty in delimiting word meanings and speech acts, especially in this cross-cultural context. My analysis leads me to create a special category of utterances, and therefore of genres, that takes into account both the hegemonic legal discourses and hermeneutics that give legal genres their stability over time on the one hand, and the widely divergent and conflicting practices in colonial and postcolonial contexts that seek to disrupt them (and therefore disrupt the genre) on

the other. I speculate that documents such as these—which are situated in times of rampant colonial expansion and the “possibilities and perils” of the contact zone, in which colonial encounters are “interactive, provisional” and “often with radically asymmetrical relations of power” (Pratt, *Imperial* 7), and which signify as they do over long periods of time—lie at the limits of genre stability.

Historical background

The standard historical account of the settlement of what is now Vancouver Island, in British Columbia, Canada, tells of migrant groups from Asia travelling down from the Bering Strait region about 12,000 years ago.¹⁶ The history I will tell here begins in the mid-nineteenth century when, as part of the Hudson’s Bay Company’s plan to begin the resettlement¹⁷ of Vancouver’s Island, HBC Factor James Douglas¹⁸ arranged to “purchase” lands from its indigenous inhabitants. The documents used contained almost identical legal wordings (apart from the names and the places) and were sanctioned in the same period by the same colonial institutional arrangements as a document called the Kemp Deed, used for similar purposes in the Canterbury region of Aotearoa New Zealand. This fact in itself is not surprising: the colonies of Britain were all supervised by the Colonial Office, which exported theories of colonisation and legal frameworks to its agents around the world (Weaver, *Great*). The account I begin here aims to capture and exemplify the degree to which the meaning and significance of this pair of texts

¹⁶ This history is disputed by some indigenous scholars (Deloria). Other theories attribute colonization of the Americas to a North Atlantic Ocean route about 20,000 years ago, called the Solutrean hypothesis. (http://en.wikipedia.org/wiki/Solutrean_hypothesis.)

¹⁷ Harris, R. Cole. *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change*. Vancouver: U of British Columbia P, 1997.

¹⁸ Douglas was HBC factor until 1858, but was also governor of Vancouver Island from 1851 until 1865.

can diverge despite the careful attention given to them in legal settings and the use of similar legal hermeneutics, because what were read as deeds or land conveyances at the time of their colonial formulation were later deemed treaties via twentieth-century legal action in Canada, but not in Aotearoa (where, it could be said, the twentieth-century exigence for treaties had already been met by the Treaty of Waitangi).¹⁹

Another part of the equation is, of course, the question of indigenous perspectives. And genre theory would ask about what indigenous participants were “recognising” when they were confronted with these documents. The following retelling of a story from the oral tradition of the Tsawout, a Vancouver Island First Nation provides one illustration:

In a conflict over the Hudson Bay Company’s logging operations in their territory, a Tsawout boy was shot and killed by whites. HBC factor James Douglas then organized a meeting: “when they [the Tsawout ancestors of the speaker] arrived they found piles of blankets set aside for them, and a document upon which each man was asked to write an ‘X’”. . . . “I think these are the signs of the cross,” says one participant, who recognized them as a sign of the White people’s religious beliefs, a “sign of sincerity and honesty.” (Foster 632-3).

As well as providing insights into the uptakes by indigenous participants of practices initiated by colonists, many First Nations oral and written histories also give substantial accounts of a pre-contact tradition of trade and peace alliances, which were considered to last for “as long as there is sun, [and] the river flows in this land” (Hildebrandt et al. 71). Contact with

¹⁹ Signed on February 6th, 1840, by Governor William Hobson and a selection of North Island Maori chiefs, the Treaty of Waitangi continues to hold legal force today, although its terms are continually debated. (See for example *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, ed. I.H. Kawharu. Auckland: Oxford U P, 1989.)

Europeans heralded a time rife with translation difficulties and misunderstandings as Indigenous people struggled to maintain lands, power, and dignity in their dealings with settler populations. The European sense of propriety demanded a paper trail, and Indigenous people were entering into agreements using unfamiliar vocabularies and routines. The tribes of the Canadian prairies, for one typical example, had no terms for, or conceptions of, the surrendering or ceding of title (xi, 74). Nor were printed records of these agreements uniformly translated into Indigenous languages at the time, but oral records such as that retained by the Tsawout above suggest that for some First Nations those pieces of paper were recognised as a record of the instantiation of peace treaties, and were not understood as representing the conveyance of title. They used their own pre-contact agreements and treaties over issues of territory and trade “as models for the treaties they entered into with Europeans” (Culhane 50). And for many of them putting any agreements in writing on paper represented a breach of trust (Chamberlin 36-7). Meanwhile, Harring notes the ways in which treaties were often coerced and/or ambiguous in the first place, then often strategically ignored; even had agreements been honoured, even when they were honoured, most can be assessed as being unfair, certainly in light of contract law: “Treaty negotiations, like contract negotiations, require an equality that did not exist under these political and economic conditions” (29).²⁰

²⁰ And nor can we assume that good translators could have prevented such foundational misunderstandings. While no translated texts were provided for First Nations in BC, settler governments in New Zealand did for the most part include Māori translations. Yet problems still occurred. In the translation of the 1840 *Treaty of Waitangi*, for example, the word “treaty” itself became the loan word *tiriti*, reflecting the lack of an equivalent term in Māori. Also, the Māori version indicated that their signatories agreed to surrender *kawanatanga*, which was a transliteration of the term governorship, whereas the English version stated that it was sovereignty which was being surrendered. In Maori the closest equivalent term to sovereignty is *tino rangatiriranga*, describing chiefly power over lands, peoples, and resources. In the Māori version of the treaty, it was exactly this chiefly power that was maintained and protected. Māori scholars and activists are clear that, had Māori thought they were ceding

It was in this context that the Kemp Deed was used by the New Zealand Company (acting under a Crown charter) to purchase large tracts of land in 1848 from Ngāi Tahu, the Māori of the South Island. And it was in this context that this second set of documents, referred to then as land conveyances, used the text of the Kemp Deed for similar purchases from First Nations of Vancouver's Island in the period of 1850-1854. Both countries were the focus of imperial schemes for colonisation that peaked in the nineteenth century.²¹ Out of touch with local contingencies, the colonial office could often do no more than sanction practices that had already been established, creating a sort of retroactive control over their colonial outposts. Translators of questionable abilities were hired, ambiguities were ignored or strategically exploited, and documentation was often prepared in haste, after the fact, and sometimes not at all (Weaver, *Great*). These documents (see Appendix), like many others pertinent to Indigenous rights and title, have come under intense scrutiny as to their meaning and significance – both in the courts and in legal and other scholarship in both countries. In this process certain terms and phrases are interpreted for their particular relevance to whatever subsequent concerns are being addressed and decisions have been and continue to be made concerning land claims and Indigenous rights accordingly.

Meantime, much of the recent scholarship has acknowledged that both the Kemp and Douglas documents have ethnographic inconsistencies, such that anthropologists and indigenous groups outside the courtroom cannot rely on their geographical or demographic information as

sovereignty, they would never have signed. On this particular point, First Nations in Canada tell a similar story (cf. Hilderbrandt et al.). Perhaps the best starting point here, though, is to acknowledge, along with Coombes, that the “Maori and Pakeha versions conflict, and both are ambiguous about the appropriate balance between their declaration of Crown sovereignty or *kawanatanga* (governorship) and their protection of *rangatiratanga* (Maori chieftainship)” (444).

²¹ Philip Temple notes that during the fifteen years before mid century there was a proliferation of books—“nearly two hundred”—on the topic of the potential of New Zealand as a new settler colony (195)

they attempt to reconstitute indigenous lives and histories. In the British Columbia context Wilson Duff explains how Douglas had to “create a set of working assumptions about the Indians which would serve his legal purpose and still be acceptable to them” (52). First Nations of Vancouver Island “helped to frame these assumptions” by dividing themselves into groups of exclusive “landowners” according to definable boundaries (52), practices that had little precedent in their cultures. For example, there was no accommodating the fact that many territories were shared, depending upon their uses. These “misconceptions and errors” that may have detracted from the documents’ ethnographic value have not detracted from their effectiveness or their standing as legal documents today (53). Under typical legal circumstances the accuracy of boundaries, the certainty of original ownership as represented by signatures, and the clarity of monetary arrangements would all be paramount. And, interestingly, it is just such issues in the Kemp Deed that are the impetus for intense scrutiny on the part of the Waitangi Tribunal, the New Zealand body set up to investigate treaty claims, in their report on Ngāi Tahu. The boundaries described in the deed, and illustrated on an attached map, are inextricably unclear to today’s readers, and they may have never been clear to participants at the signing. Who signed, and under what circumstances, has also been the topic of lengthy debate (Wai 27: 8.5.3; Evison). Recourse made to the motives, intentions, and understandings of the various Ngāi Tahu hapu²² and the officials acting on behalf of the Crown at the time bring no surety, and only indicate that numerous errors, many of which are too tangled to sort out today, were made at the time.

To recap, I have explained how the Kemp Deed from the 1848 Canterbury purchase from Ngāi Tahu in NZ was used as a template for the wording in a group of land conveyances

²² Hapu roughly translates into clan, whilst iwi means tribe.

used by James Douglas to purchase land from the “Indian tribes” of Vancouver’s Island between 1850 and 1854 in British Columbia. What happened to these texts in two colonial sites, from the perspectives of the various parties whose interests were vested in them, provides an entry point to a discussion of treaties as rhetorical genre. Most of the information about the Kemp Deed comes from the Waitangi Tribunal report on the topic (Wai 27), while information about British Columbia comes from anthropological, historical and legal scholarship, as well as two Canadian court cases: in 1964 *R. Versus White & Bob* ruled that the Douglas Deeds be understood as “treaties ... in the ordinary sense of the word” for the purposes of the 1952 Indian Act which makes all laws applicable to Indians subject to “the terms of any treaty”; and in 1989 *Claxton Versus Saanichton Marina Ltd* upheld the status of the texts as treaties to argue successfully that the descendants of the original Tsawout signatories could continue to protect their access to Tsawout traditional fishing grounds.²³

Theoretical background

In the simplest sense, deeds and treaties consist of words on a page of a legal agreement, which legal framers work to ensure are stable and clear, and can be consistently applied for whatever time is specified or assumed. The OED defines *deed* as “[a]n instrument in writing (which for this purpose includes printing or other legible representation of words on parchment or paper), purporting to effect some legal disposition, and sealed and delivered by the disposing party or parties” and traces this meaning back to 1300; the prevailing meaning of *treaty* is as

²³ Numerous other claims brought to court by First Nations in BC rest on Douglas Treaty rights: *R v. Cooper, George and George* (1968); *R v. Morris and Olson* (1999, 2004); *R v. Ellsworth, Sampson and Sampson* (1992); *R v Dio Joseph* (1990); *R v Fred Underwood* (1990); *R v. Bartleman* (1984); *Komoyue Heritage Society v BC* (2006); *Hereditary Chiefs Tony Hunter et al. v. Attorney General of Canada* (2006); and *Little v. R* (1993, 2007).

“[a] contract between two or more states, relating to peace, truce, alliance, commerce, or other international relation; also, the document embodying such contract, in modern usage formally signed by plenipotentiaries appointed by the government of each state.” The Western legal tradition’s current distinction between these two genres can be assumed, I think, as having been consistently made in the period in question,²⁴ despite the fact that the underlying premise when Indigenous populations enter into treaties is in one important sense a confirmation of their status as sovereign nations, which was not readily conceded by many colonial powers (although it was a principle enacted by various Aboriginal delegations to London).

Despite this surface definitional consistency, the documents considered here were formed in and operated over periods in which little else could be taken for granted—including political climates, intercultural relations, immigration and settlement patterns, economic and environmental resource management, and, it turns out, legal doctrine. How these uncertainties mediate and are mediated by the ongoing and comparatively stable situational exigency of the call for indigenous rights and title is part of the action that is intrinsic to the genre, as theorised by what is broadly called the new rhetoric, and the focus of the rest of this section.

The co-evolution of the theories of rhetoric and genre has brought us to new understandings of both terms. Rhetoric—which was previously limited to the art of persuading audiences to take action, usually on political causes—now includes a “persuasion to ‘attitude,’ rather than persuasion to out-and-out action” (Burke, *Rhetoric* 50). This view of persuasion, says Burke, “describe[s] the ways in which members of a group promote social cohesion by acting rhetorically upon themselves and each other” (*Rhetoric* x). A key term for the new rhetoric is not persuasion as such, but rather *identification*, as speakers and hearers (and readers

²⁴ But see *Despotic Dominion: Property Rights in British Settler Societies* edited by J. McLaren, A.R. Buck, and Nancy E. Wright for articles on the origin and development of property law in colonial contexts.

and writers) bridge differences through shared interests.²⁵ Both action and identification are now key terms in genre theory, which sees genres as ways groups of people use language to act together in the world, mediating that world in ways that bridge differences and signify solidarity. Rhetorical genre theory tells us that genres are patterns of discursive behaviour engaged in by communities of users to achieve socio-rhetorical ends; they are also, in that engagement, *persuasive*, and can enable certain identifications at the expense of others (Burke). Thus, as a means through which we “learn what ends we may have” (C. Miller “Genre” 165), genres can be seen as both mediating activity in the world, and playing a role in our social construction. Janet Giltrow (“Burke”) usefully rereads Miller to ascertain that “the level of analysis at which genres are named by theorists and researchers must be parallel to the sociality of speakers” (3), an important consideration that grounds work in genre theory in both ethnographic studies of present day communities of practice,²⁶ and, increasingly, in those such as this that rely on historical data (see also Giltrow “Making”).

But complicating things in this context are the perspectives and traditions of the indigenous co-signatories. This demonstrates an aspect of genre that has not received much attention in the literature, since, that is, Miller’s contention in 1984 that a genre claim can not be made when the rhetorical situation is construed differently by rhetor and audience. Her study looked at environmental impact statements, wherein “the imperfect fusion of scientific, legal and administrative elements prevented interpretation of the documents as meaningful rhetorical

²⁵ In the background to this use of rhetoric are also such uses as David Spurr’s *The Rhetoric of Empire*, which identifies key rhetorical patterns that enter into colonial discourse at a variety of points—under the headings of surveillance, aestheticisation, etc. My project does not ignore these larger concerns, but again, they are not my focus.

²⁶ See Russell for an overview of the North American genre school, and how it “tends to keep its analytical lens in the middle, on the interactions of people with texts and other mediational means, using ethnographic and case study methods, supplemented by historical and textual analysis” (226).

action”; the genre, therefore, had “no coherent pragmatic force” (38). The present study may show that these treaties represent not so much a failure of this genre test, but rather lead to an acknowledgement that pragmatic force does not have to measure up in the same way to all concerned; in the case in question, the pragmatic force is worthy of our attention exactly for its ideological *incoherence*.

The present study also complicates the notion of *recognition*, as this particular genre generated uptakes in indigenous communities that were in conflict with those of settler populations. If genre theory aims to capture an understanding of genres as “stabilised sites of social and ideological action” (Schryer 77) within a particular community of practice, it seems that treaties, and for that matter other documents that bridge discourse communities and work to mediate differences between them, are pushing at the boundary of that stability.

The Kemp and Douglas documents and their various uptakes illustrate the workings of genre (in)stability, made apparent through the fact that legal contexts provide an excellent display of reasoning and assumptions behind particular uptakes, intrinsic to the mediation of a genre boundary. This point is drawn from an application of Freedman’s work, but the present analysis displays two more features of legal genres, here in this fraught cross-cultural context, which I call the *limitlessness of speech acts* and the *limits of literalism (and its allies)*, which in turn display the limits of this genre’s stability. To do so I trace conceptions of the “actual” meaning or the “valid interpretation” of these historical documents over periods of ideological and political shifts in their trajectories through legal and paralegal contexts since the mid 1900s. In each context both the legal reading strategies and the uptakes were quite different, such that the whole social, or socio-legal, action of the genre defies some of the commensurability that we might expect from a genre category. It is such commensurability, we could say, that makes a group of texts recognizable as a genre—such as a medical student’s case presentation, or an

insurance company's letter containing a negative message. Commensurability in law is tied to assumptions about language—that particular wordings can be used to accomplish clear-cut acts in the world.²⁷ The presiding implication is that legal texts can be stable repositories of meaning accessible via neutrally applied legal hermeneutical reasoning, and below I explore these assumptions at work in discussions about the Douglas documents.

The literal and the literary

In the Western tradition, the history of legal interpretation is about as long as histories of the written word themselves and have their roots in the exegesis of biblical texts. Eventually there developed loose distinctions between overlapping areas of hermeneutical practice: religion (e.g. Augustine's *On Christian Doctrine*), law (e.g. Ronald Dworkin's *Law's Empire*), history (e.g. the writings of Wilhelm Dilthey) and literature (e.g. the writings of Paul Ricoeur). Numerous frameworks have since been proposed to explain present-day processes of interpretation in legal contexts that come under this broad rubric of legal hermeneutics—literal versus purposive meanings are sought; charges of foundationalism (or originalism) versus pragmatism (which at its extreme is seen derogatorily as judicial activism) are made; and judges are thought to have either declarative or interpretive functions (see Carter for a useful summary). I do not mean to equate these various terminologies—they are more complicated than that—but the ways explicit reference is made to how laws and precedents, or terms and

²⁷ A future goal is to contemplate how similar assumptions about language might undergird genre theorists' ideas about the commensurability of *genres*. In other words, in genre theory, despite our embrace of Bakhtin's ideas about the inter-animation of words, and of Derrida's release of the signified from the signifier, a prevailing ideology of language and meaning might be operating tenaciously under the surface.

phrases are read in the courts can be thought to fall generally into the two poles of literal versus figurative interpretations in literary theory.²⁸

Sometimes, in the reading of historical documents for the purposes of ascertaining or recuperating Aboriginal treaty rights in Canada and Aotearoa New Zealand, mention is made of such interpretive frameworks. When Canadian principles of treaty interpretation deem that ambiguities in language should be resolved in favour of First Nations,²⁹ this can often result in a figurative interpretation. For example in one landmark Canadian case, now referred to as the Marshall decision, a 1760 treaty clause that restricted the Mi'kmaq of Atlantic Canada to bringing the products of their hunting and fishing to specially provided trading posts called "truck-houses" was broadly taken to mean a treaty right to sell the present-day products of their hunting and fishing.³⁰ "Truck houses" no longer exist in Eastern Canada, but thought of as a metonymy, the term was taken to mean the market in general. Thus, what was intended to *restrict* Mi'kmaq to trading only with the British colonists in the eighteenth century, ended up in the twentieth century *permitting* them not only to take the products of their hunting and fishing to market in order to make a reasonable income, but also to give them a more liberal access to

²⁸ The uses to which the hermeneutical tradition is being put in modern North American legal contexts are not without controversy. Most infamously perhaps is the debate between Ronald Dworkin, who leans on Gadamer to critique legal positivism for looking for literal meanings of legal texts, and Stanley Fish, who criticizes Dworkin for not going far enough to see all legal reasoning as rhetorical. Dworkin's "principle of integrity" in legal interpretations leads to his conception of an "'aesthetic hypothesis,' in which a legal text is said to be like a literary work" (qtd. in Bruns 1992, 24). He carries this connection to literature and literary theory so far as to say that *writing* judgments is like writing successive chapters in a book (similar to James Boyd White's idea that *reading* the law is like reading and interpreting literary texts). Each chapter, says Dworkin, needs to make coherent sense in relation to those preceding. Separate judges in disparate contexts may write each chapter, and in the process of consulting precedents, according to Dworkin, they rely on neither a literalist reading of a law plainly there, nor a free-wheeling interpretation, but rather are constrained by "a critical practice" rooted in "an institutional history made up of 'innumerable decisions, structures, conventions and practices'" (qtd. in Fish, 87). As such the interpretive approach is described as neither purely objective, nor purely subjective. Stanley Fish likes this aspect of Dworkin's thesis, but not the "chain enterprise" via which each judge is more constrained than the last. Fish thinks each is no more or less constrained than the last, including the first, theoretically. All are equally, or to the same degree, interpretive.

²⁹ R. v. Badger, [1996] 1 S.C.R. 771

³⁰ Marshall Decision [1999] 3. S.C.R. File number 26014

those resources in order to have a reasonable income in the first place. One commentator described the case as “stretch[ing] the substantive law to accommodate the evidence,” in the form of “the *subjective* understanding” of the parties, gained through oral history testimony (Currie 97). Nonetheless, what is of interest from the point of view of language is that this resignification of an eighteenth-century treaty transpired with support from the requisite debate about the interpretation of terms—whether “truck-houses” should be read literally to render the clause now defunct, or figuratively to accommodate changing circumstances—upholding the transformation from one type of legal speech act (that of restricting) to another (that of permitting).

Literalist interpretations, such as that attempted of the term “truck-house” above, are often seen to serve conservative interests. Literalism relies on original documents to the exclusion of other factors such as historical contexts or other extrinsic evidence. In the process, less time and fewer resources are expended in coming to decisions, and decisions can tend to limit the rights of First Nations. On the other hand, the outcome of the case also demonstrates why some legal reading is often posited as similar to reading literary texts, with the figurative interpretation of “truckhouse” superseding the so-called literal one. This figurative reading accommodated a contemporary socio-political climate that would not allow for or tolerate a positivist literal reading, because the latter would have further concretised in law what many were seeing as a continuation of a colonial standpoint of subordination and subjection.

As for the Douglas Deeds, they came to the attention of the justice system in a British Columbia Court of Appeal case *Regina v. White and Bob*. The case named two Native men from the Saalequun band who in 1964 were convicted of hunting deer without a permit and outside of the hunting season as designated by the *Game Act* 1960. Their defence involved a reading of the 1854 agreement between Douglas and the Saalequun, which stated that the Indians were “at

liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.” Native hunting and fishing rights are protected under the *Indian Act* 1952 in those contexts where treaties between settlers and First Nations have been made. Thus the issue became whether the Douglas documents were treaties as defined in various acts and legislations, or whether they were merely land conveyances. Suffice it to say here that the Crown’s appeal to overturn the county court justice’s decision that the documents were for all intents and purposes treaties was unsuccessful. This document, along with the thirteen others between Vancouver Island First Nations and the colonial government, has been called a Douglas Treaty ever since. And, as with the Marshall decision above, legal debates engaged in to reach and uphold this decision involved invocations from the range of interpretive strategies. For example, in the dissenting opinion in the reasons for judgment in *R v. White and Bob* one judge engages in a careful literal reading of a clause from the 1763 *Royal Proclamation*:³¹

And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds.

Justice Shepard argued against seeing this as applying to First Nations on Vancouver Island, and he based his reasoning on the tense of the verb in the phrase “Tribes of Indians with whom We are connected, and who live under our Protection.” In the context of the Crown’s obligation to honour and protect the rights of the Indians of North America, this cannot mean Indians of

³¹ King George III’s statement that prohibited private land sales between Indians and colonists was designed to facilitate the orderly progression of Western expansion.

Vancouver Island, Shepard opined, because Vancouver Island was unknown to the Crown in 1763.

In the Saanichton Bay Marina case, which also invoked the 1850-1854 treaties, an interpretive issue also arose, although this time in the legal scholarship surrounding the case, and the issue was the precise and literal meaning of a verb. The case involved the Tsawout Nation of Vancouver Island, who were trying to halt the development of a marina because of its predicted negative impact on the aquatic ecosystem upon which they relied for fishing and gathering shellfish. The case for the most part hinged on the interpretation of the Douglas Treaty fishing clause, but legal historian Hamar Foster also focuses on another clause, the one that states the land in the area described, other than that reserved for the Tswaout, “*becomes* the entire property of the white people forever” (qtd. in Foster, “Saanichton 633, his emphasis). Foster thinks this verb can mean nothing other than that the Tsawout owned the “unused” land before the treaty, despite the Hudson’s Bay Company Charter or another view at the time that title could only be held to land under cultivation or used for dwellings. Thus although Archibald Barclay, secretary of the HBC, assented to the wording of the text, it seems to contradict the theory of land use he supposedly embraced, which is that Indians could not own land they did not utilize according to European norms of land use (such as cultivation). Foster attempts to explain this discrepancy: was Barclay intending to humour the Colonial Office, whose politics were being influenced in favour of the Indians by the Aboriginal Protection Society? Or did he have no choice but to adopt their view? I speculate that Barclay did not think as carefully about the word “becomes” as does Foster or other motivated thinkers, and merely copied the wording from the Kemp Deed upon which Douglas Deeds were based (see Chapter Two). Foster’s motivation is to imply that this wording indicated that the land must have belonged to the Indians in the first place. To say this in the context of a province where treaties were not for the

most part entered into is equivalent to saying that most of British Columbia still belongs to First Nations people. And this was quite the statement to make at the time of his writing: 1989 was two years into the landmark Delgamuukw case in which lawyers for the provincial government were arguing that “Indians never had title” and that even the idea of Aboriginal title was part of the “conspiracy theory of history” (Still).

Along a similar literalist line of reasoning, a miswording is also apparent to Foster in the ruling of the Court of Appeal, which indicated that the Tsawout fishing rights were “granted by the treaty” (647). One cannot grant something to somebody who was already in possession of it, deems Foster, and fishing rights were already held by the case to be a pre-existing right. Foster added that this same slip has happened in other cases, creating contradictory terminologies in important precedents. Lastly, in this case, the meaning of the term “fisheries,” as protected by the treaty, came into dispute. The Tsawout had an interest in the term referring to a “geographically defined” area as well as a practice, whereas the marina saw it to mean merely an activity that was unattached to any place. The ambiguity was resolved in favour of the First Nations, and the marina development was halted, protecting the fishing practice *and* area.³² This is yet another example of the law catching up with realities on the ground, creating an after-the-fact “culture of legality” most often described as a feature of colonial times (cf. Weaver, *Great* 13), only this time the context is the twentieth century, and this time this legal precedent turns out to support a First Nation’s interest (the development of the marina was halted). The decision also reflects the grounding of *meaning* in both practice and place, a situational rhetoric in the most material sense of the term, despite its reliance on the idea that

³² This liberal interpretation can be linked to *Worcester v. State of Georgia* (1832) which states “The language used in treaties with the Indians should never be construed to their prejudice.” But it pre-dates principles of treaty interpretation outlined in Canada in 1996’s *R v. Calder*, one of which is that ambiguities must be decided in favour of First Nations.

words have meanings for us to ascertain, and that ambiguity results from the failure of language rather than the exigencies of situation.

The significance of signatures

By way of contrast, I now move from Canadian contexts and scholarship to the second context of interpretation for the text under discussion, specifically the Waitangi Tribunal, set up in Aotearoa as part of the passing of the 1975 Waitangi Act, which provided for “the observance, and confirmation, of the principles of the Treaty of Waitangi,” and their reading of the Kemp Deed. The Tribunal’s original mandate was to act in an advisory capacity to the government after assessing and providing support for current and future Maori grievances. In 1985, this mandate was increased to include all grievances dating back to the signing of the Treaty of Waitangi in 1840, which eventually led to the Ngai Tahu bringing their longstanding land claims³³ to the tribunal (Wai 27).³⁴ In this process the Waitangi Tribunal paid considerable attention to the number and nature of signatures on the Kemp Deed. Did the signatures really belong to the named signatories? Were the signatories authorized by their various hapu to speak for the tribe? (Wai 27: 8.5.3. See also Evison).³⁵ This contrasts considerably with the attention

³³ Ngai Tahu made its first claim for breach of contract in 1849.

<http://www.ngaitahu.iwi.nz/About%20Ngai%20Tahu/The%20Settlement/Claim%20History%20Overview>

³⁴ Although it is somewhat ironic that in their long history of bringing grievances about the loss of lands to the attention of the colonial authorities, Ngai Tahu “rarely mentioned, if ever” the Treaty of Waitangi. For them, says Harry C. Evison, the treaty was “a non-event.” Because of the colonial authorities’ half-hearted attempts to circulate the text amongst the “savage tribes” of the South Island, it gained only a few of their signatures, and wasn’t even heard of by many (36-39).

³⁵ The outcome of Ngai Thai’s claim was mixed. A factor was definitely that, whatever were the boundaries of the Deed, the iwi was paid a derisory amount for what is essentially a quarter of the land mass of Aotearoa. Through subsequent pre-emption policies, land continued to leave Maori hands and be sold at huge profits by the government to incoming settlers. The Tribunal found that, in acquiring more than half the land mass of New Zealand from the tribe for £14,750 with deeds such as the Kemp Deed, leaving Ngai Tahu with only 35,757 acres, the Crown had acted unconscionably and in repeated breach of the treaty, and its subsequent efforts to make good

paid by the courts to the Douglas conveyances, where evidence suggests that in at least a few cases Aboriginal hands may not have come anywhere near the pieces of paper onto which a column of very neat crosses were subsequently added. Wilson Duff observes that the signatories' names are all carefully transcribed by Douglas (and Duff gives him credit for attending so carefully to these details, which are of value to historians and ethnographers) (54), yet the marks provided beside them are quite uniform, and not likely made by the chiefs and heads of families: "perhaps they did not actually take the pen in hand as their marks were made" (13). In nine of the fourteen Douglas Deeds, much of the actual text of the deed was added after the signatures—after, that is, the wording arrived in an emissary from the Colonial Office (Harring 378, n 24; see also Chapter Two). Lastly, the text for the deed at issue in *R. v. White and Bob* was and still is absent, although interestingly it is the only document of the fourteen on which Douglas's signature is appended (Duff 22). The point to be made here is that none of this detracted from the status of the document in court, where it was ruled by Justice Davey in *R. v. White and Bob* that: "it is common ground that ex. 8 must be taken to include the following clause appearing in all other transfers of Vancouver Island Indian land, which, for reasons that need not be mentioned, does not appear in this instrument." [Here he refers to the clause about hunting and fishing as formerly.]

As for the Kemp Deed, after the presentation of oral history, of records from a previous commission, and of the testimony of Evison saying that fewer than half of the 40 chiefs present actually signed the deed, the tribunal wrote: "Given that the deed was witnessed by reputable men and that the signatures and marks are interspersed on the sheet, the tribunal can only

the loss were found to be "few, extremely dilatory, and largely ineffectual." (Wai 27). The Ngāi Tahu settlement is the largest to date.

conclude that those who were named but did not sign still gave their consent to the agreement” (Wai 27). This version of events is challenged later by Evison, who notes: “Of the 40 Maori names on the deed claimed as signatures by Kemp, only 16 appeared to be authentic signatures. The rest are in effect forgeries. . . . [the tribunal’s conclusion will be] a welcome doctrine to forgers, if courts will agree to it” (91). Thus in comparing the discussions about signatures in these two cases there are significant quantitative and qualitative divergences, despite that the outcome in each case supported the overall legality of the deeds. (I have more to say about signatures in relation to the Douglas Deeds in Chapter Two.)

The golden rule

In *R v. White and Bob*, Justice Norris agreed with the assessment that the Douglas documents were treaties. But while Davey contended that it wasn’t necessary “to venture any extended definition of the word ‘Treaty’ in this context” (over and above saying its meaning lies somewhere between the formal definition of an agreement between two “independent states acting in sovereign capacities” and a loose agreement between individuals), Norris took a more technical turn. In his judgment he first took note that the verb “to treat” was used in the correspondence between Douglas and the Colonial secretary,³⁶ then applied “the golden rule” to the term: “that the grammatical and ordinary sense of the word is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the statute, in which case the grammatical and ordinary sense of the word may be modified so as to avoid that absurdity, repugnance and inconsistency, but not further.” He then tells of consulting the

³⁶ Who uses the verb *to treat* and why is a topic taken up in Chapter Two.

Shorter Oxford dictionary³⁷ to find no such “absurdity, repugnance or inconsistency,” and for him the deed became the treaty it needed to be for the Saalequun to be able to hunt for food on ceded but unoccupied lands.³⁸

Legal hermeneutics’ golden rule, exemplified here by Justice Norris, is an echo of what linguists for a long time believed to be the succession of events in the cognitive processing of language, which is that hearers consult the ordinary or literal meaning of a term first, and only move on to figurative meanings if the literal fails to make sense. But more recent research suggests there is no such succession of events and that “the stages are superfluous” (Toolan “telementation” 45), which is to say there is no jump from core literality to an intended meaning that takes into account metaphor, irony, and other types of indirectness, because we do not have any abstract code from which to draw.³⁹ Rather, says Toolan, we “learn and store lexical items, and even whole utterances, with contexts attached” (46). This is the crux of integrational linguistics, which theorizes the process of communication as an integration of two ends of a dichotomy, represented by the formalists on the one hand who seek notional definitions within an abstracted yet ultimately (they hope) knowable system, and those on the other hand who, like Wittgenstein, see language in terms only of what it can do in particular contexts, i.e. what games

³⁷ Norris quotes the SOED on *to treat* as follows: “To deal or carry on negotiations (*with* another) with a view to settling terms; to bargain, negotiate”; and for *treaty* he writes: “A settlement arrived at by treating or negotiation; an agreement, covenant, compact, contract”. (Although not verbatim, these definitions reflect the OED as revised in 1989.) It would be an interesting project in itself to see how judges in general attend to dictionaries as a way to anchor meaning.

³⁸ Yet more wrangling took place over whether rights are “created,” “recognised,” “reserved,” “conferred” or “granted,” each of which contains its own set of assumptions—which did not go unnoticed—about who holds the power to do what, an issue which has been partly resolved in the 1982 Constitution Act which states that “existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (35:1).

³⁹ A standard example for this phenomenon is the phrase “kick the bucket”; the cognitive processing of this phrase is not constituted by an initial consideration of the literal meaning followed by the figurative (as the code model would suggest), but rather we understand it in one step, without having to resort to images of “buckets” or “kicking.”

it permits. Communication for the integrationist is a function of merging past linguistic experience with current “communicational requirements” (R. Harris *Western* 22); a “language myth” arises from the dilemma of trying to (precisely) describe the nature of the imprecision of language with words that are not only imprecise, but that are designed for something else—something other than the description of language. Communication includes such an array of contingencies, activities and abilities that the idea of a stable fixed code interacting with a universal aptitude for language is ludicrous. Dieter Stein prefers the term “language ideology” to language myth, to get at unreflected-upon beliefs about language norms shared by groups such as law practitioners, and at how these norms are socially valued (189). He notes how law and other fields can proceed efficaciously within the ‘short-cut’ of the fixed code ideology, but ‘if this is done in an uninformed and unreflective way, it can have disastrous consequences for explanation’ (196).

The related assumption of telementation, “the conveyance of thoughts from the mind of the speaker to the mind of the hearer” (Taylor, qtd. in Toolan, “Telementation” 80), has led linguists and philosophers alike to ponder over the nature of ambiguity in such banal phrases as “the love of god” or “I had my book stolen” or “the door opened.” Problems confronting linguists about the way language can be misleading led them to search for a core of language that is reliable, and to do so they rely on logical positivism—that meaning in ordinary language must be ultimately verifiable via human sensations, or experience, which, in its need for “precisely fixed meanings” (R. Harris, *Myth* 21), paradoxically requires a huge specialized and increasingly abstract and obscure terminology.

An example from Toolan’s discussion is illustrative: in *Total Speech* he picks up Stanley Fish’s discussion of Randy Newman’s famous line about short people (“got no reason to live”) to exemplify how there is no stable meaning of this utterance that has no perspective—not

Newman's, not short people's, not their detractors' (52). Nor are there only two meanings—one literal and one ironic—as Fish would have it. Nor is the meaning completely dependent upon the hearer's uptake, because maybe some people did not get Newman's intended irony (he is actually short himself). The reactions to this song illustrate what is true of communication in general: "At the heart of all linguistic communication . . . lies risk" (53). Communication is based on a series of effects: there are no prototypical meanings—that Newman is insulting short people, or that he is being ironic—only "prototype effects" (47); just as there is no phonetic centre of pronunciation (54), nor semantic centre of lexical meaning, there are no universal speech acts. In this decidedly de-centred scenario, there is only communicative activity on some periphery.⁴⁰ Furthermore, says Toolan, there "is no general pragmatic grammar" possible to account for indirect speech acts. After all, once one begins to account for the gap between an indirect utterance and its illocutionary effects through paraphrase and explanation, "there will be no logical stopping place [because] there are no definitely explicit sentences, ideally determinate in form and meaning, that might be identified as the terminus of inquiry" (*Total* 144). This is not to say that paraphrasability cannot be a "paramount possibility" that underlies all linguistic practice, only that it should not be taken to mean that utterances are "incomplete or inadequate and in equally invariable need of referral to some fuller underlying form" (144-145).

Applying an integrational linguistic approach to legal texts in general and "the golden rule" in particular is to say that, even though the replication through rereading underlies a somewhat stable transfer of meaning, "continually changing circumstances [also] guarantee the

⁴⁰ It doesn't even make sense to say there is a model, because a model—as a creation of linguist science—"has its own kind of prescriptive pressure . . . such that non-standard behaviour may be rendered invisible or aberrant trivia of performance" (Toolan 32). This could be a cautionary tale for genre theorists. All that are accessible are instances; and as such "type" is an impossible precursor to meaning. All we have is recognition of a token being like other tokens, with no abstract characterization of type possible. There are no models, only "modeling" (142).

incompleteness of replication” (241), and therefore allows for shifts in meaning (see also Fish). An account of the colonial treaty as genre must satisfactorily explain a foundational impossibility of fixed meaning, evident in such divergent genre uptakes as that between *restricting* the Mi’kmaq of the eighteenth century to trade the products of their hunting and fishing only at now long defunct “truckhouses,” and *permitting* the Mi’kmaq of today not only to bring these products to market but also to access these now much scarcer resources in the first place; it must explain the will to see a difference between fisheries as a decontextualised practice, and fisheries as practised within a certain geographical region as dependent on the meanings of terms; and it must explain the invoking of “the golden rule” to render the differences between a deed of sale and a treaty as immaterial.

Given the findings of integrational linguistics, one could conclude that it is hard if not impossible to use *any* language unambiguously, and especially when one is motivated toward making another point, even when one holds on to the assumption that in ideal situations one *can* use language unambiguously. In this case the language use involved the appropriation of lands of the Tsawout people in 1854, while conceding their right to “carry on fishing as formerly,” and in the other the interpretation of the same language to establish their pre-existing fishing rights in 1987. It is an argument of this chapter that this obsessive and microscopic attention to linguistic detail in the face of genre-boundary-crossing uptakes is a feature of legal contexts rendered unstable by the contact zone. These nineteenth-century texts reverberated in twentieth-century contexts in ways the original signatories could never have imagined, and the exigencies for the rereading of these documents differed widely: the legality and fairness of the sale of large tracts of land in the South Island of Aotearoa New Zealand versus the right to carry on traditional practices in British Columbia. This illustrates that there are limits to how far

reasoning about the language of a text can take present day interpreters. In the final analysis, these textual limits were exceeded by social action at the level of speech acts.

Legal speech acts and genres

The above discussion would suggest that it is contexts of interpretation that stabilize the action of texts and therefore of genre more than formal and linguistic elements. I now take a closer look at how genre theory uses speech act theory to bolster its new rhetorical approach.

Charles Bazerman points to the difficulty of using the speech act theories of Austin and Searle to talk about genre, most notably because speech act theory draws on short, somewhat explosive statements (“I name this ship *Elizabeth*”) that can easily be ascribed a particular illocutionary force. Despite this problem, some genres that operate within stable, legal or otherwise highly regulated contexts can be said to deliver the unified force of a particular speech act. Some texts, like deeds, complete their rhetorical purpose in a single instantiation, and are filed away; other texts, like treaties, have recurring actions as they are re-read, reapplied, and even reinterpreted, but, as Bazerman puts it, “genre recognition usually limits interpretive flexibility” (90). Freedman’s work also supplies a fruitful connection between speech act theory and genre, and like Bazerman’s look at patent office documents, her context involves genres (legal judgments, sentences) with legal ramifications. For her, genre captures both the initial utterance and its uptake; a genre, she maintains, is less “the properties of a single text” than the “interaction of, minimally, a pair of texts” (40), such as when a verdict becomes a sentence in a court of law. Uptake describes “the bi-directional relation that holds between this pair,” or what Pierce calls “a text and its interpretant” (40). The uptake text, though, “has the power not to so confirm this generic status, which it may modify minimally, or even utterly, by taking as its

object some other kind” (40). She adopts the term “uptake” from J.L. Austin, who—fittingly for all of our purposes—often utilises legal examples to demonstrate his theory of speech acts.

According to Austin the illocutionary verbs to give, to grant, to offer, to bequeath, and therefore by implication to *deed*, fall into the category of exercitives, which “confer powers, rights, names, &c., or change or eliminate them” (155), and “commit us to the consequences of an act” (158). On the other hand, to contract, to guarantee, to promise, and by implication to *treat* are commissives, which “commit the speaker to a certain course of action” (156); they are “an assuming of an obligation or declaring of an intention” (162). One might apply this in terms of the difference between an act accomplished by virtue of a particular utterance (here a deed) versus an utterance that committed a speaker to future actions (here a treaty).⁴¹ But ever since Austin described these categories—even as he wrote about them—they began to fall apart. For example he describes the link between commissives and exercitives thus: “The connexion between an exercitive and committing oneself is as close as that between meaning and implication” (155).⁴² Successions of people have endeavoured to resolve these problems by burdening Speech Act Theory (SAT) with more specific categories (see Hancher for one summary). Many are turning their attention to fixing speech acts in a universal grammar (Searle; Vanderverken), a drive that makes linguistic anthropologists nervous—they use their cross-cultural studies to offer refuting evidence (Richland).

Still others venture back into legal contexts to seek to understand just what it is that judges do when they use language (Kurzon). Some scholars focus more on the required

⁴¹ Austin describes these aspects of speech acts illocutionary and perlocutionary respectively, although all speech acts have both of these elements. One way to think of it is that locution ascribes meaning, illocution gives force, and perlocution has consequence (Henderson 236)

⁴² This raises the issue of his other shaky (by Austin’s own account [150]) dichotomy, that between constatives (which are either true or false), and performatives (which are either felicitous or infelicitous).

institutional contexts—Austin’s “felicity conditions”—while others focus on what it is in language that contributes legal status to particular wordings. Peter Tiersma is one of the latter whose work brings language and legal expertise together, drawing on SAT to untangle the legal status of offers and acceptances. That status resides somewhere between the subjectivists who would want to deem what is “actually intended” despite the murkiness of language, and the objectivists who want to determine linguistically the actual expression of the commitment to give (Tiersma, “Language” 222-224). In lay terms, it might look like this:

Subjectivist: We know this is what you said, but what did you really mean?

Objectivist: Tell us exactly what you said, so we can see what you really mean.

Each position has its difficulties. The first one must account for people who say things like the whole thing was a joke; the latter must contend with honest mistakes, for example when someone mistakenly offers a car for \$500 instead of \$5000. But neither the subjective desire of the offerer nor their sincerity are prerequisites for the speech act to hold up in court, although they are desirable and are consulted to clear up problems in wording.⁴³ Tiersma describes the actual requirement for a speech act to hold in court in terms of “illocutionary intent,” which is the requirement “that an utterance or conduct be intended to produce in the hearer the illocutionary effect of offer or acceptance” (226). His explanation also accounts for the difference between someone offering something as a joke or a trick, versus someone offering something as part of a stage performance, the contentious issue in the so-called Searle-Derrida debate, although Derrida would say that one can never predict with full confidence the illocutionary force of an utterance. For Tiersma, a joke or a trick case still has illocutionary

⁴³ “Hereby” makes any offer the most explicit and unambiguous. In order for an offer to be deemed valid in court—regardless of the language used or the (in)sincerity of the speaker—it must be “the equivalent of, or expressible as ‘I hereby offer you that *p*’” (Tiersma, “Language” 190). In Anglo-Saxon times, verbal repertoires needed to be carefully articulated, without stammering, for an agreement to have legal force (Tiersma, *Legal* 13).

intent (even if it fails in regard to sincerity); the stage performance does not.⁴⁴ Tiersma's account relies on the concept of the reasonable hearer to deal with those circumstances where there is ambiguity and mistake, so that, for example, a reasonable person would know that to be offered a late-model Hyundai for \$500 is probably a mistake, and that the salesperson had either omitted an important "0" or was actually pointing to the 1986 Plymouth Reliant.

Tiersma's overall goal is to use the writings of Austin and Searle to describe how what the courts actually do when interpreting whether someone has made an offer or accepted it can be seen in terms of SAT; his conclusions about when speech constitutes a legal act end up relying on some fairly basic assumptions. As he puts it: "To the extent that the law is concerned with enforcing actual commitments of the parties, it will have to interpret the language and actions of the parties in the manner that the parties themselves interpret them" (215). This seems to bring legal hermeneutists back to their starting point. But it also echoes another position taken by integrational linguistics, which argues that, rather than resort to complicated theories of meaning rooted in "myths" about codes and telementation (R. Harris), the best we can do to ascertain meaning of any sort is to ask the speakers themselves: "lay statements and questions such as 'I don't understand this sentence' and 'what do you mean [by x]?' are the best kind of guides available in the uncovering or display of meaning and understanding" (Toolan, "Language" 145).

So what appears to be the end result is that legal scholars (and, as I go on to say, perhaps treaty interpreters and negotiators) are coming up against the same issues that Austin did, issues

⁴⁴ Freadman's ("Uptake") account leaves the question of intention behind, but does not discount the possibility, I think, of something that we can still call "illocutionary intent." It renders intention as an *a posteriori* aspect of speech acts, instantiated in the uptake, such that meaning comes in part from the hearer's inference of the speaker's intention.

that natural language philosophers like Austin are resolving by saying that the possibility of making this distinction between meaning and implication (to use Austin's terms) has disintegrated (see Toolan, *Total*). Interestingly, though, the efforts of early natural language philosophers and more recent legal scholars can be seen as parallel—parallel, that is, but in opposite directions. In one case—that of Austin and other speech act theorists—the effort has been towards delimiting language by fixing the *code* according to its *effects*, and in the other—in legal interpretation—the effort is towards delimiting language's *effects* according to its character as a purportedly fixed *code*.

But how does this help our present-day understandings of nineteenth-century legal documents? Bringing Austin and Tiersma to the present discussion leads us to see that an offer and its acceptance together create either a contract or a deed, both of which are mutual acts, and it doesn't matter if one of the parties "had its fingers crossed behind its back," as the settler government was said to have done in an early Connecticut treaty (Walters 104-107). SAT lends itself to the oral manner of ceremonial speech, and also to legal genres, which are premised on the "hereby"s of oral discourse for their legal force. But the second problem we encounter is that, like genres, speech acts also "depend on conventions and procedures which are valid for both addressor and addressee" (Henderson 236). This creates a problem in cross-cultural and cross-linguistic contexts, as Freedman points out when she notes how SAT has been picked up by twentieth-century communication theories, but not in a way that allows for contextual or cultural specificity (40-41). Mary Louise Pratt similarly concedes that SAT fails to account for cultural difference in satisfactory ways. In "Ideology and Speech-Act Theory," she points to its drawbacks, particularly in terms of reliance both on an essential subject and an ideal speaker/

hearer.⁴⁵ Lastly, Sperber and Wilson, in their discussion of speech acts, note how institutional speech acts require the mutual recognition of the institutional or social norms to work (245), expressing “no doubt that a cross-cultural study of such speech acts [as promising, expressing gratitude, swearing etc] would confirm their cultural specificity and institutional nature” (290, n28). It is such problems of “mutual recognition” that inspire re-consideration of genre.

The genred activity purportedly accomplishing the act of ceding title and defining ongoing relationships—if we can rest with the premise that either or both acts were at least being attempted by the genre—involved cultural norms and assumptions of both colonists and Indigenous people. A genre-theoretical approach to treaties would be wise to pay attention to earlier attempts to apply concepts of genre to indigenous groups—another contact situation in which the norms of one culture are used to make knowledge about another. Linguistic anthropology is one discipline that has done so, and although it has had little impact on new rhetorical genre theory, it may offer some insights given my particular focus on cross-cultural context. In his earlier ethnographies of speaking, Dell Hymes identified “speech events” and “linguistic routines,” anticipating the concept of genre more fully articulated in his later work. For Briggs and Bauman this demonstrates that genres can be best elucidated in their complex interrelations rather than in unitary surveys of individual genres such as myths, to themselves describe genres as “flexible social resources” (136). But this does not account for cross-cultural genres of negotiation, involving the types of speech acts that Vanderveken describes as “collective higher order illocutionary acts” (27) that draw on more than one cultural framework.

⁴⁵ Pratt says SAT is not really an alternative to Chomskian linguistics as much as “a sort of guest wing added to the house of Chomsky” (60), mostly because of both of their reliance on the ideal speaker/hearer, or what Chomsky calls the educated speaker. To support this critique, Pratt draws from the work of anthropologist Michelle Rosaldo, who determines that promises [which I note are commissives in Austin’s terms] “more than perhaps any other speech act, confirm the continuity of the individual over time” (62).

Carolyn R. Miller's requirement for a genre claim that the rhetorical situation cannot be "differently construed" by genre participants (37) seems to create a dead end in our thinking here, and I want to resist the conclusion that these activities render a failed genre claim, if only because of the persistence of these historical texts in the form of at least one community's unwavering tenacity. Perhaps the deciding factor for a genre to fail is not that there are different uptakes, but rather that there is no uptake. Freedman's point about uptake is to note that when it occurs across genre boundaries, there are these problems of translation; this creates a remainder, the differend, which has not been accounted for in genre theory. That they appear to fail, or almost fail, is, as I see it, a confirmation of the possibility for a limit case for genres.

We could usefully invoke a "fuzzy" notion of genre, making room for "all the degrees of genre-ness, from tightly defined . . . to baggy and indeterminate" (Medway 141). In this way we are not looking for an objective genre category, based on the interplay of form and situation, because this would lose sight of how genre analysis is part of the genre itself; interpretations are "genre-bound" (Cohen 212). Nor need members of a genre have a single shared trait; as Derrida reminds us, there is no mark of genre, and "participation [in a genre] never amounts to belonging" (230). (But this is not a reason to give up genre analysis!)

Indeed, Ann Freedman says that, for her, "the pay-off of genre theory . . . is in the description of cultural practices" rather than any "generalizable first principles" ("Uptake"), suggesting to me that, in the field of New Rhetorical Genre Studies, definitional statements about genre, which often turn up at the beginnings and endings of articles (this one included), might be more usefully invoked as means to uncover cultural practices rather than to constitute the desired end of field research. Anthony Paré and Graham Smart, in "Observing Genres in Action: Towards a Research Methodology," give us a methodology to uncover those practices, a methodology that comes about through them asking a couple of key questions: what, other than

texts, are "the observable constituents of genre" and how do we observe them? There is a social-constructivist perspective on genre, aligned with a methodology for "naturalistic" observation—a curious juxtaposition but one that might work. They begin by defining genre as "a complex pattern of repeated social activity and rhetorical performance arising in response to a recurrent situation" (146), and end by modifying this—based on their findings—to defining genre as "typified rhetorical actions *and* recurrent situations" (153-4, emphasis in original). What this rephrasing accomplishes is to draw in and validate those observable material conditions of a situation—for them the materiality of social action in terms of composing practices, reading practices, and social roles (147)—and make them a part of genre. At the same time, I would say, this rephrasing detracts neither from the social-constructedness of situation that Carolyn Miller suggests⁴⁶ and Amy Devitt solidifies in terms of discourse,⁴⁷ nor the materiality of the pragmatic forces giving rise to genre, and, I hasten to add, constituting its outcomes. Both the material and the discursive, then, are acknowledged, but they are not mutually exclusive. Paré and Smart's invocation of naturalistic observation in relation to this constructivist paradigm is, for the analysis of historical processes, for the most part not possible, but the materiality of situation can nonetheless be acknowledged, and is somewhat observable in its long-term outcomes. It is the ground upon which the figure of the Kemp Deed and the Douglas Treaties emerge—"ground" here being at once literal and figurative—capturing the material and discursive consequences of the genre today.

Even though the examples of the genre in question here—the Kemp and Douglas documents whose wordings are so similar—*do* closely resemble each other in form and

⁴⁶ "[w]hat recurs is not a material condition (a real, objective, factual event), but our construal of a type" (29).

⁴⁷ In "Generalizing About Genre: New Conceptualisations of an Old Concept," Devitt describes the "discursive-constructedness of situation."

situation, at least from the perspective of colonial authorities, one could still rightly argue that the national and cultural contexts differ enough to explain the different uptakes, especially the presence in the NZ context of the Treaty of Waitangi, which satisfies the rhetorical exigence for the treaty genre and therefore eliminates the need for such documents as the Kemp Deed to fulfil that requirement. (And this retroactively confirms there was no Derridian “mark” to join them in the first place.) But what is of interest here is that despite these divergent uptakes, the twentieth century interpretations of these documents and their contexts draw upon a uniform monolithic Western hermeneutical tradition (often involving the regular exchange of precedents), which in turn relies on the code model of language.

Resultant struggles over meaning happen in the hegemonic push and pull between more liberalised political and legal climates on the one hand and increasingly economic global frameworks on the other, as capitalist agendas perhaps succeed in “reconfiguring past language to meet the circumstances of the present” (Dawson 34); capitalism, in short, may end up supplying what Burke (*Grammar*) would describe as the “ultimate vocabulary” (204) for treaty interpretation—and treaty formation. I aim to posit such wranglings as part of the action of the genre, seeing the strength of genre theory as being able to bridge the space between a sentence level pragmatics that includes an integrationist theory of meaning, and these broader workings of discourse, power, capital, and culture.

Towards a definition of contact genre

The very nature of the prevalence of a legal genre requires that it must be read (replicated) in new contexts. We could characterize the current situation—where a genre is intended by one cultural and political group to prevail, and to secure a state of affairs, in the face

of pressures from another to render it insecure or to prevent it—as particularly fraught, and a feature of the genre itself. Giltrow (“Genre”) argues that some of the background knowledge necessary for the interpretation of a genre is “in the domain” of that genre. Drawing on Sperber and Wilson, she divides implicit background knowledge—in other words what is “unstated” but “necessary for interpretation”—as either encyclopedic knowledge of the world (including knowledge of the appropriateness of the genre), or particular social knowledge to do with the processing of the genre, i.e. in the genre’s domain. In the case of news reports of the sentencing of violent criminals, she found this latter category to consist of the relevance of family background of the criminal being sentenced. In the 1950s the family was heralded as a source of support, whereas in the 1990s psycho-therapeutic explanations focused on family dysfunction. Giltrow’s framework leads me to ask about the relevancies local to the domain of the colonial treaty genre.

Suggested in the analysis of the interpretive strategies surrounding treaty interpretation above are certain *interpretive contradictions* that may be seen to reside in the domain of these colonial documents. In other words, as the work of legal reasoning about deeds and treaties goes on, ameliorated by changing or oscillating sociopolitical climates, the limits of interpretive strategies (mainly literalism, but not restricted to it) intersect with the limitlessness of speech acts to in part constitute the genre. At the outer levels of the genre are strategies common to all legal interpretation, which as mentioned include the interplay between the instantiation of legal “acts” through language and the future literal and figurative interpretations of those acts. What the colonial treaty genre creates—and this is what I am arguing is genre-bound—is an essential disconnect between interpretations of words according to interpretive strategies and ideologies attached to the Western hermeneutical tradition, and the wildly divergent uptakes of seemingly new meanings, genres, and speech acts such as demonstrated by the trajectories of the Kemp

and Douglas documents. In other words the gap between the hypothetical *code* and the actual *act* seems to be almost at its limits in these cases. And it is the tenacity of this genre—through the strong exigency of the rhetorical situation in both countries whose cry is for recognition, recompense, and rights for Aboriginal peoples—that renders it so. Restrictions become permissions; the exercitive act of a deed between the colony of British Columbia and the Saalequun becomes the commissive act of a treaty between a British Columbian First Nation (with the status instantiated in the idea of nationhood) and the Canadian state. This foundational gap, I will argue below, is a feature of the genre, emanating from misrecognition at the time of these documents’ beginnings—a misrecognition that in other circumstances would render a genre obsolete, if it were not for over a century’s worth of indigenous resistance to colonial oppression.

British Columbia’s situation vis-à-vis the rest of Canada is unusual in that treaties were not signed with the majority of First Nations there. This has led to an investment into a modern day treaty process whereby 58 First Nations have registered their claims with the BC Treaty Commission, established in 1992 after decades of refusal of successive governments to concede there was an issue. Thus, importantly perhaps both for the consideration of this present day treaty process and for genre theory, the mutual recognition of speakers and listeners, readers and writers that the discourse type fits the rhetorical situation was not, is not, and can never be a given in the case of contact genres. In other genres, most of the time, this genre recognition is tacit: routine responses to routine situations within communities of practice that are somewhat naturalised, and we give some of these genres names.⁴⁸ What is true of both the contact genres

⁴⁸ Miller calls these “*de facto* genres.” Bakhtin talks about primary genres. They function routinely based on shared recognition. Secondary genres are constellations of primary genres that are defamiliarized in some way, through

of colonial times and those being formulated, for example, in British Columbia today, is that not only is shared recognition not a given, it cannot be presumed to be an outcome. Thus the goal of the BC treaty commission to find common ground among the parties, while it may be a useful fiction, is just not possible. Shared recognition must be developed in the face of its own impossibility. It is evident that each group—Aboriginal peoples and colonial officials—*necessarily* recognise something quite different, even though it might be functional to assume that shared recognition is ever-present on the horizon. The necessary impossibility of recognition has its roots in resistance to assimilation into the dominant culture.⁴⁹

Despite this genre-bound lack of mutual recognition, the treaty genre has and will continue to function, or malfunction, or dysfunction to varying degrees and in varying ways. As we learn from Wittgenstein, shared recognition is more readily and sensibly attained through *demonstration*, rather than through *explanation*. Demonstration of a treaty relationship can happen in the process of coming up with an explanation. Giltrow's ("Public") observations of one BC treaty table suggests that all involved assumed that no-one would actually *read* the treaty documents they were spending hours formulating. We could speculate, though, that a model for a relationship was being developed and enacted in the compositional process. It is not that treaties are a failed genre, or that they will cease to function, despite the problems evident in the process today; it is more that their pragmatic force will not be measured in terms of successes or failures at doing the work intended for them and encoded in their texts (as Carolyn

being quoted or else wise contrived (e.g. fiction), or through their reliance on complex institutional arrangements (e.g. legal genres).

⁴⁹ A useful conceptualization of recognition for this context is that postulated by Nancy Fraser, in which recognition uses the language of status, or esteem, rather than the language of identity, or identification (in Lash and Featherstone).

Miller's ["Genre"] work seems to suggest), but in the ongoing oscillations in the struggle for meanings in future unpredictable contexts.

The notion of contact genre attempts to capture these contingencies. A contact genre, then, is a constellation of textual and social practices associated with the particular negotiations of the contact zone, in which at least two individuals or groups respond to a rhetorical situation, but in which recognition of that rhetorical situation is not shared. The term brings together the concerns of New Rhetorical Genre Theory and—drawing from Mary Louise Pratt—the “arts of the contact zone” whereby genre participants negotiate within asymmetrical relations of power. As an example of a contact genre, the colonial deeds and treaties I have analyzed have had, and continue to have as part of their social action, constellations of compositional and interpretive strategies from at least two cultural traditions that are in turn structured by the joint influence of ideologies of language and socio-political climates. On the side of the Western legal tradition, a display of certainty concerning language and meaning accompanies an actual loss of control over a genre's action in the courts. Admittedly, this isn't always the case in indigenous rights cases, and whether the cases that are considered successful in the short term will create precedents that are read in problematic ways in the future is still a question asked by legal scholars. Nonetheless, inherent to a contact genre is Lyotard's *differend* (see Freadman 44). Between the victim of an injustice and the plaintiff seeking redress, there is an inarticulable gap. This gap represents the impossibility of shared recognition, which nonetheless continues to be on the horizon. As Lyotard himself puts it: “To give the differend its due is to institute new addressees, new addressors, new significations, and new referents in order for the wrong to find an expression and for the plaintiff to cease to be a victim. . . . What is at stake in a literature, in a philosophy, in a politics perhaps, is to bear witness to differends by finding idioms for them” (13). The suggestion here is that legal genres are not up to this task; nonetheless the rhetorical

work within other genres and between constellations of genres can create the conditions for legal genres to respond more adequately to current concerns—a process already in motion. (The role of literary genres in this process is taken up in Chapter Four.)

By way of conclusion, I recount how in the middle of the nineteenth century a series of “treaties” were signed between gold prospectors and Niha7káp̄mx in the Fraser Canyon; although not legal in any Western sense, they functioned successfully in that they brought a guarded peace between this First Nation and the hordes of miners flooding into the area (R. C. Harris 111-114). Such strategic genre equivocations, along with the uptake across a genre boundary illustrated in *R. v. White & Bob*, illustrate pragmatic forces that *are* coherent in their own way, but in a way that complicates the idea of shared recognition and common ground (not to mention the felicity conditions of speech acts). In one sense, the best guess idea of genre recognition parallels what we are coming to know about language in general from relevance theory and integrational linguistics. Given that our view of genre emanates primarily from linguistics—as opposed to its other source in literary theory (Devitt)—it seems appropriate that we continue the work of fine-tuning a sense of genre drawing from that field. Relevance theory and integrational linguistics seem poised to offer a more comprehensive theory of language to ground genre, and I hope this chapter consists of a start in this direction. So it is not that we need to do away with legal hermeneutical reasoning, to achieve what Toolan calls a “wholesale dispensing” of its categories, for they continue to have “operational convenience” (“Language” 235). But like all language everywhere, it cannot be constrained to do the work planned for it, especially when the realities on the ground require otherwise.

Chapter Two **Merging Rhetorical and Material Histories of the “Douglas Treaties”**

Chapter one told the story of a genre transformation, as the Douglas Deeds of 1850 to 1854 were interpreted as treaties in twentieth-century court cases. This chapter returns to these fourteen original land conveyances, which were cobbled together as part of the Hudson’s Bay Company’s rush to create a new colonial outpost in the wake of the 1846 Oregon Treaty, and which in turn settled the issue of the U.S. Canadian border by continuing it along the 49th parallel to the Strait of Georgia. In 1849 the company was given a charter to trade exclusively with the Indians of Vancouver Island in return for forming a British settlement; it was this latter part of the bargain that required the company to take care of the “Indian Land Question.” Flung far from the sovereign centre, the new colony’s work of establishing and abiding by European laws was carried out in circumstances that often lacked infrastructure and expertise. Law’s linguistic routines were reproduced through manual transcription, mostly by clerks and copyists;

sometimes this occurred by copying previous instances of a genre, and other times by recalling terms and phrases from memory; and sometimes these literate practices happened in the inner sanctums of HBC offices, and at other times out in the field. At times the wordings of the law seemed to be on the tips of the pens of colonial officials, who channelled the voice of the colonial centre in legal genres around the world. At other times writers seemed to proceed with uncertainty, often waiting for months for official “forms” to arrive from the HBC head office or the office of the secretary to the colonies. The management of the HBC was strictly hierarchical, and all operations were to be approved by the committee in London, a process that involved a considerable time lag between asking for and receiving official sanction (Sprakman and Margret), which influenced the documentary record associated with negotiations with First Nations over land. Whether because of or despite these ad hoc arrangements and processes, some records ended up in the Provincial Archives of British Columbia (PABC), some in loose collections of letters and other papers, and some in a *Register of Land Purchases from Indians*. I look for evidence in these textual remainders for how various participants, including the bands involved, both composed and interacted with them, and also at how colonial officials adopted, reproduced and sometimes revised those legally sanctioned and defined terms, phrases and clauses—sometimes known by the jargon term “boilerplate”—that are the means by which the law upholds a sense of its stability across time and place.

Many had a hand in the *Register* and associated documents. Sorting out who had a hand in what, in some cases literally, can throw light on how the texts functioned during the period. While the previous chapter looked at the transition of the documents from land deeds to treaties in twentieth century courtrooms, one argument of this chapter is that during the time of their instantiation, they were more than either treaties or deeds. They were also a combination of pedagogical instruments, training the next generation of colonial bureaucrats who hoped that by

demonstrating their expertise they could move up bureaucratic ladders from apprenticeship, to clerk, to positions of higher rank. They did this in part through demonstrating control over the linguistic routines required of them,⁵⁰ and this included, it seems, some attempt at mastery over the indigenous languages and Chinook Jargon in use around the fort. Secondly, they were working documents, used to update demographic and economic records where needed and possible. And lastly, they were symbols of colonial power and control, less important for their wordings, signatures, and delineations of geographical boundaries than for their rhetorical function as documents in and of themselves, as signalling materially that official documentation had taken place. It was the *fact* of their existence rather than their wordings *per se* that operated at the time, even though their wordings would be dissected in times to come. And 4) they were a sign of the beginning of the erasure of women's political power in First Nations communities of British Columbia—it was the names of men that are listed on the deeds. This gender realignment was further consolidated in the Indian Acts of years to come. As the entry point for First Nations to the linguistic routines of European law, these documents encapsulated a rendition of the material world of one people according to the values and laws of another, in this case, dominating people.

Any legal document is a layering of texts, and these, which most obviously rely on the wordings of the Kemp Deed as discussed in the previous chapter and below, are no different; but they also include inter-generic intertextual elements from outside legal discourses, subtle and not-so-subtle revisions, and a few blatant errors. This analysis will provide a contrast to typical descriptions of legal discourse as “frozen,” and “formulaic” (Trosborg 13), and will

⁵⁰ Spraakman and Margret write of the influence of George Simpson, who took over as Governor of the HBC in 1821 at the time of its merger with the North West Company, and whose approach to its management was “highly documented,” meaning that militant record keeping was “an inherent aspect of his systemic approach” (283).

show how this contact genre undermines principles of legal linguistic stability so central to Western law.

Two previous publications give detailed attention to this group of texts: Wilson Duff's 1969 history of the "Fort Victoria Treaties" and Justice Lambert's 1984 reasons for judgment in *R. v. Bartleman* (BC Law Reports 55).⁵¹ Many scholars point to the theories of land use and title during this period, suggesting that competing theories were at play, often in the minds of the individual actors (Weaver, *Great* 175; Harring 377, f.n.23). This study explores how unresolved issues and inconsistencies in the realm of politics and theory may have evinced themselves in concrete and local literate practices and products. In merging material and rhetorical approaches to the treaties, I will interrogate both the effects of technologies of transmission such as copying and transcribing ("boilerplate"), and the implications of a print rhetoric that upholds by its very existence the ideology that written language is a neutral medium via which processes and practices are fixed in legal terminologies, and that, conversely, signatures are the only and necessary site of difference, subscribing individuals to the collective will of the law. The approach traces the intermittent history of particular linguistic routines, as well as some of the more material routines to do with local bureaucratic processes and social and geographical contexts, sometimes through consulting established research, and sometimes through primary analysis, depending on gaps in the literature.

⁵¹ This is notwithstanding the various individual histories that have emerged, most notably, perhaps, those from the University of Victoria's program in indigenous governance, wherein graduate students have worked with individual nations to bring into the hearing distance of academic scholarship the available oral records of these transactions (<http://web.uvic.ca/igov/>).

On the European side, the larger picture assumes a chain of citation dating back to the Papal Bull that split the Americas between the Spanish and the Portuguese;⁵² on the side of First Nations the agreements reached with the new settlers were a link in the chain of their pre-contact traditions of trade and peace alliances going back to “time immemorial.” The detailed account below will complement research on oral traditions and precedents in this chain of citation, a topic I return to in Chapter Three. In chapter one, I assessed the interpretive strategies brought to bear on some of these deeds as they are resurfacing today to become objects of scrutiny for a variety of legal and political purposes. Here I want to shift the focus back to the contexts of production of these same documents, thus issues of translation, transcription, transmission and authorial intentions (and errors, and confusions) must be addressed. I hope that the reader does not need reminding that the legal validity of these documents is not my concern.

Unlike the many genre analyses that consider the observable material and social conditions that shape and are shaped by particular genres, potentially bearing witness to uptakes as they happen, an analysis of historical genres such as this one poses a situation in which researchers can only speculate about such things based on traces of text. In these cases, to use the words of Foucault, the text (“document”) itself becomes “monumental” (139).⁵³ Within this framework I recognize my role is not one of reclaiming a history from the analysis of texts, but rather of shedding some light on the assumptions made about *text* in the life of a particular

⁵² A United Nations report notes that although its Special Rapporteur on the Human Rights of Indigenous Peoples, Miguel Alfonso Martinez, “affirmed initially that few, if any, treaties could be traced back to colonial times in Latin America (35), further research has led him to reconsider this assumption. This modified approach is documented in the third progress report, especially with the example of the Mapuche parlamentos (Chile). At this final stage of his work, the Special Rapporteur is inclined to accept that the origin, causes and development of these juridical instruments can be compared, *prima facie* and in some aspects, to those of certain indigenous treaties in British and French North America” (36).

<http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/696c51cf6f20b8bc802567c4003793ec?Opendocument>

⁵³ Archaeology, as Foucault does it, does not “treat discourse as *document*” (138), but rather as “*monument*” (139). It does not consider “the authority of the creative subject,” nor the original aims of discourse, but rather the “types of rules for discursive practices”; it is “a differential analysis of the modalities of discourse” (139).

genre, a genre that has in turn played a role in the historical processes of the dispossession of indigenous lands, traditions, and languages. It is worth noting that around the world land and cultural loss has happened both with *and* without the genres of official land cession and cohabitation; indeed, that many indigenous peoples participated in historical treaties did not gain long term benefits in terms of qualities and standards of life today (see Martinez). One perspective on just who does benefit from treaties is suggested in a fable, repeated by one astute observer during a mid-nineteenth century discussion about New Zealand's then recent Treaty of Waitangi: in this account the treaty was described as like the shell of an oyster, a way for colonial economic powers such as the New Zealand Company to give "[o]ne shell to the natives; the other shell to the Queen; and [keep] the oyster for themselves" (cited in Sweetman 73). Those who benefit, then as perhaps today, are, to be succinct, the new and not so new colonial entrepreneurs.

Method and concepts: the "paradox of substance"

The methods of material history from the discipline of history⁵⁴ have been adopted and adapted in the following account. Material history aims to focus first on an artefact's materiality so that an empirical account of the-thing-itself precedes questions of context, function or value, as well as any secondary interpretations offered in the literature. This has been described as a "grammar" of reading material artefacts (New Brunswick Group 34). I am considering the material elements of archival documents in question, and the material conditions and effects of those documents so as to provide a particular perspective on the history of settler/indigenous relations on the BC coast. To do so I am also considering "text" as part of that material, in the

⁵⁴ Adapted in turn from archaeology (New Brunswick Group, 31).

form of both handwriting and the formal structures of text. This is to suspend the inextricable connection between form and meaning as a methodological strategy that will allow a return to meaning with new insights. My understanding of material rhetoric is that it provides a necessary consideration of how material artefacts are persuasive (such as statues, or memorials), and also on the material outcomes of rhetoric, some of which can be unintended by the rhetor. What I hope to add is a consideration of how the materiality of historical contexts—what is physically available, what can be remembered—constrains and enables rhetorical acts and outcomes. Here, in this temporary separation of form and pragmatic meaning, we might utilize Burke’s notion of rhetorical substance. A rhetorical perspective acknowledges the flow of vocabularies from public discourses into the law, indeed “the law cannot exist apart from the public vocabulary of a rhetorical culture” (Hasian, Condit and Lucaites 327). The data I present below traces a part of this flow. According to Burke, a “paradox of substance” involves the fact that substance entails both an extrinsic element (matter) and an intrinsic element (which he terms “spirit”). The paradox comes from the fact that at any one time only one of those can be the essence of the pair, in other words substance is the “*materialisation* of the spirit,” or it is the “*materialisation* of the *spirit*” (*Grammar* 47). The Douglas Deeds are primarily about land, or they are about law. Burke’s paradox suggests they cannot be essentially about both at the same time. Taking this idea one step further and for the purposes of this discussion, their materiality in general can be separated from their discursivity.

This methodological separation-in-the-face-of-its-impossibility of material and meaning, in line with Burke’s philosophical separation in his “paradox of substance,” can also be justified through a look at other philosophical inquiries into foundationalism. In *Bodies that Matter*, Judith Butler brings Aristotle and Foucault together, seeing Foucault's "the soul forms the body" (the soul as a normative ideal that gives rise to the material body) as a reworking of Aristotle's

tenet that "matter never appears without its schema" (33). Within Aristotle's schema there is no separation of form and materiality (something, Butler points out, that has led to the Aristotelian notion that women's bodies biologically restrict them to the domestic sphere). Foucault epitomizes his reversal of the Christian tenet of the body imprisoning the soul ("the soul is the prison of the body") in the notion of subjection (34), and Butler continues its meaning to include "a subjectivation ... a putting into place of the subject" (34). The power at work in this process, Butler reminds us (drawing again from Foucault), is not outside, but constitutive of materiality itself, even though "material positivities appear *outside* discourse and power, as its incontestable referents, its transcendental signifieds. But this appearance is precisely the moment in which the power/discourse regime is most fully dissimulated and most insidiously effective"(35).⁵⁵ This means that when foundationalist empiricism affirms a material world that is beyond the workings of power, then a critique of power is foreclosed. Butler wants to ask about what is necessarily excluded from "the domain of what is materializable"—what are the necessary constraints or modalities—in order "for [Foucault's economies of discursive intelligibility] to function as self-sustaining systems"(35). What is excluded from (as the “constitutional outside”) of the treaty genre is an extremely important question in this context, as the example mentioned above of the exclusion of women as signatories shows; my focusing on its constitutional materiality is not to deny this importance, nor is it done in the name of (simplistic) empiricism, but rather to assess these (masculinist) material conditions and constraints on the genre in its instantiations.

⁵⁵ A “transcendental signified” is a Derridian term usually applied to high level terms like democracy and freedom, terms that, like Burke’s “ultimate terms,” escape critique because of their investment with so much authority and value. Butler is saying that a valorization of a pre-discursive material realm can promote materiality to a similar realm, and therefore foreclose critique.

Elsewhere, rhetorical theory has also drawn on this background to include in its trajectory a consideration of the material. A (usually feminist) material rhetoric recognises that the material world matters, and that those material conditions in contexts of production have material outcomes. The exclusion of women from the signing of these documents worked to persuade Aboriginal men that Aboriginal women didn't matter; they were not intelligible in the newly forming (for them) economic and political discourses. This history of exclusion has been documented by Gehl, and it shows signs of continuing today. Woolford, for example, points out how some women's groups in Aboriginal communities have eschewed the current treaty process in BC because of women's underrepresentation at treaty tables (88-89).

Material exclusions and inclusions have led me to adopt and adapt material history's program to strategically consider *form* before a consideration of *meaning*. To do this—to consider lexemes, phrases, and even utterances as material objects in intertextual processes—is to work backwards through rhetorical theory's notion of substance so that the lexeme, the phrase, and the utterance are all now the *referents* in a material system of signification, to ultimately consider Foucault's discursive formation from his discursive archaeology of the statement. Statements in discourse appear as macro-discursive phenomena of discourse; like speech acts, they are human events. They do not abide by pragmatic or grammatical rules, but rather by epistemological ones (Blair 368). As such, they are unrelated to the intentions of speakers, or the amenability of audiences, but operate in systems that can be described: "one can define the general set of rules that govern the status of these statements, the way in which they are institutionalised, received, used, re-used, combined together, the mode according to which they become objects of appropriation, instruments for desire of interest, elements for a strategy" (Foucault 115). They happen as a result of confluences in realms of knowledge, power, and ethical relations and are noted, says Foucault, for their rarity. This is how they gain their status

as statements. Just as a historical or archaeological artefact gains its value from its rarity, so too does the discursive formation of a statement. The statement is a function (Foucault 115): the relation between the utterance and its institutional site of enunciation. It is a speech act with its overlay of institutional power; while a speech act is structured by the material conditions of the site of utterance, statements structure those conditions. One of these conditions of context is intertextuality, which relies on the material availability of other utterances in a discursive field, an availability patrolled by colonialism's particular ordering of knowledge and power.

While others have looked at such occasions of treaty making as “borderland semiotic transactions” (van Toorn 209), my method, like Foucault's, does not begin with the symbolic capacity of utterances, speech acts and genres, but rather with the material conditions that make such utterances, acts, and genres possible in discursive fields of value.⁵⁶ With its evocation of materiality, *boilerplate*—as a term left over from early printing practices—is the name given for the guiding principle behind the reproduction of genres from a legal perspective. The term has come to mean those sanctioned terms and phrases that legal practitioners insert into contracts, etc, to ensure the legal protection of all parties, but as I suggest above, *intertextuality* more accurately names what actually happens. As Hanks puts it, drawing from Ingarden, “what we call a work is actually a history of concretizations” (13), so that *intertextuality* becomes “the general term for a variety of relations amongst texts” (111). Unpacking these relations can sometimes require a closer and systematic look at form, including images and writing, at the micro-textual level, such as of a document's insignias, signatures, and frontispieces (281). Some relations occur to a degree “independent of textual form” (280), as when new publics, far from

⁵⁶ This is not to celebrate the perfection of my instrument, but rather to assess its usefulness as a way to read the archive, especially as these texts shift in their importance and reputation among Aboriginal people still affected by them.

the original contexts of a document's initial field of reception, "appropriate an ancient text for legitimating a claim to land, identity, or any other value in the present," and the genre's "meanings go far beyond the apparent 'semantic content' of the texts" (280). This would apply to the significance of the Douglas Deeds, but not just in their future contexts of postcolonial justice; I am arguing that they were iconic then as well, material symbols that signified differently to settler colonists and Indigenous inhabitants.

Intertextuality as a methodological concept helps us ascertain the ways in which material textual practices shape and mediate law in improvisational and unofficial ways that might otherwise go unnoticed. But intertextuality is a term that knows no standard definition. Fairclough first distinguishes intertextuality from interdiscourse, but then uses the former term to capture a range of phenomena (31-40).⁵⁷ I see it as encompassing a range of textual phenomena: first it includes a range of wordings from direct quotes through to phrases and utterances connected to others via dialogism, and on to a more generalised heteroglossia. Second it refers to the physical (material) traces of these processes according to the adaptation of the material historical method above. Lastly it includes what studies of texts that use intertextuality as a concept are also acknowledging, and that is that apart from what is traceable through study is the high degree to which all texts are based on "anonymous discursive

⁵⁷ Fairclough goes through a variety of approaches, assessing them for their strengths and weaknesses. He engages extensively with Foucault's *Archaeology of Knowledge*, arguing for a more textually-based discourse analysis than Foucault's, or "textually-oriented discourse analysis (TODS)" (37). Foucault's approach works in the context of his interest in the discourses of sociology, medicine, psychiatry etc, but Fairclough wants to add other sorts of discourse, such as "conversation, classroom discourse, media discourse..." (38); also for him the distinction between intertextuality—the ways texts use pieces of each other—and interdiscursivity—"the constitution of a text from a configuration of text types or discourse conventions" (10)—seems less important. The latter term comes from Pêcheux, who sees interdiscourse as a complex of related discursive formations (also drawing from Foucault) that determine the meanings within each, here defined as "that which in a given ideological formation ... determines 'what can and should be said'" (Pêcheux, drawing from Foucault, in Fairclough, 31). As for intertextuality, the term comes originally from Kristeva, whose discussion in turn involves a reworking of Bakhtin's "translinguistic" approach (from *Speech Acts*).

practices, codes whose origins are lost” (Culler, qtd. in Solin 268), speaking in the end to the citationality of all discourse (Derrida).

Although the intertextual mediations I examine are often unofficial, they are not freewheeling; as Fairclough reminds us, intertextuality is not “available to people as a limitless space for textual innovation and play” (103)—but is structured and constrained by processes of hegemonic struggle.⁵⁸ Unresolved struggles can be represented intertextually through ambivalence in texts. The deeds I look at deviated from “official forms” through the uptakes of phrases used in correspondence, through omissions and uncertainties, in some ways showing a negotiation between official and vernacular language, between the colonial centre and the edge of empire, and between indigenous and settler perspectives. The degree to which intertextuality in legal genres can show concrete uptakes within and between genres we can also make concrete a rhetorical understanding of the law as “neither a rationally constructed discourse nor simply a dominant ideology, but rather an active and protean component of a hegemonically crafted rhetorical culture” (Hasian, Condit and Luciates 323).

It is only now that the primacy of text in law is being challenged: in practice through new communications media and in theory through deconstruction. On this note, I follow Goodrich who recuperates Derrida’s grammatology—or the study of “forms of inscription, the technological guarantees of delivery of law” (Goodrich 2038)—for his study of how new media is challenging North American law’s reliance on text. Like new media, colonial treaty making offers a similar challenge to this guarantee, both through current validations of oral history

⁵⁸ Through his look at the conversationalization of official discourses by the media, Fairclough questions the assumption that this use of the vernacular represents a shift in power from producers to consumers of these discourses, empowering the public and strengthening democracy. Rather, he says, “powerful groups are represented as speaking in a language which readers themselves may have used, which makes it so much easier to go along with their meanings. The news media can be regarded as effecting the ideological work of transmitting the voices of power in a disguised and covert form” (110).

evidence in law courts (see my discussion of *Delgamuukw* in chapter three), and through what I will show below to be historical anxieties in documenting Aboriginal-settler relations, evident in uncertain mediations within the new colony's legal linguistic routines.

Material documents

What are often referred to as the “Fort Victoria Treaties” are the eleven land conveyances through which First Nations of the Fort Victoria area gave up their land to the Hudson's Bay Company, whereas the term “Douglas treaties” includes those three others signed with First Nations elsewhere on Vancouver Island – two at Fort Rupert, and one at Nanaimo (Duff 6). The eleven “Fort Victoria Treaties” were written into the notebook pictured in Figure 3; the two from Fort Rupert and the one from Nanaimo were inserted as loose-leaf, but seemed to have been written on the same type of parchment. I also include in Table 1 two other deeds in the archives, both from the Port Alberni area and signed in 1859 and 1860 respectively, for reasons I explain below.

Interestingly none bar one of the deeds were signed by Douglas, who held the office of chief Factor of the HBC fort in Victoria and that of governor of the colony. Douglas was chief factor for HBC from 1840 to 1858. He was Governor of the colony of Vancouver's Island from May 12, 1849 until March 9, 1850, then again from September 1851 after the brief governorship of Blanshard. His governorship extended over British Columbia in its entirety after 1858 when it became a crown colony.

Name on document and NAME TODAY	Date	No. of Indian "marks"	Colonial signatories
1. Teechamitsa - Country Lying between Esquimalt and Point Albert SONGHEES	1850 April 29 th	11	Done in the presence of Roderick Finlayson Joseph William McKay
2. Kosampsom – Esquimalt peninsular and Colquitz valley ESQUIMALT	1850 April 30 th	21	Done in the presence of Alfred Robson Benson (M.R.C.S.L.) Joseph William McKay
3. Swengwhung –Victoria peninsular, South of Colquitz SONGHEES	1850 April 30 th	30	Done before us Alfred Robson Benson (M.R.C.S.L.) Joseph William McKay
4. Chilcowitch – Point Gonzales SONGHEES	1850 April 30 th	12	Done in the presence of Alfred Robson Benson (M.R.C.S.L.) Joseph William McKay
5. Whyomilth – North-west of Esquimalt Harbour SONGHEES	1850 April 30 th	18	Done before us Alfred Robson Benson (M.R.C.S.L.) Joseph William McKay
6. Che-ko-nein – Point Gonzales to Cedar Hill SONGHEES	1850 April 30 th	30	Done before us Alfred Robson Benson (M.R.C.S.L.) Joseph William McKay
7. Ka-ky-aakan – Metchosin BEECHER BAY	1850 May 1 st	2	Done in the presence of Alfred Robson Benson (M.R.C.S.L.) Joseph William McKay
8. Chewhaytsum – Sooke BEECHER BAY	1850 May 1 st	3	-
9. Sooke – North-West of Sooke Inlet T'SOU-KE	1850 May 1 st	4	-
10. Saanich – South Saanich TSAWOUT	1852 Feb 6 th and/or 7 th	10	Witness to signatures Joseph William McKay Clerk H. B. Co's service. Rich'd Golledge, Clerk
11. Saanich – North Saanich TSAWOUT SONGHEES	1852 Feb 11 th	118	Witness to signatures Joseph William McKay Clerk H. B. Co's service. R Golledge, Clerk
12. Queacker – Fort Rupert KWAKIUTL	1851 Feb 8 th	12	Witnesses William Henry McNeill, C.T., H. B. Co. Charles Dodd, Master, Steamer Beaver George Blenkinsop, Clerk, H. B. Co.
13. Quakeolth – Fort Rupert KWAKIUTL	1851 Feb 8 th	16	Witnesses William Henry McNeill, C.T., H. B. Co. Charles Dodd, Master, Steamer Beaver George Blenkinsop, Clerk, H. B. Co.
14. Saalequun – Nanaimo NANOOSE SNUNEYMUXW	1854	159	Charles Edward Stuart Hudson's Bay Company in charge of Fort Nanaimo Richard Colledge Hudson's Bay Company service George Robinson Manager of the Nanaimo [Mine?] James Douglas Governor Vancouver's Island
Barclay sound	1859	2 (Chiefs)	William Eddy Banfield
Alberni Canal	1860	5	

Table 1 Nineteenth century BC deeds

Two of the treaties, Chewhaytsum and Sooke, had no “White” signatories at all. Changes in handwriting, evidence of precursory and subsequent notations are evident throughout the documents, suggesting layers of concretizations in the transcription and transcribing practices which are in part the focus of my analysis. The relatively recent designation of the fourteen textual records as “the Douglas Treaties,” although deriving from the establishment of their legal status in the courts, can elide the ad hoc nature of agreements between First Nations and the settler colony. Speaking in particular about the last entry into the book of land conveyances, the list of names of the Saalequun tribe that appears seemingly without anyone having bothered to append the text of the agreement, Foster and Grove point out: “There is an indistinct line between this sort of informality and transactions with no signatures – in other words oral promises – that can be misunderstood or misrepresented and, if necessary, denied” (58). Their contribution is to provide evidence that similar arrangements were made elsewhere, including one with the Cowichan in 1862, although a record of this was never entered into the books (61). I have added two other documents, found in the archives, showing arrangements between William Eddie Banfield and groups of natives in the Alberni area. One of these is referred to as the “Ohiat Barclay Sound Treaty” on a government of Canada website,⁵⁹ which suggests that the genre of colonial treaties includes a range of practices and documents that may not have met the requirements (at least thus far) as part of the official designation, but deserve inclusion in the genre. Indeed, one could see the whole reserve creation process that got underway after the HBC lost its charter in 1859 as a continuation of “treating with the Natives” in this broader sense. Were not oral promises made and boundaries determined in both cases so that Douglas, along with Malcolm Sproat, Joseph Trutch and Peter O’Reilley, were all alike creating Indian

⁵⁹ <http://www.gov.bc.ca/arr/treaty/landmark/douglas/payments.html> [accessed July 07, 2008]

reserves *and* “treating with the natives”(R. C. Harris)? Here the Rhetorical Genre Theory perspective and First Nations perspectives may come into alignment. We cannot let colonial and postcolonial legal arrangements be our last word on genre categories (although, of course, neither should they be ignored).

The eleven Fort Victoria Treaties concern the approximately 1675 Indians living in the area during the period; numbers had declined by this point because of European weapons and diseases.⁶⁰ Payment was made mostly in full in the form of blankets, which the Indians preferred, and which were valued according to a 300% mark-up from cost (Duff 24). The treaties were hand-written, Duff says mostly by Douglas himself, but although it could be said that Douglas was primarily responsible for orchestrating the text of the records, I note that a substantial amount of the actual writing was not in his hand. On any given deed, there seems to have been a pattern of interactions with the text: each of those written in 1850 includes a brief titular notation, written roughly with pencil, consisting of a place name; a prologue that outlines the geographical bounds of the land being ceded (Duff says, and I agree, that these are written in Douglas’s hand [10-11]); the first few lines of the deed text, from “know all men” to “do hereby surrender” are in Douglas’s hand; the body of the deed, which draws on but often rewords Douglas’s prologue, is in the hand of another, assumedly a clerk. There follow the names of the Indian signatories, each with a neat “X” beside it. On the first 1850 deed with the Songhees the “X” beside the first name is the only one super- and sub-scribed with the words “his mark”. This is also the case for the 1852 agreements with the Saanich, this time for the first name on every

⁶⁰ The decimation of Aboriginal populations has been widely documented (see, for example, Culhane; R.C. Harris; Haig-Brown and Nock).

column within the deed.⁶¹ Although Lambert suggests the lists of names are in McKay's hand (85), based on my own comparisons of handwriting, I tend to agree here with Duff, who thinks it is Douglas's (11). In the 1851 agreements at Fort Rupert, the signatories' marks are "o"s, and the words "his mark" follow the first name, with "do" (ditto) following all the others. Lastly, by the time of the Saalequun agreement, which has no text whatsoever, each Indian name is painstakingly followed both with an "X" and a super- and sub-scripted "his mark". From comparisons I have made, these lists appear to be in Richard Golledge's hand; it also appears that he may not have had recent or any access to the preceding deeds in the *Register of Land Deeds* to follow their exact format. Lorne F. Hammond also attributes the handwriting of a company ledger he analyzed to Golledge, saying "Golledge worked from 1851 to 1858 as clerk and secretary to James Douglas, [who] was of too high a rank to have involved himself in the time-consuming task of bookkeeping or transcription" (122). This is in some conflict with Duff's account; he, like me, assesses a good portion of the text as written in the hand of Douglas.

There is substantial evidence of proofreading and revisions. On the Saalequun deed, for example, "September" has been crossed out and replaced with "December." On the fourth deed with the Songhees of Point Gonzala, the sentence describing the boundary as passing along "a line of equal extent passing through side of Minies Plain" had to have the missing words "the north" added later, before the word "Minies." This was done first in pencil, then in ink seemingly in the hand of the clerk, characterizing a vigilance towards correctness seen throughout the texts, although I hesitate to assume this careful attention to accurate

⁶¹ That "his mark" appears nowhere else on the nine 1850 deeds—dated over the three days April 29th to May 1st—suggests to me the possibility that these lists of signatories were all transcribed in one sitting, by a person with different notational habits.

documentation is a reflection of faith in and knowledge of the law in its application; indeed it might be sign of anxiety over such matters. It seems relevant here to point out that the colonial office had issues with Douglas's report writing, and often corrected his dispatches (Perry 18). This anxiety may have spilled over into Douglas's personal correspondence: he was known to send letters from his daughter back to her, with errors circled and corrected (Blakey Smith).⁶²

Extra care seems to have been taken to represent the sounds of the indigenous languages. Because two copies of the lists of Saalequun "signatories" are in the archive, we can compare the two and see this in process. This "treaty" consists of a list of names without any deed text, and is comprised of over one hundred names, with the signatures of company officials at Nanaimo, and also Douglas's signature (this is the only one he signed). In this case, the records include a copy of the names, painstakingly rewritten in the same hand; as mentioned, I suspect Richard Golledge here, more evidence for this coming by virtue of the fact that only his, of all the signatures, looks exactly the same in both lists. Interestingly, in the first version, the syllables of the native names are separated out, but in the fair copy this feature is missing. One could speculate that while writing the first list, Golledge was listening carefully to the sounds of the names as pronounced by their owners and sounding them out phonetically as he wrote. For the fair copy, which is otherwise comparable in neatness and spelling, he could do without this interim step. Golledge was a clerk at the time, and became a gold commissioner later on in his career. One presumes that he took on the task of pronunciation and spelling of Native names seriously. On the 1851 deeds his name was appended with the designation "Clerk," whereas by 1854 the term clerk was omitted and the phrase "Hudson's Bay Company Service" was written

⁶² The exquisite attention to detail also reflects what Thobani describes as "the ordinary and banal violence necessary for the maintenance of colonial sovereignty" (drawing on Fanon and Mbembe, 38), being carried out by colonial functionaries—who documented the push of empire and insisted on aboriginal collusion in the process—playing a role in their apprenticeship.

in his own hand. His rise up the ladder, despite a reputation for hard drinking, to become a gold Commissioner for the company suggests a typical trajectory of upward mobility, one similar to Douglas's himself, who moved up the ladder from apprentice clerk, to clerk, to chief, to trader, to chief trader, and finally to chief factor. By the time of the 1854 Saalequun conveyance, Douglas seems to have put his trust in his clerk to listen to and reproduce the sounds of Indian names, a task he seems to have done with as much care (although without reproducing the phonetic markers that characterized Douglas's lists).

By 1854 and the agreement with the Saalequun, we could ask why Golledge would go to the trouble of making two copies of the names while leaving the space for the actual text empty. Was he intending to add it later? Could it then as now have been taken as a given? Are these fair copies of an original, now missing from the archive? It both confirms that there was a practice—albeit an interrupted one—of making copies of conveyances, and it suggests that by 1854 the demographic and ethnographic function of the lists had overshadowed that of a record of land conveyance. Making multiple copies aligns with the HBC policy of having the activities of the colonial outposts well documented in offices back in England,⁶³ and with accounts of this practice elsewhere (see, for example, Van Toorn's discussion of the Batman Treaty in Australia).

One further illustration of the demographic function of the deeds comes in the form of annotations to the Swengwhung document, where someone has used the list for a population recount, via penciled-in numerals and the all-too frequent word "dead." By the time of the update, 14 out of the 30 "signatories" listed had died. Douglas had used the original 1850 count

⁶³ In the colonial office itself it was common practice to make six copies of each incoming and outgoing piece of correspondence (see D. Murray Young's *The Colonial Office in the Early Nineteenth Century*).

to construct a census table in 1853 (Duff 22-23). So far, I have found no record of whether this updated information found its way into a similar table.

The layout of the book of conveyances poses a quandary, especially the pattern of blank sections. Others have suggested that spaces were left for the texts of the deeds, to be inserted when “the proper form” had arrived from the colonial office. Duff says this explains the break in the handwriting of the text, demonstrated in the photograph of the third deed with the Songhees, and a typical feature of the 1850 and 1852 deeds (See Figure 5). If Duff is correct, this would mean that Douglas imitated the first few lines of the Deed (“Know all men, we the chiefs and people of X who have signed our names and made our marks do hereby consent to surrender entirely and forever”) from genre knowledge. I suppose this is possible, but the question remains that if he knew this much, why couldn’t he proceed to the end? Why did he request with seeming urgency that the form be sent out? Also, in his own account, Douglas tells of assigning the names to a blank piece of paper: Duff cites Douglas to Barclay, dated May 16, 1850, wherein he sums up his actions so far, consisting of agreements made with 9 groups: “I attached the signatures of the Native Chiefs and others who subscribed the deed of purchase to a blank sheet of paper on which will be copied the contract or Deed of conveyance as soon as we receive the proper form, which I beg may be sent out by return of Post...” (Duff 7-8; see also Ormsby 96). Duff also says by the time of the tenth deed, dated February 7, 1852, there was no break in the text; Douglas wrote it all, indicating to Duff that he was no longer waiting for the wording from Barclay (21). I disagree. There do seem to be two distinct writing styles in the tenth and eleventh deeds; this time it seems to me that Douglas wrote the first half, stopping after “the condition of” on February 6, and just before it on February 11th. In both cases his hand returns to write out the names of the Indians. I also suggest, based on my own comparisons, it is Gollidge’s hand that writes the body. As previously mentioned, Gollidge was a clerk for

Douglas from 1851 to 1858 (Hammond 123). This would be too late for him to have had a hand in the earlier deeds; and even at the time of the 1852 signing, he may not have been familiar enough with the “routines” of collecting Indian names to ornament a deed, nor with the linguistic routines used by Douglas to reflect the sounds of the Indian names. The pertinent question becomes, why did Douglas orchestrate the documents in such a way that he wrote the introductions and someone else took over for the descriptions of the land boundaries? Duff says Douglas wrote the Fort Rupert Deeds all in one sitting, there being no break again in the text. On this point I agree there are no breaks in the text, but evidence again suggests it is not in Douglas’s hand. This is substantiated by one stark contrast between them: instead of “x”s besides the names, there are “o”s. Unless evidence can be procured that these northern tribes themselves had developed a habit of making their marks in this way, it is hard to imagine Douglas sanctioning this deviation from his very neat documents. It is also possible that he was not even present in Fort Rupert for these signings.⁶⁴

Other writers point out that Douglas had intimate knowledge of the land, and of the Indian families that inhabited the area in southern Vancouver Island. Certainly for those agreements, he was in the best position to explain the boundaries of the deed. As for the detail applied to the phonetic spelling of Indian names, further research needs to be done on his knowledge of the relevant languages, and of Chinook Jargon. It is possible that Douglas had benefitted from the knowledge and writings of Modeste Demers, who was the Roman Catholic bishop of Vancouver Island from 1847 on. Demers was known to have a knack for Native

⁶⁴ In Douglas’s letter to Barclay on 24 February 1851 he writes “We have concluded an arrangement with the Chiefs of the Quakeolth, for the purchase of land about Ft. Rupert . . .” (157-8), but not with the suggestion of his own presence there. Indeed, his information on events at Fort Rupert in 1851 were at least in part reported to him by Blenkinsop (Ormsby 155). In contrast, he had previously indicated a trip to Fort Rupert in February of 1850 (Ormsby 151).

languages, and wrote a dictionary of Chinook Jargon in 1838.⁶⁵ An interesting feature of Douglas's names is the practice of circumflexing double vowels, a practice not repeated by subsequent writers of Indian names. One more question remains: are there other pieces of paper from which the lists of Native names were transcribed? Or did Douglas estimate the space needed for the text of the documents, based on genre knowledge, and place the signatures according to these estimations, following up with the texts in total at a later date? He marked the pages roughly with the areas being ceded. But this would mean he would have to estimate with reasonable accuracy both the length of the text, and the number of names to be entered, perhaps sitting alone at night with an empty notebook. The patterns of spacing do indeed suggest that this is the case. In one case the clerk seems to have almost run out of room for the body of the deed, and has had to squeeze in the date. In most other cases, he seems to be stretching out the words so as to get closer to the lists of names. Again, it seems probable that Douglas did know enough about the numbers of heads of families living in the vicinity of Fort Victoria to remember them. Still, does the notebook represent a second rendition of original lists of names that have since been lost, especially given what we know about officious practices of creating multiple fair copies, and the existence of just such a copy in the case of the Saalequun? On the one hand we could keep in mind is that, as Hammond points out, Douglas was "too high in rank to have involved himself in the time-consuming tasks of bookkeeping or transcription" (122), and on the other there is the possibility that both the importance of these documents and his own

⁶⁵ Modeste Demers, *J.M.J. Chinook Dictionary, Catechism, Prayers and Hymns. Composed in 1838 & 1839 by Rt. Rev. Modeste Demers*. It should be noted that at the times of these first signings, Demers was away in Europe scaring up funds for his mission. It should also be noted that the available edition of the dictionary, "revised, corrected and completed, in 1867 by F.N. Blanchet; with modifications and additions by L.N. St. Onge," does not contain any circumflexions to vowels, so this aspect of some of the copies of the deeds would not have come from Demers' example.

knowledge of local tribes and geography so exceeded anyone else's that he played a larger role than Hammond suggests in this particular type of "bookkeeping," especially in the earlier deeds.

Given this—that at least for the 1850 deeds, the signatories' names are all carefully transcribed by Douglas—Duff gives him credit for attending so carefully to such details, which he says are of great value to historians and ethnographers (54). Perhaps this was on Douglas's mind. On these deeds especially, the marks provided beside them, as previously noted, are quite uniform, and not likely made by the chiefs and heads of families: "perhaps they did not actually take the pen in hand as their marks were made," Duff speculates (13). He also wonders if the marks were made "with the Indian just placing his hand on the pen as Douglas made his mark?" (27), a speculation also made by Adams (80). This would certainly align with images of previous treaties around the world. Penny van Toorn notes, however, that an 1886 pictorial representation of the 1832 Batman Treaty in South Australia—showing an Aboriginal and a white hand poised over a piece of paper—actually misrepresents the fact that in this instance Aborigines did not sign the treaty deed (213) nor probably even know of its existence. Batman not only fabricated marks of Aborigines, copied from their tree carvings, he also produced a fictionalized narrative of the signing in his journals. This all represents, van Toorn says, "a tale of trickery, deception, and imposture" (217). Similarly, in the case of the Kemp Deed upon which the Douglas Deeds were based, although witness accounts corroborate the idea that the signatures are authentic (details pictured below), Harry Evison's analysis leads him to speculate that "only 16 appear to be authentic signatures. The rest are in effect forgeries" (91). Nonetheless, it seems pertinent to add that the actual details of the Kemp Deed do display a useful comparison, demonstrating what a document can look like when, at least in most cases, Indigenous people made their marks on colonial documents. In comparison, a number of the Douglas Deeds, especially in the Fort Rupert case and the third deed with the Songhees, betray

marks that seem too neat to be done by the band members, with or without a guiding hand, yet too messy to be done in one sitting by a clerk. Is there a deceit going here similar to that of Batman, who seemed to have worked hard to make the signs on his treaty deeds replicas of the Aborigines' individual tree marks? Whatever the case, there can be no doubt that a myth of signing—of hands joined together over pens, of mutual close proximity and shared understandings—was important to uphold, an idea that appealed to colonial officials and to artists depicting these events. In one sense descriptions and images of hands joining over pens posit open displays of an aspect of colonial life that was not openly discussed: the coming together of brown and white in intimate encounters, especially in the face of the considerable anxiety over racial purity at that time. Despite England's efforts to reproduce itself in its colonies, notes Perry, it often instead "created a hybrid" (8) in the form of mixed race generations. She says the obsession to "amass . . . a paper empire" (33) was its way of dealing with this anxiety. Representations of this aspect of the colonial process, throughout the Americas and around the world, may also have been a way of dealing with this anxiety, a need to document and represent – to fabricate if necessary – displays of proximity and touch, of intimate encounters over text, asserting a public homosociality in the face of widespread but hidden sexual encounters between settler men and Aboriginal women. Alexander Morris's account of his involvement, as Governor of Manitoba, in a good share of the numbered treaties, often includes references to hands, handshakes, and hands over hearts, on the part of himself and the Indian chiefs with whom he had dealings.⁶⁶ According to Regis Debray, "no tradition has come about without being an invention or recirculation of expressive marks and gestures" (2). Mediology is the name he gives for the consideration of these material techniques of

⁶⁶ By my rough calculation, the words *hand* or *hands* occur approximately 1,870 times per million words in Morris's account, compared to 306 times per million words in the British National Corpus.

transmission; it is “devoted to medium and median bodies, to everything that acts as milieu or middle ground in the black box of meaning’s production” (7). Transmission, he argues, cannot take place without material artifacts which in turn contribute to the meaning produced and transmitted across time. Rituals of touch seem to often occur with transmissions of culture and meaning: the handshake, the hongis, the wafer on the tongue, the baptism, and also the guiding settler hand hovering over treaty texts around the world.

Of all the documents in my study, only the two deeds signed at Alberni Canal by William Eddy Banfield have any evidence of a wax seal, and in this case it does look like more than just one hand played a role, as is evident in Figure Six below from the wax seal. For the Indians of Alberni Canal in particular, this proximity to paper and to the arts of transcription would be amongst their first, heralding the many types of intrusions on their culture—whether through land deals, religious instruction, or, finally, to schooling in the language of the colonizer.

Intertextual documents

The “proper form” that Douglas awaited from the Colonial Office was based on the Kemp Deed, used by the New Zealand Company to buy land from the Ngai Tahu in the South Island of New Zealand in 1848 (Foster, “Saanichton” 633; Arnett 30-33). Transcribed across time (two years) and distance (a copy went to the Colonial Office in London, then it was transcribed into a letter to colonial officials on Vancouver Island), it underwent a few changes. Thus the wordings of the deeds are not completely uniform, deviating both from each other and from this document upon which they are based. In general, though, they follow the wording of the Kemp Deed, but with some notable variations, italicized in the following chart:

<p>Kemp 1848</p> <p>Know all men. We [X] who have signed our names & made our marks to this Deed on [DATE], do consent to surrender entirely & forever to [COLONIAL POWER], the whole of the lands [DESCRIPTION OF AREA]<i>the boundaries & size of the land sold are more particularly described in the Map which has been made of the same</i></p> <p>(the condition of, or understanding of this sale is this) that our <i>places of residence & plantations</i> are to [be] <i>left</i> for our own use, for the use of our Children, & to those who may follow after us, & <i>when</i> the lands shall be properly surveyed hereafter, <i>we leave to the Government the power & discretion of making us additional Reserves of land</i>, it is understood however that the land itself with these small exceptions becomes the entire property of the white people for ever.</p> <p>We receive as payment [AMOUNT] <i>to be paid to us [DETAILS OF INSTALMENTS]</i> In token whereof we have signed our names & made our marks at [PLACE] on [DATE]</p>	<p>Douglas 1850-54</p> <p>Know all men, we, [X], who have signed our names and made our marks to this deed on [DATE] do consent to surrender, entirely and forever, to [COLONIAL POWER] the whole of the lands [DESCRIPTION OF AREA].</p> <p>The condition of or understanding of this sale is this, that our <i>village sites and enclosed fields</i> are to be <i>kept</i> for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed, hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people forever; <i>it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.</i></p> <p>We have received, as payment, [AMOUNT]. In token whereof we have signed our names & made our marks at [PLACE] on [DATE]</p>
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Table 2 Comparison of Kemp and Douglas documents

The first thing to note is that the words from the Kemp Deed indicating an attached map on which the ceded areas have been drawn do not appear in the Douglas version, suggesting that Douglas did not think to map the areas in question. But this is not to say that surveying and mapping were not a concern—surveyor Joseph Pemberton arrived in the new colony in 1851 expressly to survey the town plots and farms for the HBC and the first settlers, which would have been an opportunity to do the same for the reserve lands. However, it seems that the actual reserves of southern Vancouver’s Island were secondary concerns, to be mapped out by default

from what was left over from the town plots of Pemberton's surveys. Also, there is some evidence that maps were at least eventually made of ceded lands, in that Douglas wrote to Barclay in 1852 about his agreement with the Saanich: "That purchase includes all the land north of a line extending from Mount Douglas, to the south end of the Saanich Inlet, bounded by that Inlet and the Canal de Arro, as traced on the map, and contains nearly 50 square miles or 32,000 statute acres of land" (qtd. in Lambert 86).

Secondly, the phrase "village sites and enclosed fields" replaces "places of residence & plantations" in the Kemp Deed. This could be explained in terms of more accurate reference to the habits of the respective groups, except for the fact that "village" isn't necessarily a more accurate descriptor of First Nations groups than of Ngai Tahu. People of Vancouver Island migrated seasonally and widely around their traditional territories, and often spent parts of the year gathered around colonial forts to take advantage of trade. In New Zealand, the standard habitation was the pah, or fortified village, and the terms "places of residence" or "village sites" seem equally applicable. The shift from "plantations" to "enclosed fields" has more dubious implications. For a start, "plantation" was not an apt term for Maori land use patterns, especially in the South Island where the growing of Polynesian crops was made impossible by the climate. Was "plantation" a textual remainder from some other—more tropical—Polynesian or Caribbean encounter?⁶⁷ As for the First Nations of Vancouver Island, there is some evidence they had been growing potatoes since they were introduced by the Spanish (Thrush), but no depictions I have found of this period conclusively suggest enclosed fields.⁶⁸ Is the phrase an

⁶⁷ Although it should be noted that "plantation" is not entirely restricted to meanings associated with colonial cropping, and was used during the period to describe areas of oak and pine in Scotland, for example (OED).

⁶⁸ Although there is also some suggestion from a 1877 account that elsewhere, in the Puget Sound region, "Enclosures for garden patches were sometimes made by banking up around them with refuse thrown out in clearing the ground, which, after a long while, came to resemble a low wall" (Gibbs, in Suttles 144). James Douglas

admonition to do things in the way of the colonists, and/or a capitalisation on the fact that their compliance would be unlikely? In any case, it remains that each phrase hearkens back to contemporary conceptions of property value, which were steeped in a discourse of land improvement and agricultural production (Weaver, “Concepts”). Most importantly in terms of intertextuality, the phrase is also one that Douglas had used before in his correspondence. In fact, Douglas and Barclay were bouncing phrases off one another, picking up on each other’s wording as they do so, and thereby mediating the text of the deed, which was finalized in the “form” sent by Barclay. The first mention I can find is in Douglas’s letter to Barclay of September 3, 1849, in which he writes: “I would strongly recommend, equally as a measure of justice, and from a regard to the future peace of the colony, that the Indians Fishere’s [sic], Village sitis [sic] and Fields, should be reserved for their benefit and fully secured to the them by law” (Ormsby 43). While this letter was en route, Barclay wrote to Douglas December 17, 1849 with the Company’s position stated thus: “The natives will be confirmed in the possession of their lands as long as they occupy and cultivate them themselves, but will not be allowed to sell or dispose them to any private person, the right to the entire soil having been granted to the Company by the Crown” (Ormsby lvi) . Then, on May 16, 1850, Douglas acknowledges the letter and reports back that he had “summoned to a conference” the chiefs to arrange the purchase of their lands “with the exception of their village sites and fields” in his letter to Barclay, May 16, 1850 (Ormsby 95). It is Barclay that adds “enclosed” in his reply, which remains as the final phrase in the text of the conveyance. This shows how Douglas and Barclay both usurp and reaccentuate each other’s phrases, until a particular wording becomes

does tell of finding Songees growing potatoes when he was scouting out the site for Fort Victoria in 1842 (Suttles 140), but there is no description of the actual fields. Nancy Turner, in *The Earth’s Blanket*, draws from early accounts to describe the open fields of the area, where Coast Salish carried out burning to facilitate the growth of traditional roots (99-100; 147).

concretized in these conveyances, wordings that for all intents and purposes have “forgotten” their origins. I am less interested here in the semantic shifts—as mentioned, neither phrase is particularly accurate in its conception of patterns of land use of either First Nations or Ngai Tahu—than in the way it highlights how legal texts can be mediated through intertextuality.

Thirdly, “Left for our own use” changes to “kept for our own use” in the Douglas document. At this point we can only speculate as to whether this was purposeful or not, or whether or not the change happened in London, out of earshot of Douglas. It could very easily have been a slip of the pen, insignificant, and not worthy of comment, or insignificant because of the overarching and mammoth injustice of the documents’ imposition of Western legal systems on unsuspecting indigenous groups. But assessed for its connotations and assumptions of original ownership suggested by the different terms, we could start by noting the phrase adopts an agent-less passive construction, already creating ambiguity: left or kept by whom? A case could be made for the assumption of Indigenous title in the second (BC) context (“we [FN] will keep part of the land we originally owned”), but not in the first (“we [colonial government] will leave you a piece of land we own by right of treaty, conquest, or discovery”). Another case could be made that “kept” echoes the fiduciary responsibility of the crown towards First Nations, and that the underlying title to the land remained with the Crown.

We could also try to account for the discrepancy by assessing authorial intentions. We have two colonial framers accommodating the various pressures around them. Given the legal standing of the document, we might deduce that they are attending quite closely to their respective wordings. In this case, the term “left” survived to Barclay’s reply to Douglas, so it seems to have entered the deed by way of Douglas or a clerk. There is a copy of the “proper form” in the archives, seemingly in Douglas’s hand, in which the term “kept” has replaced “left.” Importantly, what we see here in the chain of citation is another example of how a text

can “forget” its origins; as long as it is not reminded of its predecessors, the surviving terms will be taken to be the whole case. But to recover these terms as above shows “the great rarity of exact repetition,”⁶⁹ even when the forces of boilerplate are at work.

The fourth change in the wording to consider is that the words from the Kemp Deed “we leave to the Government the discretion of making us additional Reserves of land” has been omitted from the Douglas deeds, suggesting that Douglas knew at once that this was not going to ever be a consideration, and he didn’t want to suggest that “additional reserves” would ever be entertained. Although he is said to have believed in generous “ample” reserves (Harris 146), this might have come with a caveat in areas in high demand, as were the lands of southern Vancouver Island, where Douglas himself had a large property, and many other HBC employees and their families were purchasing land.

Lastly, the addition of the hunting and fishing clause to the Douglas conveyances can also be traced back to Douglas’s mention of “Fishere’s” in his 1849 letter to Barclay above. Douglas probably understood that Vancouver Island Indians needed such assurances, though it can be said that South Island Maori did too, and historical records suggest that these promises to be able to carry on traditional food gathering practices were also made there. In the New Zealand context these promises were oral, and although they were still considered legally binding (as are oral promises everywhere) the tendency historically is to add clauses to written treaties to cover every possible contingency, creating an ongoing development in this formal characteristic of the genre.

The Banfield deeds deviate significantly from the norm established at Fort Victoria in numerous ways, not just the adding of a wax seal mentioned above. The wording is not the same

⁶⁹ Giltrow, personal communication.

as that used by Douglas, but rather shifts into the first person of the colonist. It is written in a similar register, with “boilerplate” phrases such as “Know all men by these presents” but Banfield then adds what appear to be some improvisations of his own: on the 1859 deed is written that “these chiefs have acknowledged by affixing their marks and seals here under and which this is the title deed each of the aforesaid chiefs holding a copy.” There is no record of Douglas making this stipulation for the benefit of the tribes of Southern Vancouver Island, although as noted above, a copy of one list of signatories is extant. No records suggest that copies were maintained by Indian groups, although it is worth noting that this was a standard practice in New Zealand at the time. The second Banfield Deed also has the promise that the Indians are “assenting solemnly that they are the present owners and that none others have a right to sell said ground and that they have done it willingly without fear or intimid[ation] they likewise solemnly guarantee to me that not any annoyance shall be given by any of their people on there [sic] affirmation I have purchased this ground.” This suggests an increased urgency for law and order in an area known for violent encounters between traders, sailors and Indians on the one hand, and some suspicion of underhandedness on the part of whites, belying the bucolic picture given by Douglas in his letters back and forth to the Colonial Office—or, for that matter in *Scenes and Studies of Savage Life* by Malcolm Sproat, who was not long after this a resident of the Alberni region. It also demonstrates the willingness of colonists to improvise with the genre according to local contingencies. Not that these admonishments were adhered to or even understood by Indian signatories (Banfield died within two years of making this deed, under suspicious circumstances related to general conflict with Indians [see Gough 113-114]) but the sweeping terms and speedily written text of the deed contrasts with Douglas’s and shows an instability in the genre at the same time as suggesting an urgency to create a legal record of dealings on the frontier.

Chains of citation

The papal bulls were the first documents to deal with the issue of Indigenous rights in the Americas and, as noted by Martinez above, they are legitimate precursors for colonial treaties there. Records kept as the new trade territories of Spain and Portugal were negotiated, through the mediation of the Catholic Church, are where we find the first instances of talk about the Indigenous people of the Americas, mostly in terms of the role of the European powers in facilitating their conversion to Christianity. Although it is worth noting that this framework of conversion and conquest is characteristic of the whole colonial period in the Americas, clauses to do with indigenous inhabitants were not a consistent feature of this genre: there were papal bills drawn up after these first mentions that ignored the issue, suggesting some slippage within the stated intentions of the genre between their role as a strategy for allocating land, trading routes and trading partners versus a way to respect and acknowledge the rights of Indigenous peoples. The issue of what to do about indigenous inhabitants entered, then, as a sort of static interference in a genre devoted to carving up the new world for the resource-hungry Iberian Peninsula. This is a reflection of how economic and religious motives merged efficiently to see indigenous people as irreligious and not *quite* human, and the new land as underutilized or waste and therefore not *quite* their property.

One linguistic routine that has stood the test of time and has its origins in the Papal Bulls is “by these presents,” whose original meaning is “by the writing itself.”⁷⁰ This rather obscurely phrased linguistic routine that is a feature of legal boilerplates has its variations, in that many

⁷⁰ OED: “**b.** Chiefly *Law*. The present document or writing, or its contents; these words or statements. Chiefly in *these presents*.”

examples (including in present-day boilerplate language) include the dropping of the “s” suggesting that users and writers in these legal genres are taking it to mean “by these [people] present,” in other words as either a reference to witnesses (“by these men present”⁷¹). “Know all men by these presents” appears to be how Banfield actually starts his documents (See Figure Six), although it is hard to know if he knew what it meant even if he had heard it. There was a tradition—often talked about in journals—of giving presents, part of a tradition of the potlatch that carried over into the treaty genre of colonial times. Indeed, in lists of colonial accounting the word “presents” often heralds lists of items given to First Nations. Could Banfield, unschooled in the legal practices of his day but perhaps familiar with the sounds of its linguistic routines, be referring to the blankets he was giving to the chiefs of the tribes, having the understanding that taking the blankets entailed agreement? Given these slippages and potential alternate meanings, this particular linguistic routine of colonial deeds deserves further study.

As for Banfield’s ideas about Aboriginal title, again we can only speculate. Later commentators argue, as does Trutch, that Douglas’s documents were not an acknowledgment of any native title, but rather were merely a means to placate hostile Indians. This could be a likely description of Banfield’s pragmatism. In his correspondence to Douglas, HBC secretary Archibald Barclay declared 1846—with the signing of the Oregon Treaty with the US—as the point at which Vancouver Island came under the sovereignty of the crown, and it is according to the patterns of native settlement at that time that Douglas was to delegate reserves. Barclay, for example, instructs Douglas to confirm the Indians “in the possession of their lands” which he

⁷¹ I found two instances of this phrase: Laura Kalpakian describes a document 1898 in St Elmo California, which opens “Know ye by these men present that we, the undersigned, do set our signatures below, and hereby sweareth and deposeseth to the truth of this testimony taken in the city of St. Elmo, County of St. Elmo, State of California on this 30th day of August, 1898” (51); and, for a more recent example, see *Pettee v. Young*, Maine Supreme Judicial Court decision report [2001 ME 156].

states applies to “lands only as they are occupied by cultivation or had houses on them”; all other lands are “to be regarded a waste, and applicable to the purposes of colonization” (qtd. in Lambert 83). Douglas replied that “I thought it advisable to purchase the whole of the Saanich country as a measure that would save much trouble and expense. I succeeded in effecting the purchase in a general convention of the Tribe” (83); in effect, he was buying the very land that Barclay said Indians couldn’t hold title to.

What is evident is that Douglas may have on some level been exploiting ambiguities, especially since he was literally confronted with certain realities and expectations on the ground. But these expectations may have been differently construed. As discussed in the previous chapter, oral accounts from the Saanich suggest that the whole process was about giving gifts to keep the peace. Also evident in Douglas’s replies to Barclay, after a busy few days coming to an arrangement with eight tribal groups, is that there is no uptake of Barclay’s treaty language. Barclay is explicitly talking about treaties: he capitalizes the key terms when referring to “the Signing the Treaty”; he then further solidifies the term by using the phrase “treating with the natives” (83). The use of a definite article “the” suggests established or taken-for-granted knowledge, but Douglas, on the other hand, does not pick up at all on this language, and refers to “purchases,” “disposing of lands,” the “selling” of land, and then asked that the text for “the contract or Deed of conveyance” be sent out as soon as possible. Adams also points out that “Douglas himself never used the term ‘treaty’ in connection with the agreements, but referred to them as ‘purchases’ or ‘deeds of conveyance’” (79-80). Indeed, Douglas seems very reluctant to repeat Barclay’s treaty language, which is here striking for its lack of intertextuality, and again reflects Douglas’s seeming insistence on acknowledging aboriginal title to what Barclay described as “waste” lands, treating them instead as lands that must be purchased.

The archive as rhetorical constraint

The textual traces of the colonial enterprise have come to present-day readers by way of the efforts of scribes, translators, transcribers, publishers, and, ultimately, archivists; disciplined scholars are all aware of how the nature of those processes and that archive builds and shapes the knowledges made about the past. For example we are aware of how the materiality of the archive itself already serves as a severe constraint, as we read between the lines and in the margins for the quotidian, the mundane, and the presupposed and potentially ideological underpinnings of things written. And it is not just the quotidian that eludes us, but also the multiple viewpoints on many red-letter events in a society's past, which were for the most part only writable in terms of white male victories, losses, border changes, agreements and disagreements, progeny, and deaths.

In his look at history as a discipline that seeks the rational emergence, flow and decline of epochs and eras, the document for Foucault signals discontinuity. It is "no longer the negative of the historical reading ... but the positive element that determines its object and validates its analysis" (9). This chapter has aimed to resist overflowing the importance of the document, describing instead a series of discursive events which takes Foucault's observations into account, looking at the material repetitions before and apart from considering their discursive, intertextual and citational implications. Foucault would ask not by what set of rules these particular documents, sentences, or wordings have come about, but rather "how is it that one particular statement appeared rather than another?" (27). This is a twist for genre theory, is it not? Because of its focus on genres as fitting responses to recurring situations, genre theory seems to look at the production of discourse as somehow the inevitable consequence of actors in socio-political contexts. A statement for Foucault is not a consequence, but a function. It does not provide meaning, or a subject, but a relation to a field of objects, and a range of "possible

subjective positions” (108). Statements are elusive, requiring “a certain change of viewpoint and attitude to be recognized and examined” (111); the goal of analysis is to “characterize not what is given in [sentences and propositions], but the very fact that they are given, and the way in which they are given” (111), in other words to characterize what it is that makes certain statements possible.

Unlike discourse analysis, in which either a plethora of elements in discourse point to a single overarching significance, or a single signifier is seen in terms of a plethora of signified, the analysis of statements and discursive formations has as a starting point the assumption of rarity: How is it that a statement, in a particular configuration with other statements, survives amongst all the possibilities? This is not to say we are looking for what is repressed, says Foucault; we are looking to characterize the “special space [the statement] occupies” (119). “At a given period, there are, in total, relatively few things that are said” (119), and this rarity suggests value rather than meaning. Discourse, then, is not “a treasure” for endless exegesis; and statements do not occur in abundance, but are rather each an “asset,” which, says Foucault, “poses the question of power ... [and] political struggle” (120). In the textual mediations and exchanges recounted above are evident the micro-politics of a colonial discursive formation, understood here as an observable regularity in the dispersion of objects, statements, concepts, themes, and genres rather than something that links or conjoins them.

Genre theory tells us genres lie somewhere in the tension between repetition and variation, and my intention here is to add to this space that is beginning to be both theorised in the abstract and scrutinised at the local and linguistic level. Anne Freedman, for example, operationalizes Austin’s theory of “uptake” to describe how a text “selects, defines, or represents its object” (48), a useful concept to theorize the space between one instance of a legal genre and the next in a chain of citation. It is in this space where sameness meets its challenge

from difference; while “boilerplate” in legal texts presupposes meanings from sameness and imitation, iterability is its disavowal, necessitating this difference.⁷² Giltrow faces head on the problem of form (sameness) that she shows has “haunted” genre studies since the mid-twentieth century, positing genre as “the place where function differentiates form” (“Genre as Difference”). Returning to Bakhtin to clarify that genre is not the centripetal force⁷³ constraining toward a norm, a form, or a unitary language, she shows, rather, how it is founded upon the ways that a more locally described situation “pushes” centrifugally toward something new. Genre, then, is the result of this impulse toward difference, motivated by situation, not the impulse toward sameness or form. Genre is “the site of differences.”

Tracing phrases in these few links of a chain of citation that began with first contact between the indigenous people of North America and Europeans, and reaches into twenty-first-century treaty negotiations between First Nations and the governments of British Columbia and Canada, was inspired by asking about the significance of the difference between potentially mundane slips of the memory, or of the pen, and the purposeful substitutions of one word or phrase for another. On one level the answer is nothing, especially when genres, as they often do, “forget” some of their origins. Focusing on these material matters both highlights and undercuts expectations for the roles we assign to text as encoders of stable meanings, and how technologies of transmission, including copying, transcribing, typesetting, and digital texts, have historically entrenched and are presently entrenching this expectation. But through looking closely at these linguistic uptakes as resulting from potential anxieties and uncertainties in the

⁷² Interestingly, neither of these terms term can escape their industrial connotations—textual “chains” of citation, and “boilerplates”—suggesting how printing technologies and print culture inhabited and inhibited the collective consciousness of law, both then as it does now.

⁷³ Carolyn R. Miller, for example, describes genre as one of the “centripetal forces that are rhetorically available to keep a virtual community from flying apart (or dissipating)” (“Rhetorical” 74).

documentation of Aboriginal-settler relations we see how the compulsion to document suggested by Perry is also a compulsion towards difference, evident in the various textual mediations and mutations within these legal linguistic routines. Thus we see how difference is, as stated by Giltrow, constitutional of the very idea of genre. Once we acknowledge this “stability in instability,” and its concurrent impossibility of exact textual repetition—especially as it relates to treaty making in colonial and postcolonial contexts—we can begin the process of not just learning to live without it, but embracing the alternative.

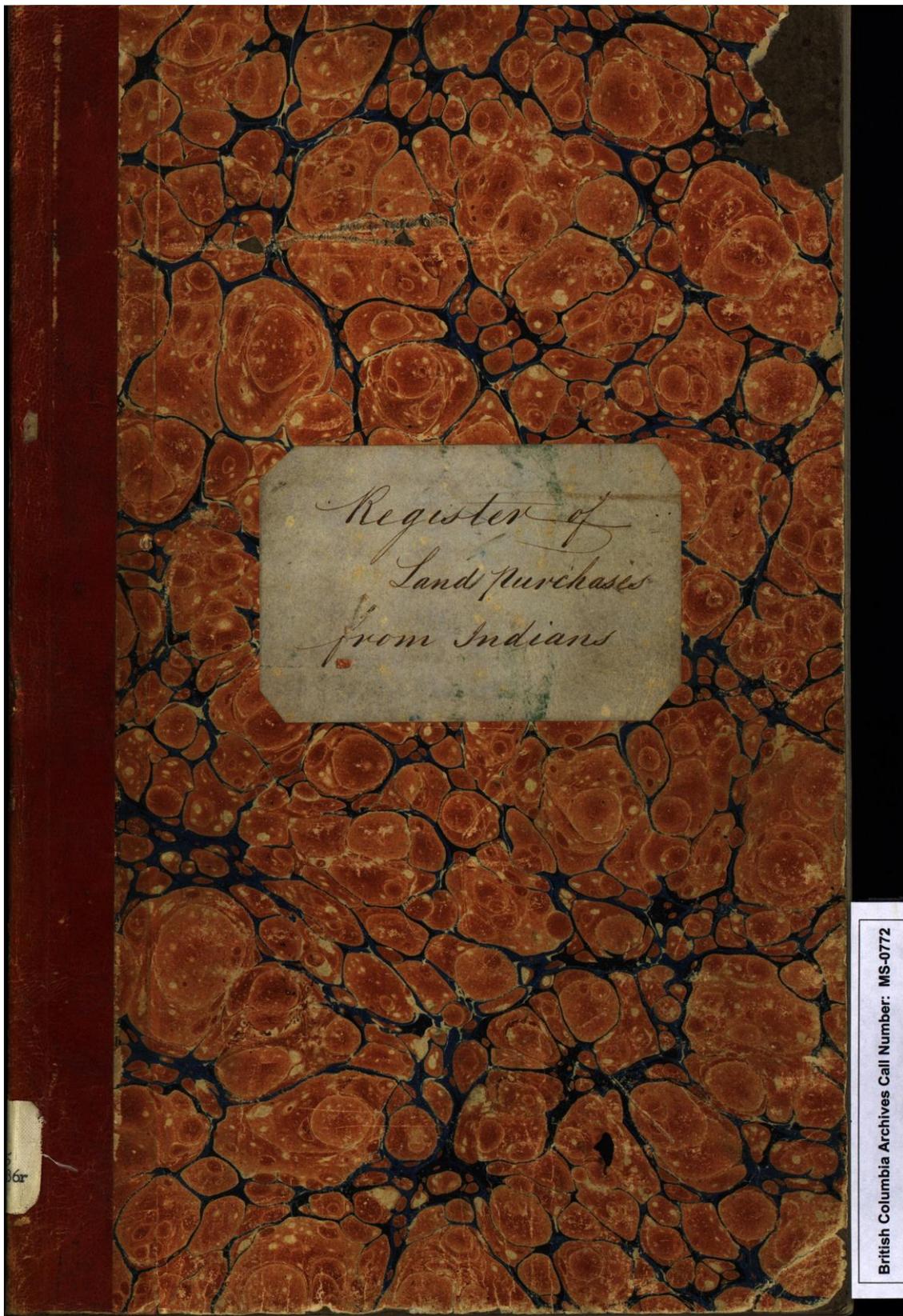


Figure 3 Cover of the register

whereof we have signed our names
and made our marks at Fort Victoria
on the Thirtieth day of April One thousand
Eight Hundred and fifty

- | | | | | |
|----|--------------------------|---|------------------------------------|---|
| 1 | Shiaw nuck | X | head | |
| 2 | Tewhämcea | X | do | Done before us at |
| 3 | Kuskaynum | X | 1 | Fort Victoria this 30 th day |
| 4 | Sees | X | 2 | of April 1850 |
| 5 | Kam | X | 3 | |
| 6 | Squoluttlesut | X | 4 | Alfred Robson Benson |
| 7 | Quoth layuc | X | head | W. R. C. L. |
| 8 | Kakey pääk | X | | Joseph William McKay |
| 9 | Syc-ääs | X | | |
| 10 | La whicht tün | X | 5 | |
| 11 | Womayets | X | dead | |
| 12 | Cutsöös | X | 6 | |
| 13 | Chätuck | X | head | |
| 14 | Kacungus | X | by ^{dead} his son Chätuck | |
| 15 | Munstun | X | head | |
| 16 | Quortay nachun | X | dead | |
| 17 | Whosay mowitch | X | | |
| 18 | Mistay niltä | X | 7 | |
| 19 | Oksaymut | X | dead | |
| 20 | La Tacet ton | X | 8 | |
| 21 | Wayana | X | 9 | |
| 22 | Kolacksin | X | dead | |
| 23 | Silawitschen | X | dead | |
| 24 | Thuch lay haluc | X | 10 | |
| 25 | Ka-qualuck | X | 11 | |
| 26 | Whitoko | X | dead | |
| 27 | Kal-hollum | X | head | |
| 28 | Tä-such-ten | X | son ¹² of Kam- | |
| 29 | Sang th niltä | X | head | |
| 30 | Whisey-ook | X | 13 | |

British Columbia Archives Call Number: MS-0772

Figure 4 Detail of signatures from Songhees deed

Purchase of land from the Tribe of Swengwhung
extending from the Lead Islands in the arm of
Cannacoon, where the Nassupson lands terminate
extending east to the Fountain ridge, which their line
follows, to its termination on the sea coast on
the Sandy Bay on the east side of Clouin Point

Nelwin Penuska
Smith of Kelowna -

3

Know all Men, We the Chiefs and People
of the Family of "Swengwhung" who have
signed our names and made our marks to
this Deed on the Thirtieth day of April
one thousand, eight hundred and Fifty
do consent to surrender Entirely and
for ever to James Douglas the
Agent of the Hudson's Bay Company
in Vancouver's Island that is to say,
for the Governor Deputy Governor
and Committee of the same the
whole of the lands situate and
containing

Figure 5 Detail from Songhees deed

Chief Barclay Sound
July 6th 1859

Know all men by these
present, that I William Edw. Banfield
Governor Agent for the Western Shore
of Vancouver Island know this day
of our said one thousand eight hundred
and fifty nine Bought of
Olesken the Chief of Chief and Howesem
the next in rank of the same tribe that
I know among the tribe by the
name of Ometteey, all and every
part of it for the sum and consideration
of two Blankets and two shirts
its water privileges and timber
to be mine forever my heirs or assigns
for the aforesaid sum of two Blankets
and two shirts which these chiefs
have acknowledged by affixing their
marks and seals here under and
which this is the title deed each
of aforesaid Chief holding a copy

(Witness Howesem son)

Olesken's mark
and seal X

Howesem's mark
and seal X



Figure 6 Banfield's Barclay Sound deed

Chapter Three **Aboriginal Oral Testimony as Contact Genre: Finding “Equal Footing”**

The interconnections between human beings and other life forms is only the beginning of the different ways in which the Gitksan and Wet’suwet’en see the world from those of us who are brought up in the Western tradition. The distinction we as lawyers make between constitutional, criminal, and commercial law are part of a large array of distinctions such as those between law and morality, politics and economics, science and religion. Of particular importance to us are such fundamental distinctions between the secular and the sacred, the spiritual and the material, the natural and the supernatural. Many of the distinctions which we make in order to make sense of the world are absent in the Indian world-view. It is not difficult to see, therefore, and indeed it is inevitable, that if we apply our distinctions without discrimination and caution to what Indian people say, we will make nonsense out of their evidence.

Understanding the implications of cultural difference in the courtroom has been the focus of much research around the world. Some of this research has been put to use, turning academic knowledge, for example, into workshops for judges (See Razack 898-9; Walsh 243); other studies focus on particular legal contexts such as when indigenous people are defendants or plaintiffs in criminal cases (Razack); still others assess its consequences for land claims cases in Canadian courts (Mills, Walsh, Napoleon), an awareness of which ends up in opening remarks such as those above extracted from the Delgamuukw trial. While much can be learned and perhaps generalized from these studies, scholars are increasingly recognizing the pitfalls of acknowledging cultural difference by making broad essentialist claims about indigenous groups. These studies point to the need for paying more attention to context, in other words the need for specific studies that tease out the subtleties of intercultural communication within a variety of

case types, and through a variety of methodological lenses. Sherene Razack, for example, brings to our awareness the “dilemmas and contradictions” (895) of using the culture defense in cases of sexual assault in aboriginal communities, cases in which aboriginal men can tend to get lighter sentences on the basis of the court’s awareness and sensitivity to the long term effects of residential school survival, cultural loss and alcoholism, which can and does leave women vulnerable in their own communities: “Culture talk is clearly a double-edged sword,” she writes (896).⁷⁴

Distinctions made in courtrooms and elsewhere—about cultural differences in worldview, in gender norms, and in communication styles—are also often related to language differences, discussions that we can trace back to Sapir/Whorf (Fee). Of interest to me in this chapter is how assumptions about the relationship between language and meaning⁷⁵ and between language and culture, and assumptions about how languages differ, are invoked in order to promote positions in legal and political contexts. These assumptions have their parallel in another broad distinction made between oral and literate traditions, and of the negative consequences to primarily oral cultures that historical legal and political processes have been so heavily textually mediated. A particularly interesting and oft-repeated claim is that indigenous languages in colonized countries are intrinsically different by being more “verb centered” in

⁷⁴ Razack identifies two operational “scripts”: the first—that women who are victims of rape are “fallen angels”—intersects with the second—that “colonization has had a devastating effect on aboriginal men” (899)—creating what she calls a “culturalization of sexism” in which the dominant overall script is one of dysfunction rather than oppression (900).

⁷⁵ Recall chapter one where I discuss Hamar Foster’s attention to the meaning of the term “fisheries,” as protected by the Douglas Treaty in the Saanichton Marina case. The Tsawout had an interest in it referring to a “geographically defined” area as well as a practice, whereas the marina saw it to mean merely an activity. Principles of treaty interpretation as outlined in the Canadian constitution come to the fore, here, in that the ambiguity was resolved in favour of First Nations. What is interesting is how actors in legal contexts do not see their own assumptions at work—in other words they do not see how their philosophy of interpretation (plain universal meaning versus contextual and contingent meaning) is less salient than the political context in which these philosophies are brought to bear.

contrast to the English language's domination by nouns. This feature has been linked to the immediate, additive and process-oriented nature of primary orality versus the static, subordinating and product-oriented nature of a more literate tradition (Ong 36-57). Some have argued that to see indigenous languages and cultures as foundationally different—for example as process-oriented and verb centred—is an essentializing and reductive move. Others *promote* such a view to bolster Aboriginal perspectives on treaty making and self-government. Below I will outline accounts of these and other ideas about difference. My purpose is not to solve this dilemma by assessing each account for its accuracy, but rather to note the ways in which different and sometimes competing views are marshalled to support particular claims in both historical and current contexts. My survey of the literature is made in preparation for a focus on one site where cultural issues are confirmed as relevant in meaning making; that is when the genres of aboriginal oral tradition and history come up against or alongside or into the genres of Canadian justice. Specifically, I analyze court transcripts of testimony by elders in the precedent-creating case of *Delgamuukw v. BC*. Other studies have illustrated in some detail the cross-cultural misunderstandings in this trial (Mills, Napoleon). I further this work by asking, can we tease out the details of culturally prescribed ways of knowing confronting the norms of Western law by first acknowledging what can be thought of as “normal” patterns of interaction in the courtroom? Once these patterns are identified and characterised, I am able to offer a rhetorical understanding of aboriginal oral testimony, which is to see it as a contact genre.

“Culture talk”

The dilemma is one of recognizing, ignoring, or overplaying issues of cultural difference. It is a tension between the recognition of larger typifiable cultural factors for the

purpose of legal and policy issues (for example for administering the Indian Act, or cultural awareness programs for government agencies) and the essentialism that stems from ignorance of the ways in which each person in each context is different. Also a problem, as Razack's research shows, is how "culture talk" can elide race and gender issues. (One goal of chapter two was to address the issue of gender in the historical and present-day life of the treaty genre.) David Kahane would agree; he similarly describes Canadian debates about difference as a tension between the risks of essentialism and the necessity of identity politics in the battle for recognition. What is needed, he claims, is an understanding of cultural difference that maintains a connection to local conditions, thereby avoiding the essentializing "one-size-fits-all accounts," at the same time as recognizing that "defining just procedures . . . requires a cogent account of cultural difference" (28).⁷⁶ He concedes that multiple and complex community memberships potentially render such an enterprise risky, but so is it necessary. In other words, assertions of cultural difference may risk useless and abstract stereotyping, but are also necessary to develop a model of culture in dispute resolution because of an "even greater risk: that of reiterating the understandings of dominant cultural groups" (29). Kahane also notes the complex nature of our identifications within and between cultural groups and social practices, language use, family groupings—all aspects of our cultural horizons that defy attempts to "view societies as neatly parcelled different, homogenous cultural units" (35). Dealing with this requires a setting aside of "generic multiculturalism," which has trivialized cultural difference—as we see in much popular and educational discourse—in such a way as to claim egalitarianism and equal footing without

⁷⁶ Like the other chapters in this collection, Kahane brings two research traditions together, a socio-political critique of culture, and Alternative Dispute Resolution (ADR). ADR grew up in the 1970s as an alternative to confrontational legal procedures, and posits strategies—reflected in books such as Patton's 1981 *Getting to Yes*—such as problem solving, mediation, negotiation, conciliation, and arbitration. Kahane points out how it has since been critiqued on the basis of a deep-rooted adherence to the norms and values of the dominant group.

real consequence in changing the status quo (36). In some popular and even academic accounts it is as if an acknowledgment of cultural difference automatically asserts equality, as if somehow the power imbalance is magically dealt with.

In the context of the treaty genre and this thesis, linguistic differences are also a necessary consideration, and here things get more complicated. Before Benjamin Whorf came along in the mid-twentieth century, the doxa about the relationship between thought and language was, as Margery Fee puts it, that thinking “does not depend on grammar but on the laws of logic and reason which are supposed to be the same for all observers of the universe” (208). Whorf, however, demonstrated that a language does significantly shape (and is shaped by) a group’s thinking and worldview, thus solidifying the link between language structures and culture. Gentner and Goldin-Meadow describe the Whorfian hypothesis as making the following related claims:

1. languages vary in their semantic partitioning of the world;
2. the structure of one’s language influences the manner in which one perceives and understands the world;
3. therefore, speakers of different languages perceive the world differently. (4)

These premises have come under attack—for example in Chomsky’s view of universal grammar through to Steven Pinker’s idea that people all think in an abstract and universal “mentalese”—but by the late twentieth century enough research had accumulated to show that in some ways the structure of one’s language plays a role in how one sees the world (which in itself is close to a rhetorical view). And now cognitive linguists acknowledge, as does Slobin, that “[i]t is unlikely that people experience events in their lives differently because of the language they speak. But events quickly become part of the personal narrative, and then

language can begin to shape those memories” (176), Kenneth Burke had already argued that much of what we know and learn “are in effect but so many terminologies” (*On Symbols* 58).

Sometimes, it seems, talk about how cultural difference is sedimented in language is so pervasive that it becomes harder to distinguish between commonplaces and scholarly accounts. Two examples can briefly illustrate this point: Robyn Davidson writes in her book *Tracks*, a travel narrative about her time in Australia, that “[in] Pitjantara and, I suspect, all other Aboriginal languages, there is no word for ‘exist’. Everything in the universe is in constant interaction with everything else. You cannot say, this is a rock. You can only say, there sits, leans, stands, falls over, lies down, a rock.” (191). And from R. Leavitt’s more scholarly account we read about the Maliseet languages: “The moon is also named by a Maliseet⁷⁷ verb—*nipawset*, ‘walks at night.’ A multitude of other English nouns are expressed as verbs in Maliseet, including weather conditions, tides, land forms, and time” (131). One can see how such views of aboriginal languages as more “verb-centred” could mirror and support aboriginal perspectives that posit their understanding of “treaty” as a verb, as an ongoing process whereby relationships of trust and reciprocity are maintained and renewed, a process of continually “brightening the covenant chain,” and also a process based on trust which settler governments have in numerous ways since breached.

But even without such understandings of Aboriginal languages, I want to contend, it doesn’t take much to argue that treaties were ambiguous and complicit with colonial agendas to begin with. A non-cultural view would see any treaty as an agreement between two sovereign powers who, therefore, have equal rights in its ongoing interpretation—a “joint words-rights

⁷⁷ Passamaquoddy-Maliseet is an Algonquian language spoken in eastern US and Canada

determination process” (Dawson 66)—and who also have equal powers to settle disputes (by either force or arbitration). In the case of early treaty making in Canada these equal powers did not exist (which is not to say that Aboriginal groups did not ever succeed in their strategies of resistance). As Sidney Haring argues, even had agreements been honoured, even when they were honoured, most were simply unfair, certainly in light of contract law: “Treaty negotiations, like contract negotiations, require an equality that did not exist under these political and economic conditions” (29). One does not need a cross-cultural perspective on language to make this claim; racism and colonial domination will suffice. And treaties per se can be understood by *all* parties as both written in law—final, textual, and fixed—and as constituting an ongoing process embedded in an extra-textual relationship.

My point is that charges of unfairness (or promises of trust) can be made without many of the assertions made (often on shaky ground anyway) about culture and language, yet legal and political actors often do make these assertions (e.g. of seeing “treaty” as more verb than noun above), just as they asserted theories of language and meaning, and subsequent rules of interpretation (e.g. “the Golden Rule” discussed in chapter one) in the service of Aboriginal claims to rights and title. More pertinent here, they invoke narratives of linguistic and cultural difference to support their claims about Aboriginal understandings. I point out these moments to show how claims about language, about languages and cultures of the Other, are invoked to serve *situations*, and as such become reifications within larger projects (travel narrative, educational reform, indigenous rights). “Cultural difference” it seems, is more a theme of liberalism and humanitarianism than a scholarly theory: it doesn’t explain anything because it is not designed to explain anything. “Culture talk” about language in contexts of settler indigenous-relations seems unavoidably ideological, adding another dimension to contact genres and their analysis.

In a related discussion, Jef Verschueren points out how most talk about cultural difference in societies that are increasingly multicultural operates within an ideology of “homogeneity,” a self-regulating societal system that in its accommodations of diversity still sees homogeneity as the norm. Its key but tacit tenets are that homogeneity is an ideal because common ground is how we will all get along, and that although diversity is tolerable because acceptance is a key means of establishing common ground, it is also a deviation to be ameliorated. Outward gestures toward tolerance and integration, therefore, contain a subtext of assimilationism: “as neither deviations from the norm of homogeneity, nor negative xenophobic or racist reactions (however ‘normal’), are desirable, some form of rehomogenisation is required” (22). In Canada we might recognise this as playing out both in the celebrations of immigrant and indigenous group identities under the umbrella of multiculturalism, and in the incorporation of post-colonial grand narratives—recognition of harms done, apologies, and restitutions—into the (homogenised) story of Canada and Canadians. Could it be that these acknowledgements of harms done are so easily absorbed into the story of Canada because the “difference” theory is so shallow, and not much more than a corollary of “diversity”?⁷⁸

The final line of reasoning pursued in contact situations that negotiate difference that I will mention here, and perhaps it is one that is more to the point, concerns the effect of literacy on culture in the broader social senses. But even here the debate risks falling into what Laura Donaldson describes as either a “triumphalist comedy” of the appropriation of literacy to fight the oppressor, or a “tragic fall” in which, through English alphabetic writing, indigenous people are sucked “into a downward spiraling vortex of power, corruption and loss” (47, drawing from James Clifford). Two points made by Walter Ong are also relevant: for primary oral cultures, he

⁷⁸ My thanks to Janet Giltrow for posing this now rhetorical question.

claims, “the integrity of the past is subordinate to the integrity of the present” and the needs of new listeners (48); and also oral cultures do not foster personal distancing or objectivity, but rather “close empathetic, communal identification with the known” (45). Such assertions of the difference orality makes could and perhaps should bolster the position of oral histories in the courts, but is this to risk succumbing to the essentialism that can come with such a view? Joe Sheridan and Longboat think yes, and they criticize Ong for “misidentify[ing] the imaginative dimensions of traditional oral cultures as mental qualities” rather than as ecologically connected ones, engaging in signification and abstraction in the processes of reading the landscape (370). Either way, discussions that valorize orality risk seeing literacy as some sort of betrayal, and this “descent” into writing and its Derridian “nostalgia for a lost presence” (Spivak, “Preface” xvi) is a topic I treat more fully in the conclusion to this thesis. Meanwhile I want to end this section by entertaining a rhetorical view rather than a cultural or linguistic anthropological one. Stanley Fish claims that legal interpretation has always been rhetorical, and to this end I will propose to bring a rhetorical view to Aboriginal oral testimony as contact genre that does not rely on essentialist notions of what it means to be an “oral culture,” nor does it, I hope, elide or ignore inequalities.

Delgamuukw v. The Queen

As Canada’s longest running Aboriginal rights court case, *Delgamuukw* resulted in a 1997 Supreme Court of Canada (SCC) ruling that said, among other things, aboriginal oral histories are to be put on “equal footing” with other types of historical evidence in Canadian courts. The initial case had generated volumes of oral history evidence, and the lawyers for the plaintiffs were well aware of the hazards involved, as is evident in the epigraph at this chapter’s

beginning in which lawyers for the plaintiffs warn that aboriginal evidence will be unintelligible in the Canadian court system without a concerted willingness to disengage some foundational Western assumptions and epistemologies. But unfortunately, though, “nonsense” was made out of the extensive Gitksan and Wet’suwet’en evidence, to the point that presiding justice McEachern concluded that these First Nations did not have “much in the way of a pre-contact social organization,” and that he could only further gather from all of the evidence assembled before him that “aboriginal life in the territory was [citing Hobbes] ‘nasty, brutish, and short’” (qtd. in Roth 147). Even since the SCC ruling that overturned the McEachern decision and determined that aboriginal oral histories are to be put on “equal footing” with other types of historical evidence, the courts still feel they lack guidance on how these testimonies are to be heard and judged. Indeed, Roness and McNeil state that the SCC’s Justice Lamer’s decision doesn’t take the courts far enough: even though his decision dictates that the courts must “come to terms with the oral histories of Aboriginal societies, which, for many Aboriginal nations, are the only record of their past” he doesn’t say just how this is supposed to happen.

Since *Delgamuukw*, scholars have variously pointed to “cross-cultural conflict” in the case itself (Mills 5) and continuing problems in the evaluation of oral testimony in subsequent cases (Napoleon). But no studies to my knowledge have engaged in systematic study of transcripts of aboriginal oral evidence utilising theories of language and communication.⁷⁹ My

⁷⁹ One contribution is worth noting: Miranda Johnson (2005, 2008) has done some important work from a communication and discourse perspective in two articles. One (2008) looks at how local indigenous histories are made “public” in different ways, depending on the existence of what she calls a “treaty archive”. In settler societies where treaties were negotiated, she argues that a more radical politics resulted because the treaty genre had created a “critical site of debate”(100). This is interesting, because although I can see the claim being salient in comparing the Australian and New Zealand cases, I think an alternate claim can also be made in Canada, where, for example, I have heard Six Nations explain their relative lack of political efficacy in comparison to BC First Nations as resulting from the fact that political relationships with settler governments have already been forged in disempowering patterns in much of Upper and Lower Canada, whereas in BC First Nations can make the claim that

starting point will be to analyze the testimony of two elder witnesses in the case by treating it as no different from any other communicative encounter, and watching for the ways meanings are negotiated in process, patterns of interaction are developed by participants over the course of the interaction and participants utilize a variety of available strategies that make up what Erving Goffman describes as “footing.” The next move I make is to see these aspects as variously enabled and constrained by genre, in this case witness testimony in courtroom discourse, already a subject of interest amongst language specialists (e.g. Cotterill). Only then will I consider what might be notably different in these encounters, specifically the testing out of new frameworks for participation in response to the traditional histories and legal genres of Gitksan and Wetsuwet’ en elders coming up against Western legal systems for the first time. Below, I present findings from this close reading of the transcribed testimonies of elders, demonstrating in more detail both the “risk and insight” that oral history evidence poses to mainstream legal structures (Borrows “Listening”). This evidence from elders’ and their interlocutors’ in-process presentations of one worldview in the face of the norms of another, will, I hope, enable a clearer picture of what constitutes cultural and other forms of difference within the project of ameliorating the problems that have been noted in the scholarship of oral histories in the courtroom, such as Val Napoleon’s concern that they will be seen as anthropological artefacts rather than as living histories.

By putting declarations of cultural difference on hold and looking closely at what actually happens as oral testimonies enter the courtroom—that is, by focusing first on the

no land was ever ceded. In the other (2005) Johnson alludes to how silences and cross-cultural misunderstandings in indigenous evidence can (necessarily) disrupt and supplement (in the Derridian sense) “multiculturalist claims to a fuller understanding of the past” (262). Like me, she is also interested in “how difference is mobilized by claimants”(263) in indigenous rights and title cases, finding ways to describe them “without closing them down into progressive and/or predictive narratives” (263).

negotiations of conversational common ground in general and in courtroom genres *before* admitting a cross-cultural layer of understanding—I hope to gauge some of the consequences to considerations of indigenous rights cases of the two lines of argument and analysis in cross-cultural studies introduced above: the oral – literate divide, and the relationship between language and culture. The risks are that, first, the closer we tie the link between language, thought and culture, the more we will associate language loss with the demise of culture;⁸⁰ and second, the more we see indigenous knowledges as centred on oral traditions, the more unavoidable it is, as literacy gradually supplants orality, that these knowledges are doomed to become “anthropological artefacts.” So, assertions of cultural difference might be strategic, and they may accurately account for some of the difficulties in the courts, but they risk becoming a catchall, and blinding us to the ways—to return to the problem at hand—in which “equal footing” can be achieved in courts.

Verschueren’s work on intercultural communication is again instructive: in his look at the testimony of asylum seekers in Belgium he focuses first on individual differences and interactional contingencies (such as the effects of the presence of translators), and not on generalisations about groups. He criticizes intercultural research for presupposing that “the phenomenon viewed [is] something ‘special,’ really different from other forms of communicative interaction, and not following the same general rules” (23). He argues for a linguistic-pragmatic approach based on “three basic notions....: *variability, negotiability, and*

⁸⁰ I see this happening on two fronts: First is the loss of culture through assimilation into the dominant linguistic and cultural group; second is the more profound loss of culture—and indeed of life itself—associated with loss of aboriginal languages in First Nations communities in Canada as documented in the statistical analyses of Hallet, Chandler and Lalonde, who ascertain a significant link between language loss and suicide rates, even when other factors to do with the health of a community (land claims; self government; education; health care; cultural facilities; and police and fire services) are factored in.

adaptability” (italics in original, 23). In other words, we need to keep in mind that encounters between people are varied, and that patterns are negotiated and adapted in process and in response to the particularities (personalities, genres) of context in ways not always necessarily attributable to cultural difference.

Given “equal footing” of aboriginal historical evidence and testimony is the stated goal in Canadian courts, it is important to understand the sources of barriers to communication in more detail. Top down rulings from the Supreme Court of Canada can bring the courts part way to that goal, but a linguistic pragmatic focus on actual practice should show where and how equal footing is or is not already occurring, from the bottom up as it were. I propose that close readings of actual testimony show the ways in which equal footing is at least being negotiated already. I hope that an analysis of actual court practice may be instructive. Practice in this case is the unofficial precedent in both legal and First Nations communities.

Methodological concerns

It is a happy circumstance that the phrase “equal footing” from Justice Lamer’s Supreme Court decision on the Delgamuukw case has its echo in communication theory in the foundational work of Erving Goffman. Goffman introduces the idea of footing because he thinks the terms *speaker* and *hearer* can limit our sense of the multitude of roles available to participants in conversation; within these broader roles, he notes, participants can shift footing, in other words they can embed different kinds of participation within one turn at talk, or they can continue the same footing over several turns of talk. Speakers can speak in their own capacity by being an “addressing self,” or they can animate the words of others, or again they can perform as a sort of character within their own discourse through their use of first person

pronoun. In everyday speech, each of these modes determines a certain role for the listener.

Below, I observe such shifts in footing in witness testimony, and ask questions about subsequent shifts in listener role.

The inclusion of narrative in courtroom testimony adds a whole other layer to the discussion, and one relevant to the inclusion of oral histories and traditions in the court. As a particular type of footing, narrative in everyday discourse puts listeners in an “undetermined” role, unlike those roles created for listeners in other types of interaction. Goffman thinks it is the most “democratising” form of talk for this reason (151), and he uses the example of a documentary about the British royal family to illustrate how, in telling stories or personal experiences, “royal personages could not but momentarily slip into the unregal stance of storyteller, allowing their hearers the momentary (relative) intimacy of story listeners” (152 n11). Below I present evidence from transcripts that suggests when oral stories and traditions enter the courtroom similar shifts in footing also occur, as listener roles are similarly disrupted and rendered less determined than normal courtroom interactions would allow.

Such questions require that I use pragmatic and conversational analytic methods along with rhetorical and genre analysis to see courtroom discourse as similar to other interactional types, and furthermore that I deemphasize divisions between literary, cultural, and linguistic approaches to understanding meaning. In the courtroom, for example, humour, irony and ambiguity, sometimes perhaps cross-culturally mediated and distorted, would present challenges to even the guise of straightforward, morphological translation, and, because some of the elder testimony in Delgamuukw is mediated by translators, we need to acknowledge these difficulties. Similarly, because of the special case of the sanctioned oral narrative (in the form of an exception to the hearsay rule), previous approaches on narrative in the courtroom—where

narratives are most often noted as leading to the loss of control afforded to lawyers on both sides—need to be adapted by virtue of this new legitimacy given them.

The testimony of two elders in the Delgamuukw case gives me an opportunity to test this method: that of Johnny David, a Wet'suwet'en elder, and Mary McKenzie, a Gitksan chief. Johnny David's testimony, delivered in Wet'suwet'en and translated by a translator, came to my attention in *Hang on to These Words: Johnny David's Delgamuukw Evidence*, edited and annotated by Antonia Mills. It provides an opportunity to consider the effects of translation, and also observe how speaker roles rehearsed in previous types of encounter (as between linguistic anthropologist and elder) may modify those of the courtroom. Mary McKenzie's evidence, given in English but with translators on hand, reproduced in the *Delgamuukw Transcripts* (369 volumes), displays a variety of strategies used to negotiate the contact zone of this encounter.

Although lacking the detail required by some types of conversational analysis, these transcripts supply some evidence of sentence flow being interrupted by hesitations, which can indicate where speakers change their orientation towards their topic or towards what they perceive to be their listeners' perspectives, or where they activate knowledge from their semi-active consciousness (Chafe). Assuming, as Verschueren points out, that the communicative context will be further shaped over the course of the interaction, as lawyers and judges attune to particular witnesses and to the genres of indigenous oral traditions and histories, and witnesses attune to the patterns of interaction of the court, I have sampled extracts from the beginnings and endings of Mary McKenzie's testimony, of both first examinations and cross examinations, to analyze in more detail, with both quantitative and qualitative methods.⁸¹

Johnny David's evidence was given over a period of weeks in a special courtroom set up in his living room.⁸² This commission evidence was collected before the trial proper. The transcript shows the negotiations and shifts in footing of all participants, the translator, the prosecution and defence teams, and Johnny David himself.⁸³ Mary MacKenzie's evidence consists of approximately 400 pages. To explore a different aspect of testimony, I excerpted the first and last 20 pages of her direct examination, and the first and last 20 pages of her cross examination, analysing and coding 903 question/answer pairs in total, over the total of 80 pages of transcript. In this case I was particularly interested in the rhetoric of the question/answer pair, drawing on research done in language and law. For example, conversation researchers Galatolo and Drew explore the interactional functions of expansions appended to or replacing answers to closed questions in courtrooms, illustrated here by the typical case of "Yes, but...". Many have noted that the participation framework of the courtroom is designed to leave witnesses with as little control as possible over the interaction, and if narratives are invited, then it is under the condition that the lawyer will have a pretty good idea of the content of that narrative, and there will be no surprises. Occasionally, though, witnesses assert control by trying to add an expansion when it was not invited; this, according to Galatolo and Drew, can be seen as an attempt on the part of witnesses to balance the social hierarchy.

⁸¹ A further study would usefully include the testimony of Gwaans, an elder whose direct and cross examinations take up over 1000 pages; she is fully bilingual, and her testimony would provide a unique opportunity to watch in-process translation at work.

⁸² Walsh makes the point that this scenario is a regular feature of land claims cases in Australia too, especially when claims are taking a long time to get to court, and elder knowledge is at risk of being lost in the meantime as older generations die.

⁸³ Translation is an unavoidable feature of courtroom discourses and the subject of much valuable scholarship. The Delgamuukw transcripts themselves have omitted the trail marks of translation. I was hoping to obtain a video recording of Johnny David's testimony, which would have provided an opportunity to fill in these gaps, and make possible the analysis of such features as "response cries" and "production faults" (Goffman) that might be edited out of a transcript. Unfortunately getting a copy is proving extremely difficult. I'm speculating that copies are no longer extant.

An expansion is any addition of “further substantiating information” in answers to closed questions, such as when a witness answers a yes/no question with “yes, but ...” or “No, because....”. I tabulated these in my data collection, as well as the case of answers that are extended not by narrative, but by the repetition of part or the entire question in the answer. Lastly I considered answers to open questions, which, following Galatolo and Drew, I considered as solicited expansions, and which allow witnesses to “choose the structure and the length of the answer” (662). As previously mentioned, in both open and closed questions lawyers and cross-examiners are always seeking to maintain topical control in the participation framework of courtroom testimony. Witnesses do strategise about how to exercise some control, and unsolicited expansions can be seen in this light. In many cases expansions are implicitly solicited, and in others they are not; the difference can be ascertained by the nature of the answer: Tacitly solicited expansions almost uniformly consist of uncontested evidence that is usefully brought to the court’s attention, and those that are not solicited mostly consist of elements of context that bolster a witness’s limited position when their answers might contribute to their lack of credibility or reliability. The following exchange between Peter Grant and Mary McKenzie in her direct examination demonstrates both types (solicited and unsolicited) expansions to a closed question:

Q. Do you remember Nicodemus Gyoluugyat’s family or his – I mean his wife and children?

A. I have probably only seen his wife probably a couple of times, but I know his children. I can’t remember their names, but I remember they were living in Gyoluugyat’s long house in the village of Kispiox.

The question is closed because grammatically it seeks out a short answer of yes or no. Mary's answer demonstrates a two-part short answer (no and yes) to the question tacitly understood in the form of a repetition of the words in the question, "I can't remember..." and "I remember..."; it also contains an unsolicited expansion in the form of *context* for her answer, "I've only seen his wife probably a couple of times" which, as explained above, speaks to her limited knowledge and therefore reliability, and a tacitly solicited expansion in the form of *evidence*, "they were living in Gyoluugyat's long house in the village of Kispiox," which in some sense gestures toward a repair of her unreliability, and adds evidence relevant to the issue of rights and title. A justification for categorising this expansion as evidence in this after-the-fact way is that determining the members of each particular Gitxsan house is an important component of the direct examination, and constitutes uncontested evidence, whereas unsolicited expansions in the form of context often signal uncertainty—not a good thing for lawyers, although sometimes sought out by cross-examiners who want to highlight a witness's lack of credibility based on their inability to remember clearly.

All of the bases for the coding of my data are as follows (with examples from Mary Mackenzie's testimony):

A = simple answers to closed questions:

Q. Does the Ganeda and the Lax See'l refer to the frog clan?

A. Yes. (162)

A + appositive = short answers followed by a repetition of A, sometimes in another form:

Q. Who is that?

A. My husband, Ben McKenzie. (171)

and sometimes not (the appositive is a direct repetition of the answer):

Q. She's not the same person as your mother is she?

A. No. No. (148)

R = repetition, which is the inclusion of part or all of the question in the answer:

Q. Do you know when she was born?

A. I don't know when she was born.

Q = Question:

Q. Is it near any place, any other community of geographic location?

A. Will you rephrase that sentence again so that I could --- . (186)

E = Expansion on closed question:

Q. Does every Gitxsan belong to a clan?

A. Yes. In fact we have three.

IE = Invited expansion, i.e. it follows an open question:

Q. Could you tell the court the significance of the fact that these three—these six sisters only had boys in the Gitxsan system? What was the effect of that in terms of Gyoluugyat's House and Madik's, and Gwamoon's, and Hlo'ox's?

A. The effect of that in the family was there were no female, and it's in our Houses that through the females the family increases, and with six men, although they were married and had children, but their children weren't in the Gyoluugyat's House at all. (172-3)

Lastly, I also kept note of implicit answers to closed questions. Often these were in the form of answers to the question “can you tell the court...?” as in the example above. Here, the grammatically required answer would be yes or no, but discursively the witness understands the question to be soliciting particular information, and she often went ahead and gave it, rather than simply answering “yes” (which in many contexts might seem facetious). Similarly, the answer in the following exchange

Q. Is there a word in Gitxsan for chief?

A. In Gitxsan chief is Simoogit (161)

was coded as a short answer followed by an expansion (A + E) and was also tracked as an implicit answer (IA), again acknowledging that grammatically an answer of “yes” is required (because it is explicitly solicited in the question) and pragmatically an expansion is invited, because in retrospect it counts as evidence. Witnesses are generally adept at assessing relevance, and seeing such questions as inviting more than a “yes”; this coding is a way of keeping track of implicature.

Friendly witnesses are more often invited to engage in long answers to open questions, and these can occur as narratives in uncontested testimony (S. Harris 72). In her analysis of three American trials, Sandra Harris points out that “extended witness narratives” are “very rare” (55), and when they do happen, the content is of the type that is not likely to be contested by either side. She is interested in how jurors construct from trials those “more abstract competing narratives of guilt and innocence which are the ultimate essence of criminal trials” (56). The difference in the context of trials like *Delgamuukw* is that narratives are entertained not to prove or disprove what actually happened as much as to assert or deny the significance of what happened. The pivotal issue in *Delgamuukw*, and the reason for the inclusion of oral

history and tradition, was to apply the “organised society test” in order to ascertain the existence of aboriginal title. Specifically, the Gitxsan and Wet’suwet’en needed to prove:

1. that they and their ancestors were members of an organised society;
2. that the organised society occupied the specific territory over which they asserted aboriginal title;
3. that the occupation was to the exclusion of other organised societies;
4. that the occupation was an established fact at the time England asserted sovereignty.⁸⁴

Thus narrative testimony in the form of Adaawks (Gitxsan oral traditions), Kungax (Wet’suwet’en oral tradition) or events remembered and recounted in other ways are heard as evidence (or not) of an organised society. It could certainly be argued that Eurocentric versions of what that means were at play in the decision, but for my purposes, as already mentioned, the issue in elder testimony did not seem to be the truth of what happened.

Harris’s criteria for identifying narrative are:

1. they involve a recapitulation of past events, including speech events;
2. they contain a predominance of past tense verbs which are often simple past tense;
3. events are temporally ordered, though this temporal ordering sometimes includes an elaboration of an event which is itself non-temporal;
4. at least two independent clauses are present. (58)

⁸⁴ Cited in Napoleon, 128-129. This test was replaced in the SCC decision on Delgamuukw with “an aboriginal title test that is based on occupancy and ownership” (Napoleon “Delgamuukw” 129).

Although open to a charge of Eurocentrism, for my purposes they will suffice. Perhaps, though, less significance needs to be placed on verb tense. In some of the narratives recounted by elders in English, tense was less stable; witnesses seemed to often switch between simple present, present progressive, future, and past.

Narratives of two types happen in courtroom discourse: narrative can occur over longer, uninterrupted pieces of discourse, or lawyers can seek out narrative through a sequence of propositions to be confirmed by the witness, creating what Harris calls a “fragmented narrative.” She found both types in uncontested testimony, but suggests that while unfragmented narratives do occur, they are not the norm (64). The difference can also be explained in terms of who is the knower and who is the teller. In unfragmented narrative, the teller and knower are one; otherwise—and this fits more with examiners’ needs to control testimony—the examiner is the knower, and the witness is the teller, in that the examiner posits a series of narrative events, which are confirmed by the witness. In Goffman’s terms, the latter would constitute an “instrumentally meaningful sequence” (142) whose ending is signalled by a shift in footing. Elements that signal a return to the context of utterance are termed by Harris, following Labov, as codas (59). These too can be implicitly coded. As Harris notes, the point of narratives is often left unstated but implicated, and left for the jury to garner (68).

Results: Expansion, repetition, implicature, questions, power

The following table shows the results of my coding of Mackenzie’s evidence, with answer types as percentages (rounded to nearest percentage) of the total of answers (n= 903) in each particular section (A full account of my data is included in Appendix B).

	Direct Exam start	Direct Exam end	Cross Exam start	Cross Exam end
A only	44	37	53	46
A incl A + appos.	63	38	55	49
Total A*	67	50	69	61
A+E (or E+A)	20	30	22	26
Invited Expansion	11	18	8	8
Q	2	2	2	5
TOTAL PERCENTAGE	100	100	100	100
R or part R	23.7	17	17.3	16.2
A Implicit	4.81	9	13.64	12.28

Table 3 Direct and cross examinations compared

*Total short answers with no expansions, thus they were either on their own, with an appositive, or with some repetition of wording from the question; this includes implicit short answers (as when repeating the words of the question is understood as the short answer).

Expansion

As can be seen from the table, short simple answers (Total A) were more a feature of the beginnings of testimony (67% and 69% of total answers) than the ends (50% and 61 % of total answers). This suggests that both examiner and cross examiner held more control over witness testimony early, engaging the witness in a rhythm of usually affirmative answers to the presentation of uncontested information to be entered in the record as evidence. Also of note, but not represented in the table, is the tendency for the rhythm of the closed question / unexpanded answer exchange to occur after an objection, or an interjection by the judge, and at the initial stages after an adjournment. This fits with the converse idea that the more the witness

is invited, tacitly or explicitly, to expand on an answer, the more likely it is for the judge or the other lawyers to interject with objections, questions, or requests for clarification. In all, we can rest with the assumption that the unmarked case for courtroom exchanges is closed question plus unexpanded short answer. This also makes expansions of all types an especially salient feature to analyse.

Soliciting longer answers to open-ended questions was a particular feature toward the end of direct examination, where this type of answer constituted 18 percent of the total, compared to only 8 percent in the last 20 pages of the cross-examination. This fits with the idea that lawyers can give their friendly witnesses more leeway in presenting evidence according to their shared agenda, a licence a cross-examiner is not likely to entertain, especially at the end stage of a cross examination. As Galatolo and Drew note, expansions are

resources to manage two principal tasks. They provide evidence that has not been sought in the question but which the witnesses regard as salient to the issue in question. They also serve to contextualise events, as well as witness actions and conduct. In both cases, witnesses use the expansions of their answers to defend themselves from the potential allocation of blame conveyed by the question. (676)

These principal tasks of providing evidence and providing context are present in my data. But other tasks can be detected as well, such as entering linguistic, anthropological and botanical information into the record. An example comes from Johnny David's evidence, when he was being questioned about harvesting berries. Here, he had just described how his people would look for huckleberries on their territory:

What time of year was that?

The area near Dennis mountain is where a lot of huckleberries were picked, and people from Babine would come to pick the huckleberries. This would be around the month of August.

Do you have a Wet'suwet'en name for August?

Yes. Buningasxkas is for the month of August. This refers to small birds being born and they're unable to fly and they're just running around on their legs.

Aside from the huckleberries, did your people harvest other plants in the old days?

The huckleberries were dried on the rack, about two or three feet long. They were dried for the winter months.

Aside from the huckleberries, did your people harvest other plants in the old days?

Berries that were picked was nawus – which is soapberries, and blueberries – the Wet'suwet'en word for that is yintoewee' (145)⁸⁵

This information in a sense does double duty: it gathers information from an elder along the lines described above (linguistic, botanical, anthropological), as well as contributes evidence in the form of satisfying the organised society test. Indeed, Peter Grant followed up with the questions “Are these berries still picked by the Wet'suwet'en people today?” and “Are they still used in the feast today?” (145).

This last excerpt from David's testimony illustrates another difference between mine and Galatolo and Drew's data, and that is in the form of the order of information. They described

⁸⁵ It should be noted that David's responses are often formulated in collaboration with an interpreter; traces of this have been omitted from the main text of Mills' edition, and accounted for in endnotes. I think the transcript still demonstrates these features.

expansions in the form of “minimal answer + conjunction + narrative expansion” (675), but a notable few of the expansions in my data came in the reverse order of expansion + minimal (short) answer (E + A). Above, David delays his answer to the question (“What time of year was that?”) by elaborating on an answer to the previous question; then, further along, he seems to completely ignore a question for the same purpose, and only answers it once it is repeated. One could speculate that Johnny David is more used to being interviewed by anthropologists and historians, and the structure and shifts in footing in his answers reflect more the patterns of these exchanges. It might also be that he is attempting to exert more control over the exchange than is usual in court proceedings.

This element of elder testimony illustrates a feature fundamentally different from prototypical courtroom discourse, based on the need for something else to be accomplished or entered into the record. As narrative, Johnny David’s testimony renders listener roles as under-specified (in keeping with Goffman above), although his offerings seem to be designed for another specified audience of anthropologists, linguists and/or historians. The differences in his testimony, therefore, are not “cultural”; what we may be witnessing is, rather, an expansion of generic possibilities relevant to and enabled by the context of Canadian law, whereby legal genres become repositories for other types of knowledge.

Repetition

The noticeably higher propensity for repetitions of wordings from the questions in the answers at the beginning of Mary Mackenzie’s testimony—20 % as opposed to hovering around 16 % for the remainder of her testimony—could represent a witness’s unfamiliarity with courtroom routines, engendering more care in making sure her answers were indeed appropriate to the questions being asked. The early propensity for appositives in her answers might also be explained in a similar way, as extra care being taken in an unfamiliar participation framework.

Only partly represented in this statistical data but worthy of comment was a noticeable pattern of the repetition of phrases in the question-answer exchange, especially in the cross-examination. This suggests that, just as in non-verbal mirroring whereby interlocutors tend to mimic the gestures of the person they are talking to, there is also a verbal equivalent. Typically, as illustrated above, it was in the direction of the witness's answer mirroring the wording of the lawyer's questions—Q “do you know...?”; A “I don't know....” —and we can interpret this as the control the lawyer has over the answer of the witness. But mirroring happens in other ways too:

Q Did Walter Wilson tell about the territory of Djogaslee?

A. No, I don't recall.

Q. Do you recall any of the other chiefs that spoke for the Gitxsan apart from Albert Tait and Robert Stevens? ... (546).

...

Q. But so far it hasn't – the dispute hasn't been settled has it?

A. No, it hasn't, as far as I know.

Q. Now, I've asked you some questions earlier about Chris Harris, the late Chris Harris, who held the name Luus?

A. Yes.

Q. And do you know if Chris Harris ever went out on your territory?

A. Not that I can recall. (547, underlining added).

Modalizing the information in testimony by establishing the limited position of the speaker can be seen to work against witnesses in examination (where the reliability of friendly witnesses and the certainty of their evidence needs to be established), and in their favour in cross examination (where witnesses are wise to be reluctant to agree wholeheartedly with a cross-examiner's propositions). But here, it seems McKenzie is having some success getting the cross examiner to repeat *her* wording. If anything, this exchange demonstrates "the orderliness of talk" (Wardhaugh 293) in the face of assumptions that participants freely and independently choose their wordings according to their purposes. Mirroring appears to be subconsciously undertaken, and can be seen as either instrumental in establishing common ground or, in cases of unequal power relations such as this, as a means by which power and control over the interaction are negotiated. No studies to my knowledge have undertaken an extensive study of this aspect of verbal mirroring, and further research would be instructive.⁸⁶

Implicature

The data demonstrate a significantly higher portion of implicit answers in the cross examination (14% and 12%) than in the direct examination (5% and 9%). As previously mentioned, implicit answers can be those assumed to questions that grammatically ask one question—"can you tell the court..."—but pragmatically are asking another. But also, they can include information the cross examiner doesn't ask for or expect, in situations wherein a witness is reluctant to answer a particular question. For example, in the following line of questioning,

⁸⁶ Woolford draws on Habermas to see justice through "communicative processes: although there exists no universal normative standards against which substantive justice can be measured, argumentation does provide us with a universal procedural means for reaching an agreement" (20). He says participants in treaty negotiations, for example, need to interact in communicative rather than strategic ways, looking to find common interests rather than promoting their own. But a treaty negotiation is not a court case, where strategies such as Mackenzie's might reflect resistance to a power imbalance.

Cross-examiner Plant is asking Mary McKenzie to explain the list of names on her affidavit, of the people she is claiming to represent in the court action:

Q. Well, when I look under the column “residence” and I add up all the people who have given their –you have given their places of residence for, and I see about 15 names there of people that don’t live in the Gitxsan territory at all, they live in Vancouver or Terrace or Richmond or Chilliwack; would you agree with me?

A. They are still Gitxsan, no matter where they live, but they are still Gitxsan.

Q. I wasn’t suggesting they weren’t. But you will agree with me –

A. Yes, I’ll agree to that.

Q. Now, apart from your brother and yourself, have any of the people whose names appear on this list ever used the resources of Gyoluget’s territory?

A. What there is here, they are all very young, and there is a lot of young women there and young men, and even today some of these people, young people, are still attending school.

Q. So the answer, with explanation, is no?

A. no.⁸⁷

McKenzie’s first answers to each of Plant’s original questions were coded as implicit answers to closed questions in the form of unsolicited expansions, and in both cases they were followed by some form of the question repeated and the explicit short answer originally sought. This delay could show both a reluctance on the part of the witness to answer the cross

⁸⁷ *Delgamuukw transcripts* 482-483.

examiner's questions directly, and the seizing of an opportunity to enter new information for the record. One could imagine that the witness fears a direct answer would incriminate her or weaken the case; one can certainly detect wariness in her answers, and the possibility she is playing for time in formulating the response.

Cross-examiners also exhibit skill at soliciting implicit answers as a persuasive device. Again, this can be observed in this testimony and can be seen not as evidence of cultural misunderstandings but as a kind of contest triggered by the pragmatics of courtroom questioning (Wang). We can see this in the following example, in which the context and background of a particular line of questioning can be inferred, as evident in David's testimony under cross-examination by Milne. After soliciting information about Johnny David's (whose answers are italicized both here and in the original) trapping activities, Milne asks:

MR MILNE: Where did you get the steel traps from?

Hudson Bay

MR MILNE: Where was the Hudson's Bay?

Old Hazelton.

Was there any other Hudson's Bay around the areas that you went to?

They had stores throughout the territory. They also sold liquor, Hudson Bay rum.

...

Did you trade with Hudson's Bay since the time you were born? I mean, have you on a regular basis traded ever since you were born?

All the old people traded their furs with Hudson Bay.

Did you also get guns and blankets and other supplies from the Hudson's Bay store?

*Yes.*⁸⁸

Here, both speakers seem to be drawing on the resource of implicature, and in competing ways, Milne to suggest Wet'suwet'en complicity with and benefit from a trading relationship with HBC, and David to suggest, through an unsolicited expansion, a negative impact of this relationship ("They also sold liquor"). David's circumlocution in answering the questions might not be a result of misunderstanding as much as his own strategy to enter in contextual information for the record.

Questions

The last stage of cross-examination in Mary McKenzie's testimony indicates a higher proportion of questions as responses on the part of the witness (5%, as opposed to the average elsewhere in the testimony of 2%). Questions are most often requests for clarification, but also can be seen, perhaps especially in cross-examination, as a strategy to gain more time to formulate an answer. And, given cross-examination is likely to be more adversarial toward the end, it follows that witnesses could strategise by asking their own questions. In one exchange, Mr Plant, lawyer for the Crown, was soliciting from McKenzie an admission that, although she had a trap line registered under her name and had listed "trapper" as her occupation on an official form, she had in fact never trapped on the registered trap line, and furthermore the ownership of the trap line was an unresolved issue. This was in the context, we can assume, of the Crown's desire to establish wider uncertainty of ownership in the form of overlapping

⁸⁸ *Hang on to These Words*, 299-300.

claims both within the clan, and between the Gitksan and the Nisga'a. We pick up the transcript where this topic is introduced:

Q. Is there a traditional way that the Gitksan people show that a dispute over land has been settled?

A. Would you rephrase that so I can really get the question?

Q. Well, putting your – put in mind the idea of a dispute between two chiefs over territory and say that the dispute is solved. Is there something that happens when a dispute is settled, something to do with sprinkling eagle down on the various people?

A. Yes, there has to be a feasting for that and whatever clan they're in it's the – say if it's Lax Gibuu people are disputing on this and the head chief have to try – will settle it for them, and if the family agrees to what the settlement of the high chief will put out to them, then a Feasting is put on for the -- these two people.

Q. And is eagle down used in the Feast?

A. Yes.

...

Q. How did you know that Wallace Danes has his trap line on that creek?

A. Would you rephrase that again?

Q. How do you know that Wallace Danes had a trap line on Win Skahl Guuhl?

A. A registered trap line you mean?

Q. Yes.

A. I was informed by Violet Brown in 19 – in the 1970’s because she went into the Wildlife office here in Smithers and they took a map for her because her boys – her sons had intentions of going to the – going to our territory for beaver trapping ...

...

Q. And that was the date you applied to register your trap line?

A. Yes.

Q. And that trap line was formerly part of Joseph Danes’ trap line wasn’t it?

A. Would you rephrase that question?

Q. Did Joseph Danes have that trap line registered before you to your knowledge?

A. No, not to my knowledge.

McKenzie uses the strategy of asking for a rephrasing of the question three times. In the first case, it results in the lawyer leading her to a particularly desired answer: the practice of spreading eagle down to finalise a settlement on a dispute. This may not have worked in her favour, because eagle down was not spread in the case most pertinent to the cross-examiner’s line of questioning, and this meant that the dispute was unresolved, a point that McKenzie may have been trying to avoid. But the second and third requests for rephrasing enable McKenzie to answer to wordings she prefers, and thereby to draw a distinction between a registered trap line according to Western practices, and the granting of trapping rights according to the protocols of Gitksan law. I suggest that question asking on the part of witnesses is ambiguously and strategically situated between attempts to clarify and attempts to control. I don’t think witnesses, or interlocutors in general, are consciously strategising or knowing in advance what their intentions are when they answer a question with another question. It could also be argued again,

as above, that the nature of a turn at talk such as a witness answer to a question can only be really ascertained by the presence of a discursive outcome rather than a speaker intention. This demonstrates Volosinov's theory of how the reception of an utterance in dialogue consists of a fusion of factual commentary with "the preparation of the reply (internal retort)" (118), and both are present in the context and substance of the utterance—in "dynamic interrelationship" (119). This renders intention as fleeting and sometimes clandestine, but open to analysis if not overshadowed by assumptions of cultural miscommunication.

Although it is commonly recognised in the literature that hierarchical power distribution in institutional discourse is established and maintained through question asking (Wang cites Fairclough and Van Dijk to make this point), it seems that they can also be exercised as a strategy of resistance. Jinjun Wang, in "Questions and the Exercise of Power," questions assumptions in conversation analysis about the symmetry of power relations in casual conversation or informal talk, and their asymmetry in institutional settings and analyses questions in both contexts. His data does unsettle the assumptions about question asking and power in each context, showing both overt and covert exercising of power in both. He notes, though, that power through question asking is especially salient in the lawyer/witness dyad, and that yes/no questions in courtrooms constituted the highest percentage (78.4%) of all questions out of any speech genre (544).⁸⁹

Sperber and Wilson offer an explanation of questions that might also be instructive. They contend that question asking is only rarely an actual request for information. Hearers (or

⁸⁹ Slightly different in Wang's data was the high percentage of questions asked by witnesses overall (8.9%, compared to 2% - 5% in my data). One explanation for this might be that his data came from movie scripts (e.g. *Kramer V. Kramer*), suggesting that witness questions, being oppositional, make for good drama, especially since questions are a signature of the genre.

readers), in their search for relevance, interpret questions on the basis of speakers' informative intentions, i.e. in the form of "the speaker is asking Wh-P where Wh-P is an indirect question" (252). The type that comes closest to this in the example above—"Q. Is there a traditional way that the Gitksan people show that a dispute over land has been settled?"—is similar to their description of an exam question, in which the "speaker wants to evaluate the candidate's attempt at an answer" (252). In the court, the lawyer as question asker wants to display the witness's answer for evaluation by the court as a whole. The question is in one sense already an interpretation of the answer, or, as Sperber and Wilson put it, "interrogative utterances are interpretations of answers that the speaker would regard as relevant if true" (252). This understanding of questions as anything but entreaties for unknown information enriches understandings of courtroom discourse in which oral histories and traditions play a role, and in which participants are variously seeking to maintain control of the discursive field. For example, the lawyer examining Johnny David also uses questions to solicit information about the spreading of eagle down, and does so in exactly the same way as the cross-examiner elicited the information from Mackenzie above. Grant is asking David how disputes are settled according to Wet'suwet'en law:

I would like to just ask you about how Wet'suwet'en people settled murders, or killings I should say. Is there Wet'suwet'en laws for settlement as to when a person has been killed by somebody else?

There is a way when something is settled when someone is murdered. For example, when Mooseskin Johnny killed someone, two of his relatives were given to people who were killed.

That is how it is done. This happened way before my time and this is what was told to me, and that's all.

When this happened in this case or generally is there a feast at which relatives are given over to the victim's family?

Yes, there is a feast.

Is eagle down used as part of the settlement at that feast?

Yes, eagle down is used. Eagle down is our law. (265 -266)

Indigenous legal traditions are invoked and assertively invited through questions by both sides, and both were left with little choice but to use the same discourse strategy, which is to use the sought for answer in the question (in each case the utterance "eagle down" was explicitly requested); they each had their own purpose, though: acknowledging eagle down as law contributes to the organised society test for the purposes of the Wet'suwet'en, but in the case of McKenzie it was used as counter-evidence to suggest that Gitksan dominion over some territories is uncertain and ambiguous.

Power

As mentioned above, Wang's discussion about the role of questions in various genres resists the standard dichotomy between institutional and conversational speech genres, and shows the negotiation of power relationships as a feature of them all. My data further confirms this, showing the way age, and perhaps gender and ethnic identities, mix with power. Lawyers questioning Johnny David show some deference and certainly much caring toward him, given the combination of his status as chief, his advanced age, his failing health, and perhaps his gender. One mechanism that shifts the power structures of the courtroom is shifts in footing (see

discussion of Goffman above). Here are two examples from each of our witnesses, beginning with Johnny David (questions by Peter Grant):

Did David Denis build a cabin on the Kilwoneetzen territory while you were trapping and hunting with him?

Yes, he did build one at Six Mile Flats and I showed you when we went there.

That cabin is still standing?

It is still there, you guys saw it.

I understand what I saw, but you have to say it for the record. (130-131)

This short exchange contains first and second person pronouns and a brief narrative, positioning Grant albeit briefly into a different listener role, which he acknowledges but quickly brings to an end. By suggesting equal footing with Grant through this narrative, perhaps Johnny David is also bringing this equal footing more generally into the courtroom. In one exchange in cross-examination, Mary McKenzie's shifts in footing are similarly signalled by first and second person pronouns:

Q. And to the west of your territory you know which Indian people claim that land?

A. Well, to my knowledge, I'll say no to that.

Q. Is it Nishga territory?

A. I've heard of them discussing it.

...

Q. Are you aware of the fact that the Nishga people make the claim to the territory of the house of Gyolugyet? Are you able to say that? Do you know of that?

A. No, I can't. (544)

Here, “I’ll say no to that” is an interesting way for a witness to answer a question under oath; with its auxiliary modal and its sense of, to use Goffman’s terms, the speaker being a character in her own discourse, it seems to shift the power dynamic slightly toward the witness. Indeed, further into the exchange, cross-examiner Mr Plant picks up on McKenzie’s phrase with “Are you able to say that?”—which he quickly repairs to “Do you know of that?” However, this repair is to no avail, because McKenzie continues in the participation framework she herself instigated with “No I can’t [say that].”

Also evident in this exchange is how McKenzie distances herself from the knowledge being sought by the question, as if she understands the hearsay rule and wants to take advantage of it herself; with “I’ve heard of them discussing it” she is indicating that she is not once (“I’ve heard them discussing it”) but twice removed from the utterance (“I’ve heard of them...”). I explore this further in the next section.

Hearsay, narrative, and reported speech: adaawk and kungax

Adaawk and kungax, being the genres that some historical information can take in Gitksan and Wet’suwet’en societies respectively, are premised on oral history and oral tradition, which in turn intrinsically rely on reported speech. In courtroom discourse, reporting on the speech of others about events relevant to a proceeding (as opposed to what one has witnessed first hand) constitutes hearsay, and has been deemed problematic as evidence in Western law because it relies on what witnesses heard said rather than what they saw for themselves. This obstacle was part way ameliorated in Delgamuukw by the decision to allow oral history and tradition to be entered as evidence as an exception because hearsay of deceased persons is

allowed if the person is reliable and no other evidence is possible, but it was still the object of commentary as the trial proceeded. According to McEachern, they were not literally true, blending belief with fact, and history with mythology.

Adaawk and Kungax are not to be confused with other types of oral history, characterized as recollections of aboriginal life, which were admitted for similar reasons, to show occupation and use of the territories according to the memories of those living. These too were discounted because the trial judge thought it was not specific enough on issues to do with land use, and he favoured archival evidence from historians. Lastly, Lysyk identifies “territorial affidavits,” which were also admitted as a legal genre, but then discounted because the “public reputation” of those consulted was not high enough to warrant the exception.

Studies of reported speech in conversational genres (Buttny and Williams), spontaneous discourse (Vincent and Perrin), courtrooms (Phillips) and news genres (Waugh) show that it can fulfill numerous functions. Its more general function in narrative can be described as a means to “move the story along chronologically” (Vincent and Perrin 292), and this is evident in the testimony I analysed. Other functions deciphered by Vincent and Perrin are evaluating or reflecting appreciation of the content; supporting the content (e.g. with evidence or examples); and adding authority to the content. A similar finding comes from Buttny and Williams, whose focus group discussants used reported speech “to articulate the subtext of what is being said” in their assessments of others’ racial slurs, which is in keeping with Vincent and Perrin’s support function. It is beyond the scope of the present study to assess the role of reported speech in general in the two forms of oral tradition in the communities involved in Delgamuukw (although this is a direction for my ongoing research), but my data does reveal how reported speech gives narrators a variety of resources.

In the terms provided by the research above, in order to enter oral traditions as evidence courts must not only be open to expansions, but they must also explicitly solicit them. Narrative expansions are a problem for the courts on two counts: they relinquish the most control to the witness, and they are opportunities for hearsay. Hearsay is defined by the court as speech of another recounted by a witness. It is necessarily excluded from testimony because it cannot be validated by anything other than the witness's subjective account. Exceptions to the hearsay rule can be invoked in certain circumstances, for example to determine the state of mind of another as long as it doesn't pertain to the finding of fact, and Delgamuukw exhibited these. Oral tradition, in the category of "declarations of deceased persons," came under such an exception to the hearsay rule and could give evidence of an organised society and a history of "public or general rights" (Lysyk 3). Oral history, those events that have occurred within a witness's living memory, seemed to be thought of as less crucial to land claims because of the potential of corroboration from written accounts. Indeed, Julie Cruickshank critiques the surface admittance of oral testimony on the basis of an exception to the hearsay rule. She notes how McEachern saw historical documents as "speak[ing] for themselves" (31), for example the documents supplied by HBC, or missionary and trader accounts, although, as we saw above, they emerge out of a variety of discrepant locations and are saturated with relations of power. McEachern, it became evident, admitted oral testimony as "not limited by the hearsay rule," but ended up discrediting it as "belief" in relation to the veracity of written "fact" (31). This despite the fact that anthropology has come a long way both in theorizing orality and in validating indigenous ways of knowing, and despite also that First Nations claimants stressed, as indicated at this chapter's opening and repeated here in Cruickshank's words, "their traditions must *not* be understood exclusively in the literal sense" (37).

The seeds for McEachern's position can be found in the exchanges between the participants of the commission hearing in Johnny David's living room. Both lawyers elicited both oral history and oral tradition from Johnny David, but Johnny David also referred to and abided by Wet'suwet'en law, which precluded him from telling about disputes whose resolution had been signalled by the spreading of eagle down (Mills 30-31). Because hearsay is reporting the speech of others, a consideration of how the speech of others is reported is interesting. Susan Philips contends from her analyses of courtroom discourse that variation in the way speech is being reported is "systematic" (166). Quoting is a foregrounding device, used by both sides in a trial, to "provide evidence which is central to elements of the charge" and not for background information (169). And it is a way to orient listeners (for Philips, the jury) to information being presented. Quoted speech is generally perceived as more authentic and "credible" than other forms (154). Directly quoted speech was a rare occurrence in the data I analyzed. Given this, it is worth noting the few instances of direct speech reporting in the testimonies in question. Johnny David introduced an instance of direct speech to quote an elder known only in the oral tradition before David was born in a kungax about a negotiation over territory:

...you indicated you remember this territory that Hakasbaine used from Tsadzalh. Can you – do you remember that now, do you want to explain what happened?

Okay. *There was [I remember] the incident with Hakasbaine. There was a person named Klayslaht ... Hakasbaine's father had given Klayslaht a box of berries which had some oolican grease mixed with it. He had given it to him because there was starvation ... And Klayslaht told Hakasbaine [']you can use my territory for one year for giving me the berries and the grease.[']* (172)

Here the function of reported speech is dual: on the one hand it contributes to the narrative in that the information about using the territory for one year is introduced as the next thing that happened; on the other it fulfils the authority function in that it merely adds authority to the premise already introduced that a deal had been struck. Vincent and Perrin argue that such coexistences demonstrate the “polyfunctionality” of reported speech in spontaneous discourse (304).

Mary Mackenzie invoked the direct speech of others only five times in the 905 responses to questions in my data set, and all occurrences were in the last part of her direct examination, which is also the locus of the most solicited expansions. Thus reporting the direct speech of elders seems to be favoured only in the context of questions from lawyers on one’s own side, and only after a rapport or rhythm has developed in the dyad. The first time was a record of her grandmother’s assertion to Tommy Muldoe that he was illegally trapping on Gyolugyet territory: “you are not going to own that territory ... it doesn’t belong to you, it belongs to Gyolugyet and all the houses” (442). The speech can be seen again as fulfilling the authority function, supporting McKenzie’s earlier statement that Muldoe was “trespassing” (441). The incident was cited by Mackenzie because it precipitated a court action.

In another instance, Mackenzie quoted two trappers, one named Marian Jack and the second one her husband Ben Mackenzie, to illustrate shifts in the plenitude of beaver on a trap line in question:

A. ... [Marian Jack] said “It looks like,” he said, “that the beavers have a disease out there,” he said, “for I don’t know what reason, but without being trapped, they are dying off quickly.” So he said “there is hardly anything there.” So a couple of years after that my husband went and that built up the beaver again, was plentiful there. So he made

quite a good catch the first year he was there, and he came back and reported – he had my son and the sisters, my mother and I – and he said, “You people have a rich country up there,” he said, “of beaver.” (448-9)⁹⁰

Further into her testimony, Mackenzie also cites with direct speech reporting a negotiation between chiefs about hosting a feast (459-60), and she cites Gitksan elder Delgamuukw (447). All that can be ascertained from the data is that, as within indigenous elder testimony—whether in the form of *adaawk* or *kungax*, or as a part of the remembered speech of deceased persons—it is the speech of esteemed elders that is most often cited directly, and the cited speech seems to contribute authority to the more salient evidentiary matters. Because explicitly solicited expansions are the only way to introduce *adaawk*, *kungax*, or most narrative events into aboriginal testimony, it is interesting to keep in mind that this is the situation in which examiners have the least control, a step toward *adaawk* or *kungax* having “equal footing” with other types of evidence in Canadian courts. As Johnny David’s testimony demonstrates, his narrative renders listener roles as under-specified (in keeping with Goffman above), for one thing because he ignores the questions asked of him, and for another because his offerings seem to be designed for another audience, composed of anthropologists, linguists, historians, and perhaps even, importantly, future generations. The differences in his testimony, therefore, may not always be due to “cultural” misunderstandings. What we may be witnessing is, rather, an expansion of generic possibilities relevant to and enabled by the context of Canadian law.

⁹⁰ What is also interesting to note is Ben Mackenzie’s use of the second person pronoun in “you people” when referring to his wife and her family, reinforcing at the level of pronoun use the matrilineal organization of Gitksan clans. Even though they are married and have had a family, and even though they live bicultural lives in many ways, Ben is not in his wife’s clan group.

Truth, tradition, and rhetoric

The excerpts above are chosen to illustrate the key points of this chapter's claim, and can be considered a preliminary investigation in preparation for what could be a more statistical corpus-based account, and/or a more extensive and closer reading of actual courtroom discourse. Dara Culhane, who describes her look at the Canadian legal system in its dealings with First Nations appeals to their courts as a "close reading," similarly recognizes the role of discourse in these dealings as "communicat[ing] meanings directly and subtly, by using language in particular ways; by writing and speaking in rhetorical styles; by deploying metaphor and evoking certain images and emotions; by using grammar, and constructing each text as a whole along specific lines" (21). She also acknowledges First Nations strategies in this regard, for example by noting how their own pre-contact agreements and treaties over issues of territory and trade were used "as models for the treaties they entered into with Europeans" (50). We could say that First Nations models of interaction have always and are still mediating dominant Western legal genres in Canada.

Although not using a discourse approach, Antonia Mills gives a careful account of miscommunications and mistranslations in her introduction to *Hang on to These Words*, and notes how the proceedings were compromised by this, even finding unfortunate miscommunications between David and the lawyer for Wet'suwet'en, Peter Grant. But whether using a discourse based or a communication approach, though, it is important to affirm that extreme positions—enduring conflict, coercion and misunderstanding from antithetical world views on the one hand, and equality, mutual understanding and verisimilitude on the other—are already and *necessarily* ruled out. As Kahane puts it, all cultures are co-constructions, or, as he puts it, the results of "coformation" (37). My data gives substance to something of this

coformation, and could be a further acknowledgement that Canadian legal doctrine—which has had to acknowledge both customary and common of law of Canada’s First Nations (see Slattery)—is always already a coformation between aboriginal and colonial enterprises.

A variation on this view was recently popularized by John Raulston Saul in his book *A Fair Country: Telling Truths about Canada*, and I need to note how this idea of coformation is also a rhetorical possibility of my own findings. But on the one hand to adopt the rhetorical view that Canadian law, or Canada itself, is a coformation or as Saul puts it a Métis culture, in other words as always and already happening, might also be to accept cultural loss through domination. The pull of legal genres is so strong that even the most supportive counsel for the plaintiffs cannot protect oral traditions from being, as Val Napoleon puts it, “fractured into slivers by both direct and cross examination” (“*Delgamuukw*” 127). So, admitting the content of the important institutional genres of the Gitksan and Wet’suwet’en through the question/answer pair of courtroom discourse seems to leave their forms—and therefore much of their rhetorical substance—behind. John Borrows seems to concur:

The progressive instructions of the Supreme court of Canada that the laws of evidence be adapted to incorporate Aboriginal factual perspectives does not take into account the adverse costs of such a declaration. Despite the court’s extraordinary generous intentions, its loosening of the evidentiary requirements with respect to oral histories may have the effect of diminishing aboriginal control over First Nations cultures. (*Recovering* 92)

Napoleon suggests, perhaps to lessen this impact, that in Canadian courts “a future strategy might be to offer the *adaawk* as a complete system, and agree that their internal ‘truth’ can be established only within that system. The only truth that a court would then look at is

whether there is an *adaawk*. If there is an *adaawk*, then land ownership is established” (“Living” 151).⁹¹

Whether this is necessary or even possible is yet to be decided, but what I would like to add to these accounts is the rhetorical view to see the ways in which these court room interactions, like any other interactions, are and continue to be moments of possibility. So far, *eagle down* enters a Canadian courtroom only as a verbal enactment, not as a speech act with full illocutionary force, but as a narrative report of a speech act. It is, nonetheless, a rhetorical gesture, resounding with the possibility of the day when *eagle down* is literally spread in Canadian courts. By defining the law rhetorically, i.e. as “neither a rationally constructed discourse nor simply a dominant ideology, but rather an active and protean component of a hegemonically crafted rhetorical culture” (Hasian, Condit and Lucaites 323), the law is not outside of culture or society but one integral part of it, and each legal proceeding, each discovery, each piece of witness testimony, contributes to negotiations between and amongst hegemonic and counter-hegemonic interests. If there is a degree to which monolithic structures constrain, forestall, or prevent egalitarianism and justice, there is also a degree to which the ground is always shifting beneath them. There is a degree, in other words, that the genre of witness testimony in aboriginal rights and title cases is unavoidably rhetorical.

Thus the coformations that manifest in the genre of aboriginal witness testimony are very but not entirely like mainstream witness testimony. The degree to which aboriginal local knowledge may be more diffuse, less certain, and “produced during human encounters rather

⁹¹ Gordon Christie, too, maintains that the courts need to go beyond generous interpretations of aboriginal laws and early treaties. What is needed at the constitutional level is a full and unequivocal acknowledgement of cultural difference, such that aboriginal perspectives will be more fundamentally acknowledged—i.e. at the level of the constitution of the Canadian state—than is presently the case even when judgments are made in their favour. Tom Wolfe argues in a similar way in regards to the situation in the U.S.

than discovered” (Cruikshank 4) has its parallel in the courtroom, despite the latter’s demands in the interests of resolving suits efficiently and permanently. It is just another example of how rhetorical substance, to draw again from Hasian, Condit and Lucaites, enters law (as it always has) from the vocabularies of the polis: “The law cannot exist apart from the public vocabularies of a rhetorical culture” (327). The difficulties in law, therefore, will be resolved as they always have been, via outcomes of ongoing hegemonic struggles in the wider society. Courtrooms sometimes follow and sometimes lead, but are never far away from, these negotiations in the public sphere. My data begins to show that efforts towards common ground and “equal footing” are ongoing in the courtroom, in both initial testimony and cross-examinations, in a way that reflects the struggles for meaning and consensus that are ongoing in the wider society.

Overall, it may be unavoidable to maintain an abstracted idea of “culture” because this is the best name we have for our “metapragmatic awareness” (Verschueren 30-31), or what we notice through concrete practice and expression. It is at the mid-level of abstraction that we run into trouble—in generalisations about *cultures*, plural and stratified. In her work on autobiographical fictional texts Deanna Reder aims to stand apart from the self/other, indigenous/euro binary, to situate these texts within a multicultural framework that allows what Timothy Powell calls “the polyvalent nature of lived cultural identity” (280). This is not to adopt a saccharine multiculturalism, because the protagonists in the texts she studies can “lay claim to ... First Nations identit[ies], despite the seeming conflicts” (292), assert the negative effects of colonial schooling, as well as exploit multiple cultural positionings for the purposes of acting strategically in a complex wider society. Returning to my own category of “contact genres”—those genres that arise in the contact zone, a zone, as Mary Louise Pratt tells us, that is full of “the perils and possibilities” of disparate power relations, subversions, cultural mergings, and

apartheids—I note similarly that they exhibit a wide range of strategies to make meaning, even within the genres of Western law.

In closing, it seems to me that on the one hand we have actors in this sociolegal political context with intentions, motives, understandings and misunderstandings lurking behind the words they utter; on the other hand are the larger legal speech acts and genres that have ongoing ramifications as precedents for future cases. But between and alongside these extremes are the more subtle workings of language and genre in these interactional dynamics, some of which could indeed be constrained by cultural norms. But it seems the moment we try to extract and name these norms and constraints we enter into the realm of reification.

Chapter Four **Aboriginal Titles: Indigenous Narratives as Contact**

Genre

Certain kinds of trauma visited on peoples are so deep, so stupefyingly cruel, that—unlike money, unlike vengeance, even unlike justice, rights, or the good will of others—art alone can translate such trauma and turn sorrow into meaning, sharpening the moral imagination. (Toni Morrison, “Roundtable on the Future of the Humanities in a Fragmented World” 717)

It would require sustained rhetorical effort, backed by the imagery of a richly humane and spontaneous poetry, to make us fully sympathize with people in circumstances greatly different from our own. (Kenneth Burke, *Rhetoric of Motives* 34)

Here are two examples of the many thinkers who provide rationales for turning to literature to understand what words in the non-literary world have failed to express. Morrison sees the aesthetic as the only route to meaningfulness and even to morality in situations of gross oppression; Burke, in a related move, sees the aesthetic as the only means through which identification (in the Burkean sense) with the Other can be reached. Literature and other modes of artistic production are being affirmed and theorized in a way that suggests their possibilities in postcolonial and cross-cultural contexts. As a category, postcolonial literatures are broadly construed as including the literate and literary endeavours of people who have historically been subjugated in some form by the processes of colonialism and European imperialism. More often than not this process involved not just the exploitation of labour and resources, but also the alienation of culture and land. As a form of expression and identity formation, postcolonial

(including indigenous) literatures have also been a strategy of resistance, asserting themselves as they do by “foregrounding the tension with the imperial power, and by emphasizing their differences from the assumptions of the imperial centre” (Griffiths and Tiffin 2). Still, as a category of academic endeavour, postcolonial and indigenous literary criticism is rife with problems and objections. Spivak (*Critique*), for example, senses the imperial assumptions of the academy’s “remote discursive precursors” still conditioning the production of history, philosophy, and literature (3 n5). A similar point is addressed by Griffiths and Tiffin, who point out how European theories “clearly function as the conditions of development of post-colonial theory in its contemporary form and as the determinants of much of its present nature and content” (153). Indigenous authors tell of the dilemma of being “herded into the reservation of ideas” from the pressure to write about “Real Indians” and “Our oppression [and] how we miraculously Found Our Culture and got healed” (Sewell 20). These are cautions and the unavoidable conditions of what follows here, and I do not cite them just so I can move on, I also return to them as and when they take shape in other forms throughout this chapter, to keep myself and *my* reading in check, as I go about analyzing the readings of others.

This chapter looks at three postcolonial texts and uses genre theory this time to keep in mind how they are taken up in diverse reading contexts: Rudy Wiebe and Yvonne Johnson’s *Stolen Life: The Journey of a Cree Woman*, Alan Duff’s *Once Were Warriors*, and Patricia Grace’s *Baby No-Eyes*. On the one hand these texts may support and exemplify the epitaphs above, but I also contend that they offer, allow, or bring to fruition certain excesses and elisions as uptakes occur in different rhetorical contexts. I use the term “excesses” in an attempt to avoid

the gendered nature of the Derridian term supplement,⁹² and the connotations of expulsion in Butler's abject. I mean it in the sense of the remainder--after the encompassment, after the uptake, after the verdict. The closest theoretical concept would be Lyotard's *le differand*. And following Butler, I do see these excesses as constitutional of the genre, and/or of the speech act, in that it is these excesses that define their genre boundaries. In *Bodies that Matter*, Butler considers the heterosexual matrix as well as other regulatory regimes including race, which itself, she contends, is the product of a history of racism. Nevertheless, she resists seeing racism, misogyny, and homophobia as too similar because of the dangers of missing their specific histories, as well as the ways in which they "require and deploy each other for the purpose of their own articulation"(18). But, to the degree that the categories of race and sex operate in similar ways, i.e. each is a "continuing effect ... reiterated and reiterable"(22), then both are effected through genre. Genres are (like gender performances) ritualized repetitions; they are sites for both the reinforcement of norms and values as well as opportunities to rework them. In the case of contact genres they are a critical site for the disassembly (disidentification, resignification, and "resubjectivation") of colonial racial formations.⁹³ However, the very agency of subjects, to continue within Butler's framework, lies within citationality, not apart from or opposed to its normalizing authority: "The paradox of subjectivation ... is precisely that the subject who would resist such norms is itself enabled, if not produced, by such norms"(15). The work of disidentification happens in conjunction with and as a result of identifications that are already a part of a genre's social action.

⁹² Derrida applies the idea of the supplement to Rousseau's notion of writing and puts it alongside supplement from another source: onanism. Both leave a trace; both are a form of auto-affection, either giving a self presence, or giving a self pleasure (*Grammatology*166).

⁹³ This iterability constitutes a version of the eternal return discussed in philosophy, but not as a metaphysical property as much as a discursive one.

I bring three literary texts into the genre fold, complete with a rhetorical understanding of audience, and a definition of uptake from chapter one that sees uptakes and (dis)identifications as often escaping the intentions of speakers, but still admissible as part of the social action of the genre. Uptake accounts for how, as Thieme puts it, “texts play their partners: they can call for a particular genre as respondent; they can make other genres less likely to occur in their wake; or they can play several games at once, inviting multiple partners into the dialogue” (283). My question is: How do uptakes of three “postcolonial indigenous texts” allow for the category of contact genre to reverberate in literary and literary-critical domains? Thus I use rhetorical and pragmatic theories in conjunction with the postcolonial theories most commonly invoked for the critical analysis of such texts to explore the postcolonial narrative as contact genre.

As said previously, contact genres arise out of conditions of contact, and are written in, from, or about the contact zone. With the paralegal and legal texts analysed so far, readers bring hermeneutics associated with their contexts of interpretation that are quite narrowly constrained. This is not so with literary texts, which are opened up to a wider variety of situations and situated readers, including critics, reviewers, students (in literature and other courses) and a more diffuse and diverse reading public, who all bring a range of reading strategies and socio-political lenses. To understand uptakes in these readerships, this chapter draws from rhetorical understandings of audience to examine how “contact” is genrefied in this domain. Surveying and characterising a range of uptakes as well as undertaking, where appropriate, closer readings of the texts, allows me also to identify and characterise a range of elisions and excesses of this particular contact genre, seeing these aspects too as potentially in “the domain of the genre” (Giltrow, “Genre”), and, as the spatial metaphor suggests, close to its exterior boundary.

All three texts topicalize to varying degrees land claims, treaties, protests, political resistance to colonialism, and moves for self-determination and self-representation from indigenous perspectives. I compare how authors—and scholars and critics in different areas—are thinking about issues of redress and property through literature, with how these texts are taken up in their rhetorical situations of reading. Indeed, all three of these texts are giving rise to readings in which “property” is broadly construed and land claims are sometimes more metaphor than substance. This chapter wants to complicate the position of readers, who when un- or under-theorized and -contextualised are reduced (or elevated) to individuals seeking aesthetic experience and moral enhancement, rather than as audience members of diverse politicised and sometimes institutionalized communities. Burke attributes no agent for his “sustained rhetorical effort,” and what I hope to do is to put his observation in situated contexts of texts and their readers.

As suggested above, postcolonial theory inevitably informs any discussions of texts such as these. The term “postcolonial” has gained such wide currency in a number of fields that it risks “altogether losing sight of its provenance and intellectual history” (Ashcroft, Griffiths and Tiffin 194). Without getting into that history here—but noting where it can be found (Ashcroft, Griffiths and Tiffin’s *The Empire Writes Back*, especially chapter six “Rethinking the Post-colonial: Post-colonialism in the twenty-first Century”; see also Laura Moss’s introduction to *Is Canada Postcolonial?* for a discussion as it pertains to Canada)—I will define postcolonial theory for my purposes as a methodological lens for a type of text analysis which highlights how racial, national and other identities are discursively sustained and critiqued. As well as drawing on Patricia Tuitt for how postcolonial theory can be applied to both literary and legal texts (see below), I also keep in mind Marie Battiste’s use of the term “to describe a symbolic strategy for shaping a desirable future, not an existing reality. The term is an aspirational practice, goal, or

idea . . . used to imagine a new form of society that [indigenous scholars] tried to create. Yet we recognize that postcolonial societies do not exist” (qtd. in DePasquale xvi). What I hope to add to these definitional moves, including my own just articulated, is a rhetorical twist that captures includes a nuanced and particular account of audience reception.

Through this postcolonial lens with a rhetorical twist, then, one could explore in more detail what can be characterised in the critical literature as both pessimistic and optimistic views. The pessimistic view of the position of much indigenous literature might see it as characterised by and part of a more general cooptation of indigenous art into forms more palatable to the western consumer, the unwitting efforts of “a people who are ‘trapped against their will’ within somebody else’s framework” (Maaka and Fleras 21, citing Boldt; see Cook-Lynn for an example of this view from an Amerindian perspective). A more optimistic view would see the indigenous postcolonial text as a politically salient intervention into the still-Eurocentric structures of Canadian and Aotearoa New Zealand societies. Perhaps in a spirit of acknowledging the former and hoping for the latter, Patricia Tuitt, drawing from Homi Bhabha, points out how postcolonial criticism is indeed at the ready, poised as “an interrogative tool” with which to “intervene in those ideological discourses of modernity that attempt to give a hegemonic ‘normality’ to the uneven development and the differential, often disadvantaged, history of nations, races, communities, peoples” (74). For Tuitt, postcoloniality—because it reinscribes the colonial in its very name—needs to work towards superseding itself, and for this to happen, its origins and dispersions of sovereignty must be disrupted through rewriting colonial texts (75), also entailing that this subsequent postcolonial text (she looks at both legal and literary genres) must be equal in power to the colonial text. For her, Jean Rhys’s *Wide Sargasso Sea* approaches this state, because it “formally overrules its source” (89) through naming itself as *Jane Eyre*—not eliminating the force of the latter, but rather “designat[ing it] as a weak

epistemology in the constitution and representation of the postcolonial world” (88-89). To ask the same question of a legal text, she turns to the judgment in *Mabo v Queensland*, which, although working towards a rewriting of the doctrine of terra nullius—does not quite achieve this status because it stops short of dismantling its “imperialist skeletons” (82).

Tuitt provides a useful theoretical bridge between the literary and the legal. In some senses, legal texts are more explicitly rewritings, because writing judgements involves the re-encompassment of precedents, whereas few literary texts are as explicit in their reworkings of colonial texts (her other example is Ngugi’s *The River Between* as a rewriting of Conrad’s *Heart of Darkness* [72 n11]). To return to Butler’s framework, and the notion that the agency of subjects lies within the very fact of a normalizing history of repetitions (citationality), I want to contend that Tuitt’s claim at the level of genre is a version of what Butler is talking about at the level of speech act: the post-colonial text must closely invoke the colonial text just as the postcolonial subject gains its agency from the history of colonizing repetitions. Still, perhaps none of the three texts in focus below would fit as neatly into Tuitt’s category (because none fully invoke a source text) as a framework to think about their postcolonial potential. But, as another in the long tradition of bringing together the legal and the literary⁹⁴ her contribution is fruitful.

Tuitt does not give any detail as to how the power of a postcolonial text has meaning in the social world of reading, seemingly assuming it rests somewhere in the texts themselves and/or in this act of naming, or even in the act of writing. I want to add to this framework by

⁹⁴ Most notable in this tradition are James Boyd White, who sees law as “a literary activity” in that the *reading* of the law is “as if it were a novel”(17); this is related to but seemingly the inverse of Ronald Dworkin’s idea that writing legal opinions is like *writing* a succession of chapters in a novel. Tuitt goes beyond this to see, among other things, the violence of the literary text as the necessary counter to the violence of the law: “the literary text,” she writes, “can be used precisely as a counter-violence to which the law can yield, and through which law can be created” (“Law” 203).

giving some attention to indigenous texts' status as discourse, their rhetorical action, their addressivity,⁹⁵ their genre (un)conventions, as well as their positions in the literary or legal marketplace. The idea of a rhetoric of address, or of rhetoric *as addressed* brings the communicative element of postcolonial literatures to the fore. So, this chapter goes over similar ground as does Tuitt, but brings a rhetorical genre perspective to literary texts within political and cross-cultural contexts in order to get at this issue. The particular topics of sovereignty, property, land claims and access to resources from positions of marginality in both locations provide the content with which to assess the trajectory of this literary/political genre. In particular what I show below is that, depending in part on the audiences designed by the particular text and in part on how texts are remembered and taken up by audiences, their socio-political (in)efficacy can be assessed in more detail, but perhaps with less conclusive results, in terms of overall outcomes.

One thread of this chapter will analyze *Stolen Life: The Journey of a Cree Woman*, a collaborative autobiography by Rudy Wiebe and Yvonne Johnson that tells the story of the first Aboriginal woman to be given the maximum sentence for murder in Canada. In one sense the book is the story of what happened, both in Johnson's life and crime, and in the trial and its aftermath, and in another it is an exploration of the effects of institutional and systemic racism on aboriginal peoples. The book is also an uptake of Rudy Wiebe's *The Temptations of Big Bear*, which provided the impetus for Johnson, Big Bear's great-great-granddaughter, to contact Wiebe and seek his collaboration. One subsequent text in the chain of citation is in the form of a Canadian Senate Committee hearing of the blocking of Bill C-220, in which *Stolen Life* was

⁹⁵ Bakhtin writes: "Each epoch, each literary trend and literary-artistic style, each literary genre within an epoch or trend, is typified by its own special concepts of the addressee of a literary work, a special sense and understanding of its reader, listener, public, or people" (98).

cited and which would have diverted profits made from the writing of prison inmates to the Crown. This is now the law in some provinces of Canada, and indeed, Johnson was disallowed to profit directly from the book,⁹⁶ although profits were eventually funnelled into a trust for the benefit of her children. *Stolen Life* can be seen then as a successful post-colonial intervention in terms of working to alleviate the generational effects of colonialism, and (in Tuitt's terms) as renaming and rewriting a court action and a judgment that resulted from a trial during which Johnson did not speak in her own defence, but also, as I show below, it is a grand narrative whose elisions and excesses work in an opposite direction to tacitly reinforce regressive gender stereotypes.

In the second thread, Alan Duff's *Once Were Warriors* is analysed for the controversy surrounding its portrayal of urban Maori life and Maori masculinity, heightened by the novel's uptake as a film directed by Lee Tamahori, and the subsequent expansion—and redesigning—of its audience internationally. In particular I read the changes made to the plot and the assumptions about audiences that underwrite these shifts. Turning a novel into a screenplay and subsequent film obviously means change; genre theory alone would predict this, even if the goal was to be “faithful to the book.” But when the genres are contact genres, consequences are shaped by postcolonial and neo-colonial projects and thus deserve special theoretical consideration. The film version now has iconic status in Aotearoa New Zealand and still to some degree sits ambiguously between criticisms that its portrayals were too real and not real enough. In keeping with my expansion of Tuitt's framework above, my analysis appends to current

⁹⁶ Manina Jones sees this as potentially “mirror[ing] the expropriation of property rights at the centre of colonialism itself” (219).

criticism concerning this text a consideration of rhetorical effects by looking at uptakes within a diversely situated audience.

The final thread takes up *Baby No-Eyes*, a novel by Maori author Patricia Grace, which uses multiple and multi-generational narratives and perspectives of a large *whanau* to address both the colonial appropriation of land, and the neo-colonial appropriation of genetic material, the latter suggesting the need for a sort of genetic title (Prentice). The book's title is cited in public and political discussions about gene harvesting and the impact of new biotechnologies on Maori communities,⁹⁷ constituting an example of similar sorts of socio-legal uptakes as *Stolen Life* in Bill C-220 discussions. I also investigate how *Baby No-Eyes* reframes settler/aboriginal contact from a Maori perspective, in that it rewrites cross-linguistic problems inherent and now legendary in the two versions of Aotearoa New Zealand's founding document, the Treaty of Waitangi. *Baby No-Eyes* succeeds in mobilizing a post-colonial critique because it does not succumb to, I will suggest, any encompassment by a grand narrative.

All three texts are chosen to illustrate the way literary contact genres have within their realm of socio-legal-political action generated uptakes for postcolonial projects. I try to link these outcomes to textual strategies in the texts themselves, to the literary critical uptakes of the texts, and to their public rhetoric, thus switching between three related levels of analysis. This will help me explore the potential for genre theory—a version of it invoked by me to theorize and explore issues of contact—to apply to literary texts, which necessarily involves, I suggest, a consideration of readerships, and the possibilities for uptakes in the realm of socio-political action in postcolonial projects. But first, what can Tuitt mean by a fully realized postcolonial text? Although acknowledging that “any form of critical interrogation of a cultural form effects

⁹⁷ Biotechnology is defined by Roberts and Fairweather as “the use of living organisms to make products and solve problems” (vii).

a type of rewriting” (72, n11), only those texts that fully and directly inhabit a precedent text can approach the “moment of judgment,” where the colonial is at the most intense risk of being re-inscribed—but is not (xi). It is at this moment of the most intense ambivalence that a full rewriting is possible. I explore the possibility of such moments in the texts that follow; while conceding that none of these texts as a whole directly invoke a pretext, there seem to be moments when the postcolonial is achieved.

Drawing from genre theory, it seems to me the concepts of uptake and encompassment characterise Tuitt’s notion of rewriting. Can these theoretical worlds be reconciled so that Tuitt’s findings within her postcolonial paradigm are explained via their rhetorical efficacy in the contact zone? The claim of this chapter is that the shifts in reader subjectivity—the shift in audience as both assembled and as designed by and for new contexts—from that of the unspecified diffuse reader in similarly unspecified reading contexts, to that of activist (in the case of *Stolen Life* and *Baby No-Eyes*) or movie-goer (in the case of the film adaptation of *Once Were Warriors*) bring with them certain risks. In short, given that genres encompass situations, or, as Knighton puts it, have the “capacity to name dominions of needs and desires with purpose” (356), the *re*-encompassments that result from these differently genred uptakes bring with them elisions and excesses that indicate the vulnerability of contact genres to containment—to a cut-and-dried world of nameable causes and effects which can and do oversimplify and polarise discussions of redress and resistance. Encompassment as theorised by Burke and Knighton provides the link I need to Tuitt’s concept of naming and renaming (*Wide Sargasso Sea* successfully (re)names *Jane Eyre*; *Mabo II* not quite so successfully (re) names the doctrine of *terra nullius*), giving concrete rhetorical substance to her richly and generatively theorized account of the potentially successful postcolonial text.

Stolen Life: The Journey of a Cree Woman: encompassment and excess

As already mentioned, this collaborative autobiography resulted from a particular uptake, which is Yvonne Johnson's reading of Rudy Wiebe's *The Temptations of Big Bear*.⁹⁸ Given this history, I begin this section by highlighting some of the textual traces of this uptake as a way to contextualize the collaborative aspects of this explicitly "contact" genre. Indeed, Johnson articulates the psychodynamic details of the contact zone when writing to Wiebe about how she came across *Temptations*: "I must admit I have seen it many times before but did not wish to even pick it up. As I figured, yeah, what do any of those White people or history really know of my family [...]. But now I am glad I read your book. I was slapped in the face by how much you really knew or could understand. And I wondered if you had talked to my relatives. Or how you did your research. Where did you get it all?" (Johnson and Wiebe 8). Johnson's reluctance to pick up the book, in the face of a "White" person's audacity to write it in the first place, finds its paradoxical echo in Wiebe's reluctance to tell Johnson's story on the same grounds; in his response to Janice Robinson, Johnson's counsellor in prison who sought to facilitate this collaboration, he writes: "I am an aging, professional man, exactly the kind of 'powerful White' who's so often created problems for her. Isn't there someone else who should work with her, a woman, a Native writer?" (41). Thus Johnson's criticism of whites writing about aboriginal people has its textual trace in Wiebe's account, through his editorial choice to use direct citation of speech in "powerful White", which is not quite but close to Johnson's original wording to him in her first letter. Sentences such as this demonstrate and go part way

⁹⁸ Wiebe attempts to rewrite standard nineteenth-century Canadian history by upsetting cultural stereotypes that would construct the native other as either "good" (reasonable, Christian and civilized) or "bad" (warlike, heathen and primitive). But perhaps, following from Cook-Lynn above, this text falls into the trap of a romantic presentation of Cree Chief Big Bear as the wisely resistant (to Treaty Six in Canada) "proto-postcolonial" Indian.

toward answering Manina Jones' question about this text: "What does it mean to claim authorship in the autobiographical contact zone?" (218). As Bakhtin reminds us, the appropriation and re-accentuation of words and sentences is on the one hand a feature of all genres, but how one represents them editorially in writing is itself a measure of "white power," and it is a power Wiebe seems to be reluctant to own by setting off his words in quotation marks. It is a critique from the outside, he seems to be saying, and not one he wants to fully acknowledge even in its acknowledgment. The violence of Johnson's wording about being "slapped in the face" by how much he knew seems to get at her own awareness of how this power/knowledge has put her at risk of physical harm elsewhere in her life; it also, perhaps, acknowledges both the violent alienation from her "nativeness," and her vulnerability to coercion, textual and otherwise.

Sentences that question his role as 'powerful White' are also, we can imagine, sentences that Wiebe never uttered in relation to his initial decision to write about Big Bear, which apparently was based on a "fascination [that] has its roots in the happenstance of birth," according to one interview (Bergman 115).⁹⁹ One could note the privileged perspective of (Euro) academics and authors inherent in such words as "fascination" and "reflection" in relation to aboriginal culture. It speaks the language of the leisured class at liberty to so indulge,¹⁰⁰ and could be seen as typical of the old style literary critic engaged in privileged discourse that Fahnstock and Secor characterize as "conservative, self-celebratory sermons of an enclosed religious community" (in Wilder 77). But rather than constraining or co-opting history to build a literary or literary-critical career of his own, though, another could argue (as

⁹⁹ "Wiebe was born [...] on a homestead in Speedwell, Sask., just 45 km away from where Big Bear was born more than a century earlier" (115).

¹⁰⁰ Carole LeClair (personal communication).

some have) that Wiebe's narrative style in *The Temptations of Big Bear*—with its multiple perspectives, the inclusion of actual transcripts from Big Bear's trial (one of the many ways in which the book is a foreshadowing of *Stolen Life*), and the open-ended nature of the text—seems to open up the possibilities for aboriginal history rather than rewrite or co-opt this history per se. As author of *Temptation*, Wiebe seems to position himself as over hearer; far from being omniscient, he creates the sense of not wanting to concretize the historical content, nor the intentions of the real historical actors to whom he gives voice. Referents are often obscure, and meaning often ambiguous, not only in passages that recount Indian lives and conversations, but as a general strategy to recount history. Perhaps, therefore, it was this resistance to closure that opened up the possibilities for Johnson, rendering Wiebe a safe collaborator for her. But, while in a blatant sense *Stolen Life* is the result of an uptake—a physical and psychological taking up by Johnson of a perspective on her ancestry—the *result* may be a different kind of narrative altogether, one that more directly ascribes reader roles and constrains further uptakes. *Stolen Life* has been described as more like a testimony, placing readers as proxy witnesses for Yvonne's retrial (Rymhs, drawing from Laub, 55-56), and as such the narrative strategies are orchestrated to bring readers to another verdict. Of the four people involved in the murder of Skwarok, none received as harsh a sentence as Johnson, and one of those involved turned prosecution's witness to receive a considerably lighter sentence. This new "testimony" if anything sees each of those four present at the time of Skwarok's death as equally "guilty," and posits Johnson's sentence as unjustly severe in comparison to those of the other three. But the risk of encompassing Johnson's narrative in *Stolen Life* as testimony is, according to Susanna Egan, "that it overrides complexity because it has a case to make" (13). The case here is not as simple as the absolution of Johnson; if this is all it attempts, then it elides complexity, even as it attempts to be comprehensive (as Egan also points out).

In the thoughtful and comprehensive literature on this text, the book has been seen variously as an appropriation, a facilitation, and a trespass. The issue of collaboration and appropriation, for example, has been argued from two ends of the spectrum: Manina Jones sees the text as benefitting from the possibilities of the contact zone, noting that “through Wiebe, Johnson is able to appropriate and renegotiate the terms of authorship itself” (214). But Egan, as indicated above, is disturbed by what its status as testimony disables, for one thing its possibilities as “scriptotherapy”—“a healing activity dependent on language, a process rather than a product” (13)—which works as a “counter text” in some conflict with its function as testimonial (15). Although I find versions of my own observations and reactions to *Stolen Life* in both of these authors’ accounts, my own claim of re-encompassment developed below finds more resonances with Egan’s. Nonetheless, in terms of scriptotherapy, if this is indeed the potential for Johnson’s writing, I do not think we need to assume that *Stolen Life* as written “product” precluded this “process” for Johnson then or since. For such a prolific writer as she is, scriptotherapy seems to me to be an endless possibility, and other encompassments always an option.

The proliferation of her writing after her sentencing is in stark contrast to the fact that Johnson did not speak at her own trial. Perhaps on some level (and given her history of encounters with the law) she was cognizant of the ways in which her story would be transformed in legal uptakes. But regardless of the fact that she not testify, a story about her is told, either implicitly or explicitly, in the police reports, the testimony of her co-accused, and elsewhere in the ensuing trial. If these stories constitute Tuitt’s “colonial text,” the question becomes whether or not the rewriting of that text by Johnson and Wiebe is the postcolonial text that “exceeds” the violence of the original text (Tuitt 94, 95).

To answer this question requires a consideration of the consequences of Johnson opting for another type of transformation, one that places her this time figuratively in the witness box to tell her side of the story. Whether one sees *Stolen Life* as a facilitation or an appropriation would depend on this outcome; it would depend on material outcomes, for example on whether it is a positive or negative intervention into the injustices of a wider society in which women are in the greatest danger of harm in their own homes, and into Canadian criminal justice system that incarcerates far more aboriginal women (and men) than is proportional to their population in Canada as a whole. *Stolen Life* is an intervention into the material realities of racism, sexism, and sexual violence perpetrated by men against women and children. It could potentially speak back to injustice in numerous ways, regardless of whether it is successful as scriptotherapy, or whether it gives Johnson a fair trial. But whatever the genre encompassment, my interests here now turn to its remainders and excesses.

By encompassing the story of Yvonne Johnson in a context of patriarchy, violence against women, racism and colonialism the book bequeaths both omissions and excesses, and it is through detecting the excesses that potential omissions can be identified. Below, I provide evidence for what I think is an undercurrent of homophobia in parts of *Stolen Life*, leading me to speculate that a thread of anti-gay aggression may have partly and tacitly rationalized the four accuseds' motivation for the murder of Leonard Charles Skwarok. But first, I also show how the play between Wiebe's and Johnson's storytelling similarly encompasses parts of the story in a narrative rooted in patriarchal premises about motherhood. I then conclude, therefore, that both the dominant and tacit narratives of the book inhibit the full literary and post-colonial possibilities for a full acknowledgment and exploration of the events leading to Johnson's arrest. The dominant story of Johnson's motivations in regards to the crime, the one that encompasses the situation (Knighton), tells of her perhaps irrational but understandable fear for her children

in the face of her own history as a victim of sexual abuse. Johnson's history is undoubtedly one of trauma and its suppression, and of acting out her psychic pain in self-destructive behaviours. But her presentation as a mother in *Stolen Life* is as one almost militantly devoted to the safety of her children. Her motherly instincts are presented as so heightened that on one occasion she had so much empathy for (co-accused) Shirley Anne Salmon's child, whom Yvonne felt was being neglected, that she "wanted to give [her] my other breast" (231). Apart from this being one more of the many opportunities taken by Johnson and Wiebe to set the reader up for a negative evaluation of Shirley Anne, it also contributes to what Egan uncomfortably refers to as "the explicit naturalizing of Yvonne's maternal vigilance" (24) that camouflages the "darker aspects of Yvonne's narrative" such as the trauma her children might have experienced as a result of their parents' lifestyles, especially on the night of the murder in their home (25). This is just one elision of the dominant narrative.

Of her life with her husband Dwayne (also co-accused), Johnson (with Wiebe's help)¹⁰¹ says: "But even if an occasional party developed, for me the children always came first. I bathed them, always watched out, and never drank much until they were safely asleep. My love for them, their love for me, kept me on the ground" (213-214). Of note here is the unusual seeming slippage between the transitive use of the compound verb *to watch out for* and what is also

¹⁰¹ The degree of his editorial intervention is suggested in the following section supposedly written by Jonson in the first person, and recounting an experience with her mother Cecelia:

She did come with me when the police caught up with me about the Douglas Barber case in Butte. One day around New Year's, 1979, four cops stood on the porch of our house in Winnipeg when I opened the door: two RCMP and two plain-clothes Montana State marshals. I was alone at home, and they were so enormous they surrounded me like a wall sitting in the living room. I had broken probation in Butte, I was subpoenaed to be a witness at the Frank Shurtliffe trial. *The initial charge of manslaughter in the death of Douglas Barber had been changed to one of murder, and Yvonne was to be called as a witness to the prosecution.* So mom took leave from her job and flew with me the whole day, through Minneapolis and Great Falls, to Helena. Dad, with Perry, drove up from Butte to meet us." (Italics added 166)

Was the penultimate sentence in the third person meant to have been added as an explanatory note, perhaps in brackets, or was the whole passage originally in the third person (omniscient Wiebe), and then an editorial choice was made to turn it into first person?

connoted, i.e. the intransitive imperative *watch out(!)*. This slippage leaves the question of whom or what she (or her children?) should watch out *for*.¹⁰² A few pages later, she speaks of them again in a protective way and, if there was a missing object for “watch[ing] out” above, it is given just a little more substance in the form of a second person pronoun: “They kept me alive: inside myself I was an empty space, all I kept intact was ‘Don’t you dare touch my kids’” (217). This is an important foreshadowing of (and preparation of the reader for) her rationale for the violence against Skwarok, i.e. that she was led to believe that he was a child molester. But is that all the participants in the murder were thinking? What other insights can be garnered from the account of events? What, indeed, does “sustained rhetorical effort” (to pick up Burke’s wording again) in the direction of fierce maternal protectionism render less consciously apparent in a cursory reading?

The scene setting for the actual murder is lengthy and more heavily mediated, I suggest, by Wiebe, adopting as it does a more traditionally “literary” style, complete with evocative imagery, and invented speech and laughter of the participants; it reiterates and focuses on Skwarok as a potential child molester in the context of an otherwise idyllic family scene. After a paragraph-long epigraphic entry supposedly direct from Johnson’s journal, the crucial chapter begins with Wiebe telling the story of his own visit to the neighbourhood in Wetaskiwin in 1996, followed by the omniscient description of the scene as it would have been at the time, interspersed here and there with direct speech reports from Yvonne. But mostly it is Wiebe as omniscient narrator painting a picture of suburban bliss: “Dwa laughed as he counted fourteen little kids either running through the house or playing in the yard” (229). The introduction of

¹⁰² A search revealed only one other instance of this construction, in the British National Corpus: in *The Crooked Scythe* George E Evans (London: Faber & Faber Ltd, 1993) writes: “The only thing you had to watch out was that she didn’t start to stagger and put one of them feet down on you a bit sharp, or fell on you as she were a-swaying about with her jink-back.”

Skwarok is accompanied by more harmonious scenes of the “gentleness of a September day, trees gold and shedding” juxtaposed with Johnson suddenly remembering news on television of “warnings about a man hanging around schools, of children disappearing for a few hours” (240). It is in the midst of her panic over this intrusion to an otherwise idyllic domestic scene in the neighbourhood that she discovers Skwarok and Salmon in the living room, and is shocked to note that her youngest child is on Salmon’s lap with her panties pulled down. Salmon’s later explanation was that she was “just showing Chuck [Skwarok] her birthmark” (241). Wiebe, who has taken control of the most of the narrative here, portrays Yvonne as becoming increasingly troubled by what she saw: “she felt a chill through her: had she seen him, . . . had she seen him leering at her baby’s naked bottom?” (241). By this hesitation and repetition, the reader’s vigilance is heightened and prepared for what is to follow. The plot and its characters have been confirmed: the vulnerable child, the feral mother, the evil perpetrator, and his accomplice.

But what are we to make of another elliptical reference, one that this powerful plotline overshadows? Twice in Johnson’s description of a phone call between Shirley Anne Salmon and Skwarok she mentions “buns, cousins, males”: “I dialled the number as she [Shirley Anne] could not find his [Skwarok’s] amongst all of the other phone numbers on the calendar. I dialled and handed it to her. I stood there a while, to hear her, talk about buns, cousins, males. Then she said, ‘Why don’t you come over? Yvonne’s passed out and her kids are running around half-naked.’ I then grabbed the phone, but she pulled away as I tried, raising her fingers to her pursed lips, and then came her sexy voice and talk of cousins, males and nice buns again” (248). The suggestion here could be that Salmon was interested in Skwarok’s male cousins and their “nice buns,” although there is no other evidence for this. Salmon’s descriptions of “half-naked” children are obviously presented to suggest Salmon’s attempt to lure Skwarok, but even so, the open ended nature of the repeated phrase “buns, cousins, males” also suggests (to this reader) an

undercurrent of homoerotic titillation that might equally be seen as luring Skwarok. The less declarative the mode of discourse, the more open it is to ambiguity and allusion. If indeed there is this undercurrent to the (group) dynamic preceding the murder, then the attack on Skwarok could also be seen in this light, a possibility that is elided, though, in this mode of storytelling.

According to recent scholarship, “sexual prejudice, peer dynamics, and thrill seeking [are] primary motivators for anti-gay aggression that are justified by broader heterosexist societal norms” (308), and all three aspects need to be taken into account. It is beyond my expertise to assess the validity of these claims in the social sciences, but by separating out these factors of anti-gay “prejudice, peer dynamics, and thrill seeking” I can further investigate how each of the actors involved in this crime might betray one or more of these factors (at least as they are presented in this text). In a sense, to the degree that the four acted together, homophobia may have played a role in the actual murder; but I will limit my discussion to how an open-ended exploration of potential homophobia is foreclosed by the dominant narrative, only to be revealed as its excess.¹⁰³ I am invoking, then, both Wiebe’s mediations,¹⁰⁴ and, potentially, his and Johnson’s joint elisions in what seems to me to be an inadvertent subtext to this retelling (and potentially to the scene itself), homophobia thus eclipsing the postcolonial retelling of the story of Johnson.

To look once again through the lens of research in the social sciences, I now report on two otherwise unrelated events in *Stolen Life* to gather more evidence for potential homophobia if not anti-gay aggression. First is a story Johnson tells in the first person of hitchhiking with Minnie when they were teenagers. They accepted a ride from a rest stop attendant in a national

¹⁰³ This possibility may also have been foreclosed in the actual court cases.

¹⁰⁴ These draw from the unmarked traits and styles of the white male literate and propertied class often invoked as the voice of the public sphere (Warner 382).

park: “Minnie nudged me, pointed silently. The guy’s fingernails were painted and he was wearing red spike heels. Big brawny guy. I’d never seen anything like it. At the next rest area, he got out, heels and all, and hauled out the garbage sacks and I said to Minnie, ‘Let’s go.’ So we left him” (150). Here we have two teenaged sisters encountering, seemingly for the first time, a cross dresser. Perhaps Johnson felt embarrassed and uncomfortable, perhaps she felt endangered (he was “big” and “brawny” after all); presuppositions necessary to the interpretation of this little anecdote do not supply readers with a clear motivation, except that on some level the abrupt flight from the company of a cross-dressing man is an escape. Even with the hindsight made possible by the narrativization of Yvonne’s life by her and Wiebe, the opportunity to view this from a wiser adult perspective was missed. In itself, this means nothing, but in the context of what I am arguing is a subtext of heterosexism if not homophobia as the narrative ensues, it is one way this text exceeds the boundaries of the testimonial on Johnson’s behalf. In trying to understand anti-gay aggression, Parrott and Peterson make it clear that “sexual prejudice is associated with the perception that violations of gender roles are threatening” (307, drawing on Kilianski, Parrott et al., and Sinn). Yvonne and Minnie obviously interpreted this cross dresser as a threat, because they abandoned the ride before they had reached their destination.

The second event that adds to this slippage between sexual aggression and pedophilia on the one hand and homosexuality and alternative gender performances on the other comes from a transcript of a cell shot after the murder. (In a “cell shot” a police officer goes undercover in a cell and tapes their conversation with a suspect.) When two of the four co-accused, Ernie and Dwayne Wenger, were first incarcerated as suspects, an undercover police officer (Jones) tapes a conversation in which the suspects talk about the murder (and here Wiebe presents sections of the official transcript):

Jones: ... What ya in for?

Wenger: second degree murder

Jones: Hoo fuck. Was that that one on the news?

Wenger: It was on the news?

Jones: Yeah.

After a moment Wenger mutters something that ends in “fuckin’ queer.”

Jones: What’s that?

Wenger: the guy was a child molester. (287-288)

Further into the cell shot, the following exchange occurs:

Wenger: Ernie and I took his [Skwarok’s] clothes off and said how do you like this (inaudible) fuckin’ diddling little kids. You’ll get your own medicine, and he shoved it up.

Jones: [...] Ernie says your old lady gets pretty wound up, eh? [...]. Because the guy was a skinner? That’s what pissed her off or?

Wenger: Yeah ... (inaudible) Ya gotta defend yourself. (295)

In prison slang, the term “skinner” can refer to both pedophile and homosexual¹⁰⁵ positing at the semantic level the slippage demonstrated between “child molester” and “queer” earlier in the transcript, and in Salmon’s reported telephone conversation. The cell shot also reveals Ernie’s role in the brutalizing of the victim, given more attention elsewhere in the book. Ernie was described as a person whose small stature made him insecure about his own masculinity; this is also known to be a factor when combined with sexual prejudice: “to the extent that a man

¹⁰⁵ Listed under “skinner” in www.urbandictionary.com (Accessed April 15TH 2009) are “bitch pervert pedophile molester fag wanker skin ricer homo faggot ass ripper skinna sex sicko skiner retard rape rapist idiot koove loser emo dick diddler dirty sanchez child child rapist blanket party.”

questions his masculinity or has it questioned by other men, he will experience a significant masculinity threat. In turn, he will more likely exaggerate stereotypical masculine emotions (e.g, anger) and behaviours (e.g. aggression)” (Parrot and Peterson 308). Social science research determining the exact interrelationships between these three motivational factors in anti-gay aggression is not definitive and is ongoing, but I draw from its concepts and frameworks to offer the possibility that there is potentially more going on here than the dominant narrative of a woman’s fear for her children. Of course, Wiebe and Johnson are telling *her* story, but these various layers of telling, both within the text and between text and reader, are functional, and draw on audiences’ abilities to draw implications founded upon myriad unspoken norms and standard narratives of causation. Also, by virtue of the fact that others are involved and have *their* stories told too (by becoming characters in *Stolen Life*), I want to suggest that the untold story, the foreclosed story, could be the degree to which peer dynamics were in operation and the group acted *as a whole*, and how peer dynamics and homophobia interrelated to produce what is in part an act of anti-gay aggression. (This is not to insinuate anything about Skwarok’s sexuality.) The actual psychological imperative to commit such an act draws on the same unspoken assumptions as would the discourse used to explain it.

We do not need to confine ourselves to the pages of *Stolen Life* to find evidence of the slippage between homosexuality and pedophilia. During the mid-nineteen nineties there was a case in Southwestern Ontario in which the police were caught up in a “moral panic”¹⁰⁶ about a child pornography ring, inflamed by the media, but which turned out to be, according to Kirsten Kramar, more about the “deep seated fears held by police and others in the middle class professions about queer sexuality and sexual practices” (287). One could argue that such fears

¹⁰⁶ Citing Victor, Kramar defines moral panic as “A societal response to beliefs about a threat from moral deviants” (286).

were at play in Westkiwin at the time, given rumours in the town of a pedophile picking up children. As Kramar points out about the case in Ontario, “The social construction of a ring of pedophiles operating to sexually abuse children was facilitated by an already existing discourse depicting homosexuality as socially evil” (305). And it was not that long before this when such claims were made openly and publicly in political discourse: in the late seventies in California, Senator Briggs publicly and repeatedly maintained that it should be possible to fire homosexual teachers on the basis that they wanted to abuse children and turn them gay.¹⁰⁷ So it is not much of a stretch to see the possibility of this undercurrent amongst the four co-accused in the murder of Skwarok. Between the thrill-seeking of Shirley Anne Salmon, the sexual prejudice underlying the incident in the truck with the cross dresser, and the homophobia suggested in the cell shot, there is a confluence of factors to add to Johnson’s own history as a victim of sexual abuse, and thus collectively fan her fears. The only story explicated in *Stolen Life* is this latter one of her survival strategies, and a fuller exploration of what stories contribute to readers’ (and participants’—and even these authors’) tacit sense of what is going on—what is dangerous, what is an understandable response, and, perhaps, what constitutes a pardonable crime—is foreclosed.¹⁰⁸

There is one other elision that deserves mention: though protective of her children, it is also evident that alcoholism compromises Yvonne’s and Dwayne’s parenting on occasion. Reading between the lines of drunken escapades, and notwithstanding Johnson’s protective mothering, it would not be illogical to surmise, as Egan also has done, that there must have been substantial child neglect at some points. We get no admission of this from Yvonne in these

¹⁰⁷ “John Briggs (politician).” *Wikipedia*. 2009. Wikimedia Foundation, Inc..

¹⁰⁸ Skwarok’s friends and family have also reacted to the book, notably to the representations of Skwarok, which they describe as “filtered through 3 different people before reaching the reader” (Accessed May 1ST 2009 from www.nsmdesigns.com/hisnameischuck/stolenlife.html).

pages of her decline in the days leading up to the murder, nor in its aftermath, nor in the concluding narrative of healing and of the renewal of her spirituality. I am not saying this to fault the authors for an omission, or to fault Johnson personally, but if I am going to talk about elisions and excesses then it behoves me to notice and acknowledge this one, i.e. that Johnson does not acknowledge she may have neglected her children. One possible explanation—and one preferable to me at this point—is to see Johnson’s relationship with her children as ongoing, personal, and frankly beside the point. In other words she has taken an ethical position that her story for and about her children belongs in part to them, and she is respecting that. This *is* the commitment of a parent toward her children. As such, although the text may be as Egan describes, “too tidy for the mess of trauma on which it is based” (23), it can also be argued that the story is not over yet, nor is it all publicly displayed. So while on the one hand this elision of text in the form of the affective mode and the ethical relations of the private sphere hints at that without which testimony or (auto)biography would not happen,¹⁰⁹ on the other it consists of the measure of possibility left over as excess from this genre encompassment.

Taking the human story of Yvonne Johnson (which included her own uptake of Wiebe’s uptake of the story of her historical ancestor) and encompassing it in *Stolen Life* to place the reader in the position of jury member considering new evidence can, like courtroom discourse itself, obscure unsettling possibilities and limit the postcolonial potential of such a text. Perhaps had Johnson continued with her scriptotherapy, the possibilities for an understanding more complex, more insightful and more nuanced could have eventuated. Then neither Egan, nor myself, nor any reader would be left with these unsettling questions.

¹⁰⁹ To adapt a point from Siskin makes about professional discourses, “private life is a product of discourse. Without the individual privacy of body, soul and property, [biography] would have nothing in which to intrude” (106).

If contact genres herald both the perils and possibilities of the contact zone, one such genre—of cross-cultural collaborative (auto)biography—seems to heighten the distinction between the two. It is the excesses in *Stolen Life* that “crack” or “expose” this “genre’s illusion of normalcy” (61), to cite Anthony Paré. Excesses such as those ambiguous moments of word choice and syntax I outline above, micro-discursive moments to consider alongside macro-discursive decisions discussed by Egan, and those that point to an undercurrent of homophobia at numerous places throughout the text, crack the veneer of the narrative, not so much in its attempt to exonerate Johnson but in its attempt to provide a more well-rounded postcolonial critique of Canadian justice and society as a whole that includes feminist and gender considerations. The narrative of a mother’s alarmed attack on a child predator dominates the rhetoric designed to render this version of events as the most exculpatory for these authors.

“Coming from a *Once Were Warriors* family”

This Aboriginal title has also led to uptakes in political scenes and is part of my category “contact genre” in the sense of both perilously and generatively addressing issues to do with contact in Aotearoa New Zealand. These potentials shifted when the novel elicited a film adaptation, an uptake that seems to have risked becoming a neo-colonial re-encompassment. In other words, while the film adaptation of Alan Duff’s book of the same name put the New Zealand film industry and a version of Maori culture on the international map, it also had repercussions in the media and social life in general back home. I posit that the book can no longer be seen in its original un-encompassed form, because in keeping with the idea that genred

uptakes define situations, it follows that encompassment can be retroactive.¹¹⁰ Knighton (drawing on and furthering Burkean biblical metaphors) outlines the tripartite form of genre encompassment: it is *grammatical* in the uptake and resignification of traces, or in how asides subordinated in dependent clauses can be transformed into central elements; it is *communitarian* in that it creates and delimits communities through shared meanings and presuppositions; and it is rooted in *recurrence* in that every repetition (every reading, every citation) is an opportunity for re-encompassment. I use this lens to explore the shifts between book and film to ascertain that encompassment of book by film in this case renders the original irretrievable, and I give substance to this encompassment by presenting a few anecdotal uptakes in the film's now long and still incomplete aftermath.

Both book and film tell the tale of Jake and Beth Heke and their five children, a fictional family not unlike the real-life family of the Johnsons of *Stolen Life*, mired in poverty, alcoholism, violence against women, and disjunction from cultural heritage or *maoritanga*. The novel is written in a postmodern style, a mix of omniscient narration and free direct and free indirect thought and speech, often switching between various characters' points of view. But for all this, a key component of the plot is clear: Grace, the oldest daughter, is raped, upstairs in the bedroom of her home in the aftermath of a drunken party hosted by her parents. In the book Grace writes in her journal that she *thinks* it was her father, Jake; in the film, she names a family friend, "Bully," as the rapist in the journal. Whatever the case, the trauma is so harsh—especially given that at this point in the narrative she has lost faith in her mother's ability to keep her and her siblings safe—that she commits suicide.

¹¹⁰ As is the case, more obviously, in the legal context of appeal decisions.

Although the strong suggestion in the novel is that the rapist was her father, the issue of who is responsible for the rape is not completely resolved. In one of the final chapters, “Letter from the Grave,” Beth confronts Jake with the evidence from Grace’s diary that it was Jake, an accusation that takes him by surprise, although it could be said that the reader as well as the character Jake have the probability/ possibility (respectively perhaps) of the rape quickly dawn upon them.¹¹¹ Jake’s friend Sonny is present to hear the accusation and does not hesitate in passing judgment: he attacks Jake and beats him up badly. Over half of the five-page chapter is taken up with Jake coming in and out of drunken consciousness of the profundity of the charge and its possible truth. Using free indirect discourse (FID), Duff interposes Jake’s current reality and confusion with his dream-world memories of childhood pain and shame:

Jake. Walking. Walking the streets. The Pine Block streets. Hurting. My pride, man. Of Sonny Boy hitting him. That other matter not yet sunken in. Accepted. It couldn’t be, because a man’d not done it. Just Sonny Boy Jacobs then, a picture of him. The feel – the force – of his gut punch (162)

[...]

Walking. Walking and hurting and that other matter drifting round and round in his mind of not being true, it can’t be true. I’m not like that. But then again ... you know how drunk a man gets, he don’t remember nuthin half the fuckin time. But surely he wouldn’t do *that*? Man don’t even have *thoughts* like that, of, you know: having sex with kids. Let alone his own daughter. But then again ...

¹¹¹ Alan Duff has since refuted the idea that Jake raped his own daughter, saying “I should know, I wrote the bloody thing.” He also resolved the matter once and for all in the novel’s sequel. But the fact remains, regardless of his intention, readers of the book widely assumed it was incestuous rape (See Martens 27-28).

thinking of the dreams, how violent they were, how – a man don't have the words
– but he knows his dreams are strange. (162-3)

Swallowing. Courage fleeing. Just up and fuckin off on a man. Just this shell of
him standing there, being stubborn, stupid, waiting forem to move first. Inside the
man it was like a ...? Like a kid or somethin ...? Like a kid was cryin. (164)

Through indeterminacy, FID provides opportunities to destabilize identities. In the case of male authored books, says Kathy Mezei, it can enable women focalizers¹¹² to gain agency as speaking subjects “despite their male narrators,” or it can mobilize narrators in the service of “representing the slippage between the author’s possible ambivalent sexuality and society’s concept of appropriate sexual behaviour. . . . [and] offers a coded structure within the text to reveal authors’ discomfort with conventional gender roles and forms of gender polarization” (71). In this case, I believe, the opportunity concerns the author’s creation of unsettled and unsettling identifications with his protagonist in terms of Maori masculinity, as it juxtaposes and runs together Jake’s role as perpetrator and also as victim. The passages quoted demonstrate Jake’s internal conflict in the face of the beating he had just received, and the (too?) painful possibility that he had indeed raped his own daughter. There is ambiguity in the fragment “Hurting,” which could either be the narrator representing the consciousness of the character, or the character’s represented consciousness (demonstrating too the slippery-ness of these terms in their application).¹¹³ If anything, the postmodern stylistics here disrupt the possibilities for

¹¹² Taken from the field of narratology, the term “focalizer” for Mezei seems to be an alternative to designations such as P.O.V. or even possibly protagonist. Chafe also distinguishes between verbatim indirect speech, verbatim indirect thought, and verbally uncommitted thought. For Chafe they together make up what he calls a “free indirect style.”

¹¹³ And the usefulness of Chafe’s category of “verbally uncommitted thought” (322).

encompassments at the grammatical level, putting them on hold as Jake's role as protagonist hovers between sinner and sinned against.

Elsewhere the narrative is similarly interspersed with assertions of pathetic machismo—"Feeling his old power surging through him. *Come to me now, Sonny Boy*" (163 italics in original)—and the generational shame he carries as a descendent of a slave tribe, which mixes and merges and separates from shame rooted in childhood trauma: "(Like my mummy and daddy and all my uncles and aunties and cousins and friends – of, everyone – from childhood. Don't only not like me but hate me. Me. Just a lil kid. And they *hate* me)" (164 italics in original). This tangled web of shame and guilt and the mode of discourse chosen for its representation—which is a mix of authorial and child-centred consciousness—fill most of the remainder of the book, and although it leaves Jake as an undeniably broken and guilty man, the source of his guilt and shame is left diffuse through its grammaticalization in free indirect style.¹¹⁴

In the film, on the other hand, perhaps in meeting the demands of mainstream film for clearly articulated good and bad characters and for retribution as part of narrative closure—perhaps too shying away from the too disturbing possibility (for film audiences) of paternal rape—the issue of who raped Grace is treated quite differently. The perpetrator is Bully, a Heke family friend, and one whom Grace had been taught to call "Uncle Bully." In the novel Duff sets up Grace's relationship with Bully when, in her entry back to the family home on the night

¹¹⁴ Mezei usefully summarizes the controversy over the naming of FID, for example in that arising from the difference between Volosinov's quasi-direct discourse and Bakhtin's pseudo-objective discourse (see her page 67 for a fuller account) to say some of the confusion comes from whether it is seen as a linguistic or a literary phenomenon. As for the confusions between author, implied author, narrator, she says "I think it is important to remember that in fictional texts there lives an author as well as an implied author who may or may not be the narrator, and, if it is a heterodiegetic text, one or more character focalizers, along with characters who are not focalizers" (67).

of the rape, she describes giving “her father’s friend, her false uncle a hug” (88). Nicholas Thomas presents this encounter between Grace and Bully as evidence in the book that Bully was the rapist (in Martens 28), so while Duff himself and one critic point to Bully, the fact remains that readers, at least before the sequel, widely believed otherwise; thus the text, I believe, left indefinite who the rapist was but included an easy assumption that it was Jake, despite Duff using the option of omniscient narrator elsewhere in the book. This seemingly calculated indefiniteness along with its defensive retraction (the rapist was “obviously” Bully) seems unfortunate, because uncertainty, acting as a deferral, allows for the reader’s journey inside Jake’s consciousness for a wider exploration of the perils of urban Maori life, and an acknowledgement of how pre-contact Maori traditions such as the practice of slavery can intersect with other factors such as post-contact “colonization of the mind” (Said), gender inequalities, land loss, Maori migration from traditional lands to cities, and increasing social divisions effected by consumer capitalism.¹¹⁵ In the film Jake is disgraced not for the rape directly but for allowing the conditions in which rape would happen. His complex internal guilt as represented in the text is a shared guilt, mixed with shame and pain, a comment on the complexity of urban (male) Maori dysfunction in the context of colonialism; in the film, this is reduced to a scene of retribution, guilt and exile from community through its simplified ending. Unfortunately Alan Duff himself limits the possibilities of his own book. In 2002 he was cited as believing “Maori men lash out at the people around them because their ‘warrior’ mentality has been debased and corrupted.” The article continues: “But Mr. Duff, who is part Maori himself, also blames misguided tolerance by the white middle classes. ‘They make excuses for

¹¹⁵ Alluded to through such signifiers as “Pine Block” as the name of the suburb in which the Hekes live. Pine trees are an introduced species to New Zealand, and are grown for profit on large tracts of land that were previously forested by indigenous species.

us and say it's all a result of colonization,' he said. 'But we don't want to be judged by lower standards. We want the same playing field as everyone else.'"¹¹⁶

The film audience is given some scope to find the characters of Beth and Jake more likeable than in the book. As Jake puts it, "I'm a likeable chap, aren't I?" This is in keeping with director Lee Tamahori's goal of making a commercially successful film in a necessarily recognizable Hollywood genre (Martens 41-44), and includes the presentation of Beth as a stronger resister to the alcoholic world in which she and Jake are enmeshed. Her return to the marae, "the spiritual centre of Maori culture and identity," was seen as a more attractive and commercially viable ending than that of the book, which Tamahori described as unrealistic in its portrayal of Beth's "conversion into Mother Teresa of the ghetto" (qtd. in Martens 42). In the metadiscourse about this text, and within *Stolen Life*, it seems commonsense assumptions are more easily invoked: level playing fields, likeable characters, both sets of parents rendered more likeable. In the film and in *Stolen Life*, mothers are redeemed; they are the carriers of culture, the carers of children and the stalwarts of the heterosexual couple, if only their efforts weren't thwarted by the destructiveness and abuse of (a cultural) masculinity.

Commercialization is a necessary consideration when measuring the degree of success of the postcolonial text, and this also complicates Tuitt's framework. The film's re-encompassment of the book *is* successful, as Featherstone argues, "in establishing an aboriginal production base . . . and its initiation of a . . . debate about Maori modernity" (in Martens 55 n32), but I am more interested in what it forecloses. Another aspect of the plot can elucidate this further: both book and film tell the story of when the family sets out on a trip to visit Boogie (the second son, who's doing time in a reformatory); the visit is curtailed by Jake's decision to stop at the pub for

¹¹⁶ Kathy Marks in *The Independent*. Saturday, 14 September 2002. [Accessed online. 2 Mar. 2009.]

“only one” beer. In the film Beth stoically waits with the children in the car until sunset, at which point she and the kids finally take the bus home; in the book, however, she joins Jake drinking in the pub and shares with him this responsibility for yet another failure at maintaining the family and nurturing their children. Here Duff takes the risk that Wiebe and Johnson and Lee Tamahori seem to shy away from: the neglect by a mother of her children. Tamahori’s wish for the audience to have more sympathy for Jake and Beth, says Martens, is achieved through their character development in a narrative structure linked to causality (Martens 59). The consequence of the book’s uncertainty in the face of film’s certainty in this regard, of the book’s nagging and irresolvable guilt versus the film’s clear retribution, and of the book’s suggestion of incestuous rape versus the film’s clearly indicated perpetrator all map onto the book’s postcolonial potential versus the foreclosures of the film, a similar effect, perhaps, to that on the reader of *Stolen Life* as grand narrative.¹¹⁷

A media or cultural studies approach to *OWW*’s representation of Maori posits that meaning in either book or film is not fixed but found rather in the audience members’ incorporation of signifying practices and cultural forms “into their own consciousness” (Martens 57). We can predict some of these outcomes based on cultural and media critique, but a rhetorical view of audience is also instructive. Besides, both Maori and Pakeha critics are discussing this film *as critics*, discussing how cultural representations are realistic or stereotypical, too real or not real enough, or overly stylized, or negative and positive images of Maori. Alia and Bull are two critics who seem to see both book and film versions in an identical light and as contributing to “the influential and persistent stereotype that Maori crimes of

¹¹⁷ Giltrow asks if it is aboriginal guilt that drives these texts to these entrapments by a ready-made narrative of post colonial and feminine redemption (personal communication)

violence have their roots in their warrior past” (52). A survey of more incidental uptakes—as when the book or film is cited *en passant*, en route to a point being made about something else—is one way to get at the critical impulses of the polis, to uncover the more tacit critical conscience of audience members, as opposed to the discursive consciousness finding articulation in the academic and institutional practices of big “C” criticism. While lines between positive representations and romanticised stereotypes and between realistic representations and negative stereotypes can never be objectively drawn, individual uptakes can be assessed for their encompassments, throwing light on how *OWW* figures in the collective consciousness of New Zealanders. For example, former Prime Minister Helen Clark, when commenting on a news item about a pair of brothers making headlines in New Zealand for crimes they had committed, spoke of them as coming from a “*Once Were Warriors* family”(Tipa 26); this is a re-encompassment (probably one that could not have been possible without the film) perhaps engendering a negative stereotype of urban Maori, and even a form of colonial racism—not based on a negative stereotype intrinsic to the film or book from where it may have originated, but rather one that has been expanded by a wider media-driven socio-political milieu that is her context of utterance. On the other hand, in a bulletin report about Maori offenders, the statement “In the absence of any positive role models, their [young Maori men serving prison sentences] identity is often based on negative stereotypes like ‘Jake the Muss’ out of *Once Were Warriors*” (Tipa 26) can be seen as an example of how stereotypes work as critical constructs, invoked in an argument for culturally sensitive sentences for Maori offenders. Martens points out that since the film’s wide release in New Zealand, Maori saw the film in record numbers, and Maori men and women were recognizing themselves in the characters. Reports of domestic violence apparently increased (139). In this social movement, the term “warrior” has become “‘a handy tool’ to specify all kinds of people and events” (qtd. in Martens 140). As pragmatic theories of

meaning predict, terminologies and the connotations attached to them—in this case the warrior stereotype—can be marshaled for opposing concerns; what it does though is leave the stereotype intact. “Handy tools” can be used for good or ill.¹¹⁸

Given the film’s position as “a sociological document and cultural phenomenon” (Martens 138), one can also draw on social scientific accounts of audience responses to certain features of film genres. Indeed, the presentation of violence in the film deserves some consideration in light of recent research on the impact of violence on film audiences and the efficacy of the portrayal of violence if done as part of an anti-violence agenda. It has been argued that the realistic depiction of violence in films for the sake of violence prevention does not work: “A critique of violence may be best pursued on screen in its absence, that is by not showing—at least in graphic detail—the very phenomenon that the film would address” (Prince 32).¹¹⁹ So does the violence in the film *Once Were Warriors* pull the film generically in the direction of a more mainstream Hollywood genre gaining momentum during the period of this film’s release, and limit the potential of the film to contribute to the work of decolonization? Tamahori himself admits to liking violence in films because “that’s where it belongs” (qtd. in Martens 31), and critics have noted how *OWW* is “matched with the genre of the African-American urban movie” (Martens, drawing from Freincke 63). But while the film is also being

¹¹⁸ Alia & Bull coined the term “*Once Were Warriors* syndrome” to refer to “the by-product of the long-term effects of media-sponsored colonial racism” (52).

¹¹⁹ Stephen Prince is a communication scholar who takes an interest in violence in films. He admonishes his own field somewhat for “having virtually nothing to say on the matter” of violence in films in terms of its “sociological effects on audiences.” Unlike in film and cultural studies, he contends, in sociological studies, the primary concern is “not one of the filmmakers’ ideological intent, or the viewers’ ideological reception, but of the viewers’ behaviour, the attitudes that behaviour may manifest, and the role that a film may play in fostering the behaviour. Flesh-and-blood moviegoers don’t have much of a place in our discipline’s theoretical realm.” His call is for an interdisciplinary perspective that benefits from both approaches, although asking somewhat pointedly too: “social science has studied actual viewers and has produced findings. Film studies has produced interpretations. If you were a senator concerned with formulating public policy, whom would you call to testify?” (“Why” 18).

touted as succeeding in an anti-violence agenda (as the increase in the reporting of domestic violence by Maori women since the film's release suggests), it has also been conceded that domestic violence amongst Maori families could also be on the rise in New Zealand. (It is never easy to determine because the figures for reporting violence may not be correlated with actual violence; the increase in reporting can suggest either that more women are leaving abusive relationships or that more abuse is happening, or both.)

My larger question is, by shifting from page to screen, does *Once Were Warriors* have more or less power in Patricia Tuitt's sense? Or, to take a step back, does Duff's original novel constitute what Tuitt calls a "fully achieved postcolonial text," which, as she defines it, "sets out to re-write the colonial and in doing so, in the nature of its relation with the source or founding text, accesses the position of the post-colonial subject—the refugee, the indigenous person, the subjugated minority—torn between inclusion and exclusion in the dominant structures of the West" (73)? I would have to say it did not (and I use the past tense self-consciously here). But in contrast to the approach of *Alia* and *Bull* (above), a genre lens would account for each mode of (re)presentation differently—invoking different audiences, and grammars of motive. By making the leap from page to screen, and thereby to what we might call more mainstream audiences, Duff's original loses subtlety, complexity and ambiguity, but it gains a wider audience—a potentially more diverse audience both locally and internationally. But by foregrounding violence and by reducing the dimensionality of the characters of Beth and Jake and the subtlety of the plot, the situation (including its fictional participants and its audience members) called up and defined is one that more readily fits the narrative into one or more of those already provided by the marketplace for mass-cultural products: a postcolonial/feminist victory narrative (in both texts discussed so far this consists of an indigenous, doubly-marginalized woman rising up against domestic violence and a cycle of abuse to reconnect to her traditional culture); a political

call to arms for (essentialized) Maori to resist colonial oppression; and/or a sad comment on a race of people who failed at modernity. This is not to say that these narrative patterns are not available for uptake in the book, but that the postmodern prose style leaves the narrative open to multiple readings, and in terms of the communitarian aspects identified by Knighton, does not overly define and delimit interpretational communities (e.g. Maori may see the film one way; Pakeha another). For example, a possible reading of the presentation of unresolved dysfunction and violence (in the book at least) is one of exploring the indigenous text's capacity and willingness to tell the story of dysfunction (both pre- and post-contact) as a way of wresting this story from the (social-scientific) Western power/knowledge nexus that has had anthropological and sociological control of interpretations of Maoridom in the mainstream up until this point. But, as previously mentioned, the degree to which genres encompass and delimit situations and audiences is the degree to which this novel (to put indigenous literatures into the category of contact genres) loses its potential for articulating the complexity of the contact zone. Indeed, contact zones, as Knighton points out about rhetorical situations in general (356), become evident only through the ways they make knowledge about that situation. Recurrence instantiates this knowledge in communities, but also creates opportunities for its disruption. As *Once Were Warriors* shifts from a pragmatic but inherently exploratory gesture in print to a visually symbolic encapsulation of the urban-rural Maori dialectic in film—and now on to the iconic gesture it has become in uptakes such as those mentioned above—I think it shows how these opportunities have been constrained, as the film *OWW* has been re-inscribed and weakened of its postcolonial potential, losing, to draw from Lyotard, opportunities for “turning sorrow into meaning” (qtd. in Morrison 718). My point is not to see these generic possibilities

of film and book in binary opposition, but rather to acknowledge the complex nature of reception and its ties to genre.¹²⁰

One uptake not found in the literature on *OWW* comes from an aside made to me by a Pakeha acquaintance, who said she found the film particularly disturbing because it reminded her too much of her own family of origin, growing up in a working class home in small town New Zealand. This posits *OWW* as not a Maori story at all. This anecdotal uptake demonstrates how some audiences in New Zealand can and do take from the film a view of the negative influence of dysfunctional *Pakeha* modes of behaviour—alcoholism, domestic violence, child abuse—on Maori families, rather than as a sign of dysfunction intrinsic to Maori peoples’ inability to successfully modernise. Indeed, Christopher Bracken argues that negative stereotypes of Indians in colonial British Columbia arose from settler discomfort at seeing their own image reflected back to them in the behaviours of those Indians who were increasingly valuing European modes of dress and social practice. The alternative to objectifying and problematizing the indigenous Other would have been to throw an uncomfortable and critical light on their own values and practices. In this case there is more than an embarrassed disassociation with the public performances of settler society as reflected in the newly acquired dress and habits of an indigenous population, but a more pointed refusal and/or projection of the abject practices inhering in male-dominated working class families in situations of alcoholism and abuse.

¹²⁰ Leela Fernandes describes reception as “the form of representation, the context of reading, and the tactics of rhetoricity deployed in the texts” (52). Audience for her is not “empirically defined audiences at the local level” but rather conceptualized as “the national and international cartographies of power within which texts circulate” (52). She makes this claim in the similar context of understanding audiences for *I, Phoolan Devi* and *India’s Bandit Queen* (respectively, autobiographical and filmic accounts of the life of Indian activist and now politician Phoolan Devi). Within this more theoretical framework, however, there *are* opportunities to assess audience more concretely, at local levels, made evident in its uptakes.

The question of overall success as postcolonial text of book and film cannot be answered in this case, but it can be conceded that its publication and production as book and film continues its rhetorical work in the ongoing formation of Maori-Pakeha relations and identity formation, now in a global context. To this end I give the penultimate word to Martens, who writes:

In the post modern world, *Once Were Warriors* became the most debated novel in New Zealand literary history, the most successful film in New Zealand film history, and the most controversial cultural phenomenon in New Zealand contemporary history. The resulting disjunctions, discrepancies, tensions, conflicts, and contradictions are central to a consideration of postmodernity, interculturalism and the politics and practice of multiple difference [Bottomley 1994]. The controversy around *Once Were Warriors* was a reflection of the hybrid postmodern world which in the 1990s was not yet accepted as real. (145-6)

Once Were Warriors is fading as a cultural phenomenon in Aotearoa New Zealand, replaced by new controversies, anxieties and cultural performances, at the same time perhaps as maintaining a more lasting presence in the critical literature (Martens' book was published in 2007). As a "handy tool," the title, or even simply the word "warrior," has been reaccentuated dialogically in the Bakhtinian sense to bring to the fore in any discussion about Maori sovereignty and/or identity its double-valenced nature as both a reinforcement of colonial stereotypes and a symbolic call to arms for Maori activism (See Keown 107-108).

***Baby No-Eyes* and bio-politics**

In this novel, which has been likened to Toni Morrison's *Beloved* (Wilson 268, 272), author Patricia Grace gives voice to a stillborn baby who haunts her Maori family through inhabiting her younger brother Tawera. The closest Western concept for this haunting is that of "imaginary friend," but Baby is more real than that. Indeed, she becomes increasingly real to the family until, at the novel's close and with the facilitation of Tawera's great grandmother Gran Kura, she leaves the family and finds peace in the spirit world.¹²¹ Again, I investigate the intricacies of literary tropes as discourse strategies within the text, some of the criticism of the text, and the book's uptakes amongst more public political discourses in Aotearoa New Zealand society at large.

The literary strategy of *Baby No-Eyes* is similar to that of the novel *Once Were Warriors* in that each chapter picks up the narrative in the voice of one of its characters, an echo of the Maori tradition of passing around the talking stick. One character, Gran Kura, uses her turn to tell the story of the ancestors, and in keeping with the fact that all Maori living presently in Aotearoa have some white ancestry somewhere in their lineage, this story includes the oral tradition of how Kura's great grandmother Pirinoa met and married her white great grandfather Billy Silk, an early trader. This meeting symbolizes two possibilities for contact genres as truly postcolonial literatures: the first topicalizes language and translation issues and takes as its starting point that Pirinoa and Billy Silk shared no mutual language; their marriage contract is articulated with translators, and represents a parodic role-reversal of the translation problems

¹²¹ The two plots of *Baby-No-Eyes* are echoes of actual events: the appropriation of a stillborn baby's eyes before she was returned to her Maori family for a burial ritual happened, as Grace points out in an author note, "in 1991 in one of this country's hospitals" (6); and a 1995 Maori land protest in Wanganui involved the occupation of a local park (Keown 150).

inhering in negotiations, conflicts, and so-called settlements with Maori. The second takes its starting point in the sometimes unwitting role played by Billy Silk in early counter-colonial projects to argue that this work complicates and disarticulates standard histories of colonization and subjugation. Lastly, this section will consider an instance of the book's title being cited in a discussion about bio-technology.

Before her marriage, Pirinoa is in a threatening situation: she herself is the only and no longer young high-born child of a marriage cementing a peace treaty between warring hapu, and she risks being unmarryable because her chastity has been compromised. A marriage with Billy Silk will keep this secret doubly protected: Billy Silk likes to drink, so his memory of the consummation of their marriage could be rendered unrecoverable; and even if it wasn't, and he wanted to tell a story of his wife's less innocent past, he would have to do so with the help of a translator, who was already a confidante to a group of women supporting and protecting Pirinoa. This solution was orchestrated behind the scenes and surreptitiously within and by this community of women, representing and reasserting, for one thing, female power within traditional Maori society. Thus this representative anecdote of contact, contract, and fecundity (in terms of female wisdom and power) heralds the future for Maoritanga as already inscribed in this mythical past, asserting the future possibilities for contact genres, and of women's role as always and already present in this future.

As mentioned, the marriage was orchestrated by a translator who spoke for Billy, in a scheme concocted by Pirinoa's circle of women friends to assuage her of any potential discovery that she may have sexually transgressed, something prohibited for a Maori princess. Kura speculates in order to fill in the missing gaps of the story in her own memory: "What did the old mothers know? Why were they so in favour of her marriage to Billy Silk? Was it because he was a man without family and that there could be no reprisal if it was found that this

special high-born daughter had already been with a man?" (117). The old mothers seemed to have worked in cahoots with Mehana, the translator; in a comical reversal of the early Maori-Pakeha relations, the marriage negotiations proceeded:

Billy was asked through Mehana: 'Do you have a wife in this country, or any other country?'

'There is no wife in any country,' Mehana replied.

'Do you have children in this country or any other country?' they asked.

'There are no children,' Mehana replied.

'We will marry you to Pirinoa.' They said. 'You'll be part of this hapu. You'll live as we live.'

Now it wasn't until this moment that Billy Silk, through Mehana, knew what this whole day was about. How do we know today what his response was? How do we know that the response was not straight from the lips of Mehana.

'He agrees to it,' Mehana said.

'When you marry her,' Billy was told, 'you'll have land to live on and timber for a house and a trading vessel. Your children will be our own children and will inherit rights in the same way as their mother has inherited. They'll be brought up in our way and our custom. If we find that you have a wife or children elsewhere, we will kill you. If you deal in land, or sign any paper to do with land, we'll kill you. If you ever leave her, we'll kill you. If you don't treat her as we've treated her, we'll kill you.'

'He agrees to it,' Mehana said. (99)

Billy Silk is mute in this exchange, a silent assenter to the stipulations laid out in the marriage contract. This lack of mutual understanding echoes the *ad hoc* land and trade deals going on in

the earlier history of contact leading up to the Treaty of Waitangi—ambiguous, assembled in the hurried need for land, resources, and peace. Parties were unaware of each other’s understandings in ways that mattered little at the time, as long as life and reciprocal exploitation could continue in a fairly peaceful fashion. As in the Treaty of Waitangi—as for any contractual language or commissive speech act—stipulations made can be seen as more of a symbolic gesture unless and until a breach is suspected; as long as there are no perceived breaches and mutual benefit is ongoing, hermeneutics lie dormant. “Linguistic politics” (Dawson 2) only come to the fore in situations of conflict, as happened with the Treaty of Waitangi. But in the case of Billy Silk, the interpretation of this contract—what was meant by what was said; are interpretations best ascertained in terms of author intentions or audience understandings—was never an issue, because Billy Silk’s life with Pirinoa and his newly adopted hapu proceeded in peace.

To pick up again on Tuitt’s reading of *Wide Sargasso Sea*, if Beth Mason was rendered mute in *Jane Eyre* as the incoherent and mad woman in the attic (to be given voice by Rhys), so does *Baby No-Eyes*—in the character of Billy Silk—render mute the early colonial settler who can speak no words of his own to his new family-in-law. Like Rhys, Grace is also rewriting a colonial script, this time an anthropological one, by creating a story of another unintelligible “other,” the white trader who clumsily, somewhat comically, but benevolently negotiates his new surroundings and enters a new community for mutual benefit. Indeed, he goes on to fight on behalf of his adopted hapu in subsequent wars against the Pakeha over land.

Kura’s retelling of this story has manifold implications in the narrative: it reframes colonial history to enhance the possibilities of contact generally in terms of more empowered women’s roles; and it shows the disjunctions masked by the power of the standard narrative of colonialism and colonial subject formation. There are numerous Billy Silks in Maori ancestry, and Gran Kura’s inclusion of this story in her oral tradition heralds in a larger sense a role for

this novel and those like it as representations of and enactments within a cultural revolution in an unavoidably globalized future, one which, to draw from Stuart Hall's "The Local and the Global," is coming about *as a consequence of* the margins coming into representation—in art, painting, in film, in music, in literature, in the modern arts everywhere, in politics, and in social life generally. The choice for indigenous authors to make is that between a retreat into defensiveness, a sort of cultural fundamentalism, or a seeking out of a new positionalities; the latter do not retreat into a lost past,¹²² but rather enter into some dialogue with the global. The local, then, is not some exception "waiting on the margins . . . waiting to be incorporated" into the global (186), but is already inscribed with contact characterized both by the racial discrimination used to justify colonialism *and* the tools for its undoing. This is achieved in Grace's text, and made retroactive in her recounting of this fictional but representative oral history.

Many authors have discussed the role of language in *Baby No-Eyes* for how Grace undermines "the univocal authority" of English (Keown 149), and resists its received norms through using Maori speech patterns (Ratheiser). My contribution is to suggest how she completely undermines the role of language (as shared, or transparent, or mutual) in forming meaningful and peaceful alliances through the operations of Billy Silk's marriage contract. To connect this point with the overall aims and claims of this thesis—which are to undercut the importance of the role of language and translation in treaty and other negotiations in settler and aboriginal relations, and to argue for a rhetorical category of texts and genres that allows for the resultant heightened but necessary interpretive instability—the more important precondition to what is being called in British Columbia at the time of writing the "new relationship" is *trust*.

¹²² "Not," says Stuart Hall, "I will show you my crafts, my skills; I will dress up, metaphorically in my traditions; I will speak my language for your edification" (186).

And, I now want to add, its obverse, which is an openness to the risks of trickery, or even trickery itself, a symbolic open clause in contractual relations that is fallible and unfillable by anything that can translate into (especially legal) language.

Continuing in the vein begun by Keown about how Grace undermines the grammar of Standard English, I note how she also undermines the language's illusions of semantic stability, by re-inscribing each of the English terms that have haunted her sense of self: *good* and *wild*. And once again the story of Billy Silk emerges as an avenue through which she does this. Her ancestor Billy Silk represents the advent of "goodness" in her life as the product of colonialism: "Goodness and silence had set itself in amongst the people, and even though the stories were told they were told in whispers, kept as secrets among themselves, to become stories of shame. People became more and more silent, because if they spoke they would harm their children. They had stolen their grandchildren's lives" (116). In keeping with the nature of contact genres, the marriage ritual between Pirinoa and Billy Silk was a double-edged sword. Kura describes this coming together as the place where "goodness began" (107), but for her "goodness" has been re-inscribed with its opposite, as the internalized racism that has haunted her whole life and impacted the role she took on as parent and grandparent; it was this "goodness" that co-opted her into continuing the colonial mission of the schools into the home and her parenting. Goodness infiltrated the whole community, whose members "kept themselves good . . . with alcohol and the church" (114). Her retelling of the mythical past helps her (and us) recapture something else she inherited from this generation, which she calls "wildness," which ends up being goodness's antonym.

Shifting from good to wild also characterizes Tawera's development as an artist, his eventual freedom to colour outside of the lines, and his understanding of colour itself as coming from (blind) Baby's need to have each colour explained with metaphor and simile: "Grey . . . is

like putting your tongue out and licking a window. Starting from the bottom and going right up to the top” (135). The marriage of Kura’s great grandparents was the place where both goodness and wildness began, and begets the hybrid nature of the postcolonial project for indigenous people—which, as Stuart Hall reminds us, is a future of “the most profound cultural revolution” (184), and which is also founded upon the cultural production of indigenous peoples. This is not to see the local as “waiting on the margins . . . waiting to be incorporated” into the global (186), but rather in some necessary dialogue with the global. If Tuitt’s understanding of the postcolonial literary project is as “stag[ing] a re-writing of the colonial” (71), then Hall’s, it seems, is a rewriting of the global; they are compatible in the sense that globalization began in colonization.¹²³

Tuitt limits her critical interrogation to those texts that explicitly set out to rewrite a colonial text (this is why her critical lens lends itself to legal texts that explicitly cite and “rewrite” legal precedents), which means she would probably exclude *Baby No-Eyes* from this category. But if we bring contexts of production and reception into the picture, and see authors (novelists and judges) as situated readers of cultural texts, then the authorial initiative it would take to successfully rewrite the colonial text in Tuitt’s sense must necessarily find its criticality somewhere, immersed in and emerging from a reading of the colonial text.¹²⁴ To retell the story of early contact in the way this tale is told of Billy Silk does successfully rename colonial accounts of contact and contract as “founding texts”, this time making explicit the complicity of

¹²³ As in their ascendancy, so in their decline, centres of power are dangerous, says Hall. As they accumulate power they “gobble up everybody” and in their decline they “take everybody down with them” (177). The risk to postcolonial projects is how global mass culture now “stage-manages” independence and diversity. Marxism foresaw this: “Capitalism only advances on contradictory terrain” (180). Capitalism liked that people clung to their ethnic, gender, religious identities. This makes it necessary for postcolonial interrogations to happen at a global level, to interrogate, that is, global mass culture.

¹²⁴ Tuitt makes the point that “the more a text moves away from the source or founding texts as a framework for analysis, as a mode of reasoning, as a form of aesthetic, the more it is reflective of those bodies on which the colonial attempts to fully inscribe itself” (73-4).

the interpreter in negotiating a contract according to the terms of one group. It also mocks the much touted role of language and communication in coming to just decisions and agreements, which, as mentioned, is a theme of this thesis as a whole.

As for those more incidental citations in the public sphere (like the uptake of “warrior” in media and political contexts above), I note two in relation to this text. While the book *Once Were Warriors* was noted for the fact that its readership consisted of a mainly Pakeha middle class (“Maoris don’t read,” says Duff), there is evidence to suggest that *Baby No-Eyes* was picked up by a new generation of Maori readers. First I found evidence that the novel was cited by a Maori informant in the context of focus group discussions ascertaining Maori reactions to issues of biotechnology; second, the title also found reverberation in parliamentary debates about a new bill, the Coroners Bill, in 2006. Co-leader of the Maori party, Dr Pita Sharples contributed to the discussion in the following way:

A particularly important initiative that has arisen from the passage of this bill is around the need for whānau consent related to the treatment of body parts for any reason other than the post-mortem. Traditionally, our people saw that body parts separated from the body were accorded a ceremony similar to a tangi. Yet, as experience has taught us, in the past it has not been the practice of hospitals to return body parts. So for many whānau the vital healing and grieving processes have been disrupted and disturbed through the disclosure that tūpāpaku—bodies—have been returned with body parts removed. In other cases, lengthy post-mortem examinations or removal of body parts has created major distress for the whānau in facilitating tangi arrangements.

Internationally renowned writer Patricia Grace described the traumatic experience of the whānau whose deceased baby’s eyes were removed in a

hospital, for genetic research and experimentation. She described it in her novel *Baby No-Eyes*. The impact of the removal of the baby's eyes is described as follows: "When we woke my mother sat up and looked into my face ... 'I want you to know you're not an only child.' 'I knew there was someone,' I said. 'You have a sister four years and five days older than you.' 'Now I see her,' I said. 'Shot. Two holes in her head.' 'You mean she has no eyes,' my mother said. 'You mean her eyes were stolen.' "

The Law Commission recommended that the removal and the retention of body parts must purely and simply be to determine the cause of death, and for no other reason. The Māori Party is pleased, therefore, that the Coroners Bill introduces improved procedures to guide coroners in their work around the retention and release of bodies and body parts, including notifications of reasons for, and likely duration of, such procedures.

Maori narrative, thus, is entering Aotearoa New Zealand governmental and legal genres, laying the groundwork and stipulating protocols for culturally sensitive practices and processes, here in regards to death rituals, and in the research report on Ngai Tahu perceptions of biotechnology, in regards to gene harvesting, genetically modified organisms, xenotransplantation, and the like. Rhetorically, Sharples invokes Grace's ethos as "internationally renowned"—the world's eyes are watching, it seems—and also relies on direct speech of the characters themselves to add to the authority of the points being made. As an example of a literary work in the contact zone, *Baby No-Eyes*, both within the field of literary criticism and in the larger political sphere, stands up for and in a postcolonial project. It is particularly amenable to such citations because of how concisely the title captures the issues in the book; nonetheless, Sharples cited more than this, reproducing a whole relevant passage to convey the sense of theft that indiscriminate coronary

practices can entail. Indeed, the titles of both *Baby No-Eyes* and *Once Were Warriors* seem to function as relevance optimizers, a topic to which I return in the conclusion of this chapter.

Toward a “fully achieved postcolonial text”?

The first quote with which I began this chapter was spoken in the context of a roundtable discussion on “The future of the humanities in a fragmented world.” In it, Toni Morrison argues for the importance of the humanities and the creative arts as a “way to break free from what may have become merely static rather than living history” (716-717). In the same conversation Spivak mourns the decline of the humanities, saying that by favouring the fast solutions of law and “at best the edges of the social sciences” modern universities have reduced the humanities to being little more than the pursuit of cultural capital (in Morrison, Spivak and Te Awekotuku 718). So, while statements such as those in this chapter’s epitaphs risk the privileging of the literary and of literary criticism mainly for the benefit of those whose careers are built upon such analysis, what I have tried to do by keeping audience more fully in mind (more than does Tuitt, for example) is entertain the possibilities for uptakes more fully. Audiences are designed by discourses, but so too are they more concretely assembled, for example by university professors in course syllabi, and by forces in the global mass cultural marketplace. Dominant social scripts are at play in any act of reading or viewing—feral aboriginal woman kills suspected paedophile to protect sleeping innocent children; Maori woman finds retribution and healing in connecting to her tribal roots; or Maori elder refuses to speak English to reclaim her cultural past and find resolution before she passes to the spirit world—and these will play out in readings given in student papers, in literary criticism, and in book and movie reviews. These readings deserve to be explored and deconstructed, but those outside the literary critical enterprise, in other words

those encompassments and uptakes in more general public and political domains—in prime ministers’ comments, parliamentary discussions, and focus groups for example—might be the real litmus test for success of the indigenous narrative as postcolonial text.

These speakers uttered literary titles in the hope that they carry some degree of rhetorical force—enough, at least, to make their utterances worthwhile. Titles of literary works are (amongst other things) “designative” of that “to which we wish to refer repeatedly” (Fisher 287); they “allow discourse” (292). Often they are poetic, constituting, perhaps, Kenneth Burke’s idea of “spontaneous poetry” (*The Rhetoric of Motives* 34). Daniel Dor’s work on newspaper headlines, including those that use figurative language, suggests that their production and reception can be best explained using Sperber and Wilson’s relevance theory. Newspaper headlines, Dor maintains, are designed to optimize relevance for readers, in other words to produce in a reader’s consciousness the most “productivity or yield” (123) for the least cognitive effort.¹²⁵ The titles of the texts analyzed above could be assessed this way: *literary* titles as relevance optimizers. Perhaps this is the best way to describe the process via which literary titles find their way into locations outside and apart from literary and literary critical domains; they are at once superficial (fleeting and peripheral illustrations to bolster a political concern) and deeply significant (the eruption into public discourse of aspects of the “private” reading).

By bringing literary and legal texts together, Tuitt argues for a radically different form of law than we have at present, one founded upon a profound shift in discourse strategies based on using poetry as a metaphor for the causal world rather than a more commonsense idea of

¹²⁵ For another example of how particular titles are attached to particular political causes, Joy Kogawa’s *Obasan* has often been cited in discussions about redress for the internment of Japanese-Canadians during WW II.

causation operative in the legal realm at present.¹²⁶ Could contact genres in artistic domains be the necessary precursor for this, supplying the metaphors necessary to rewrite colonial texts, in the same way that “eagle down” is entering Canadian law (See chapter three)? First Nations traditions have already brought the literary and the legal together. They saw treaties not as merely enunciating an agreement, but as enacting it orally; they were storylines to be reiterated. Chamberlain reminds us that the retelling of these stories was a “check against the anarchy of falsifying or forgetting” (18). I am ready to make the claim that the contact genre of indigenous narratives is crucial to the process of reformulating law in settler colonies and in this sense is as foundationally about indigenous rights and title as other contact genres discussed in this thesis. This is in keeping with indigeneity itself as a critical concept, a “politicized ideology for challenge, resistance, and transformation” (Maaka and Fleras 14).

On the level of global politics, widespread attention to human rights requires at least the redistribution of wealth, which, as Spivak argues “cannot happen without a highly trained sympathetic imagination . . . nourished by the slow learning of the other’s language” (Morrison, Spivak and Te Awekoutu 720). Although she says “language is there because we want to touch another. . . . [It is] our most intimate possession” (719), this is not an argument for accuracy in cross-cultural communication, for plain language, or for carefully drafted legal texts. To validate

¹²⁶ According to Tuit’s (*Race*) account, common sense assumes a chain of events type of causation, with one thing leading to another, as well as the possibility of working backwards to access to an initial causal event. The racial domination inherent in colonial processes, though, cannot be explained or understood in this way, and Tuit uses Fanon’s discussion of irrationality, disjuncture and fragmentation (in *Black Skin, White Masks*) to propose a new notion of “(a)causality”: “a state or situation in which the experience of the constant conjunction of events, states and so on is not reliable enough, either in form or in incidence, to account for phenomena. (A)causality occurs when the irregular conjunctions or unpatterned chains of events or states represent, if not the norm, then a common feature of social relations” (25). Repeated (a)causal events create a state of incomprehensibility. The law, apparently, may be able to recognize an (a)causal event, but not states of (a)causality. Racial discrimination is such a state, rooted not in cause and effect but in irrationality. Tuit believes that legal processes need to account for this and returns to Hume’s lack of distinction between them—between, that is, “so-called ‘causes’ and ‘mere conditions’” (26)—to make her argument that compensation for the results of racial domination can best be sought through the courts, once legal language has undergone this transformation.

Burke's point about "sustained" attention and spontaneity (and here perhaps one could include trickery), both language and *imagination* respond to and are an attempt to fill the void between self and other. Artists (authors, film makers) continue to contribute to the ongoing formation of positive intercultural relations, more successfully perhaps within genres that remain "open to interpretation," that do not seek too purposefully to constrain audience's imaginations by making an argument, but rather, as oral histories have always done, by spinning out the possibilities through telling a story.

Conclusion **An Essay on the Politics of Language**

Through the lens of genre theory, this thesis has addressed the relationship between language and meaning in colonial and postcolonial genres, positing a category “contact genres” to illustrate how and why some of the key tenets about how this relationship is structured within genre theory—for example identification, and shared recognition—need some adjustment to cope with the difference “difference” makes. As a result, I defined contact genre as a constellation of textual and social practices associated with the particular negotiations of the contact zone, in which at least two individuals or groups respond to a rhetorical situation, but in which recognition of that rhetorical situation is not shared. This definition draws from contact linguistics, and from Pratt’s “arts of the contact zone” to acknowledge both the nature of language and asymmetrical relations of power in contact zones. As examples of contact genres, the colonial deeds and treaties, the courtroom interactions, and the literary narratives I have

analyzed have, as part of their social action, constellations of compositional and interpretive strategies from at least two cultural traditions that are in turn structured by the joint influence of ideologies of language and socio-political climates. Following Freedman, Lyotard's *differend* was one way to understand the incommensurability between discursive realms involved in these genres, which I described as an inarticulable gap. The rhetorical work within these genres and between sets of genres can happen across a divide that is not only cultural and linguistic (although these become the fallback explanation in many discussions), but also economic, political, and legal. This means that underlying how reading, writing, speaking and listening proceed in these genres are rhetorics of recognition and of redistribution, which in turn require an account of difference and of commensurability.

In genre theory shared recognition is thought to be necessary for a community to identify and invoke a genre as a way to address shared goals. For genre theorists, too, articulating commensurability between texts makes a group of texts recognizable as a genre, and this is the case whether that understanding of genre is rooted in "formalistic classifications of types of texts" (Devitt 697) such as poem, novel, and screenplay, or in new rhetorical genre theory's more finely-tuned social view, which identifies contextual categories as also pertinent. In the case of my own work here on the treaty genre, the (in)commensurability of contexts (situation) was more salient than that of the materiality and language of texts (form), adding even more weight to the proposition already posed by NRGTS scholars that contexts are a necessary part of genre definition. Though both the Kemp Deed and the Douglas Deeds had the same "boilerplate" language, and were invoked in the same time period in similar contexts of colonial expansion, their uptakes in subsequent legal contexts varied widely, symbolized but not contained by the way that the Douglas documents are now considered "treaties" in British Columbia. In one sense this represents a shift from a context of commensurability to one of

incommensurability, a shift I am tying to the lack of shared recognition in each of their founding contexts, and to the shortcomings of the code model of language. This contact genre seems to have pushed legal interpretation to its limits of intelligibility, for example in the absolute lack of legal significance accorded to the authenticity of signatures in the Canadian case, compared to the Waitangi Tribunal's (*Wai 27*) and others' (e.g. Evison) careful analyses of the authenticity and validity of those on the Kemp Deed.

Alongside commensurability rooted in shared recognition as it relates to genre claims, this thesis has also addressed the way that commensurability operates in law, where it is tied to precedent: similar cases give rise to similar strands of legal reasoning, and similar outcomes. My work has followed the tradition of those who notice how these strands of legal reasoning—for example those that define what constitutes a treaty in settler-aboriginal relations—can be tied to assumptions about language, especially the dominant assumption that particular wordings can be used to accomplish clear-cut acts in the world. In law the presiding implication is that legal texts can be stable repositories of meaning accessible via neutrally applied legal hermeneutical reasoning. I have used all of rhetorical (Burke, Fish) integrational linguistic (Harris, Toolan) and language ideology (Cameron, Stein) perspectives to point out how this is problematic, but also I have come back to the idea that myths of code fixity and telementation are in some sense unavoidable given that to some degree we have to assume that language offers us a “context-neutral code for the expression and extraction of determinate meanings” (Love, in Toolan “Language” 165). This is not to say the journey was a waste of time, because ideologies (Stein), especially in situations where the law shows itself as not being clearly readable and easily applied (Toolan “Myth” 165), can mask power relations that favour a dominant class. Toolan, however, notices shifts, at least in the context of the British court system:

But if the law is approaching language differently and in a more integrational spirit, and if this gradually filters down to everyday practice at the high-street or magistrate court level, then we should expect a number of equally interesting developments: more improvisatory judicial activism, more 'politicised' jurisprudence, less certainty, and more anxiety about the survival of the rule of law. (181)

This legal uncertainty is perhaps heralding the shift whereby twentieth-century attempts to control Indigenous activism through law are giving way to twenty-first century controls through the seductions of global capitalism. The uncertainty of meaning in legal texts, in other words, gives way to the certainty of market forces. I would not be the first to suggest that this trend requires a more radicalized and globalized counter-hegemony, in which the local is in dialogue with the global (Hall "Local" 186). This conclusion is another move in that direction, in that I further the thinking about language begun in the pages above by offering up an analysis of one more contact genre, in the form of the Maori ritual called "te wero." To ascertain another politics of language at work in contact genres, I draw from Derrida's deconstruction of Saussure, Rousseau, and Lévi-Strauss to return to a key but perhaps under-examined term for this thesis, and that is "contact." First I posit contact as a discursive formation; then I pass it through the lens of deconstruction. In the following discussion of "experience," I have substituted Derrida's key term for my own, in an attempt to "exhaust the resources of the concept of [contact] before attaining and in order to attain, by deconstruction, its ultimate foundation" (*OG* 60). As a "pre-contact" contact genre te wero functions as an archetype of a language-less performative with which to unsettle the authority of the concept of contact as it operates in law, literature, linguistics and elsewhere.

Contact revisited

In Chapter One I argue that cross-cultural mediations in contact zones provide a limit case for genre definition. I see contact as an on-going and relational aspect of contact zones, but nonetheless I worry about the danger of the term “contact” in this metalanguage—that it has implications and dialogical connotations that escape control, specifically, to make too much of discontinuity, of a point in time after which “everything changed.” Those who study indigenous rights in Canada and Aotearoa New Zealand are aware of the legal connotations of such understandings of contact, whereby land claimants are burdened with the onus to prove continuous traditional uses and relationship to their territories in situations where their abilities to maintain traditions and practices were curtailed by colonial processes, including both the negative impact of language and cultural loss through education and positive ones based on innovations and trade goods imported from the West. Similarly, those disciplines whose objects of interest are literary and artistic works are burdened with the notion of authenticity as pre- and post-contact genres are compared. Lastly, a similar tension exists in linguistics between orality and literacy, as societies are seen as undergoing fundamental changes with the advent of literacy. This paradox of contact, drawing from John Borrows, is a question of *mobility*, as confronted by indigenous groups whose social legibility is based on the fact that continuous traditions are recognized in law and society: First Nations can be accused of both changing too much (being too mobile)—thereby losing their identity and legibility as indigenous other—and of not changing enough (of not being mobile enough)—thereby not invoking and utilizing Western education and legal frameworks to further their aims.¹²⁷ “Contact,” it seems, is a

¹²⁷ “Physical philosophy: mobility and the future of indigenous rights” forthcoming in *Indigenous peoples and the law: comparative and critical perspectives*.

perilous concept, as commentators assess both aboriginal authenticity and progress according to its effects (see Raibmon). Because I don't want to risk any effacements that might arise from this idea of contact as a point-in-time, I want to furnish my definition of contact genres with a more stalwart foundation in the form of a deliberation on contact as a discursive formation. I do this because the presence of the idea seems, drawing from Foucault, to play a role in identifying a range of possible statements or discourses about indigenous peoples, cultures, legal traditions, and knowledges. Discursive formations, as I understand them, enable a level of analysis beyond genre and beyond discourse. A discursive formation, as discussed in Chapter Two above, is a regularity that disperses objects, genres, types of statements, concepts, themes and discourses more than it links or conjoins them. The conditions of a discursive formation are what Foucault calls "rules of formation" (38). Here, the origins of contact as a discursive formation are less of my concern than is its tacit currency in discourses of which contact genres are made up.¹²⁸

To explore this further I will posit two rules of discursive formation for contact, at each of two extremes: at one extreme contact is the pure co-presence of self and other in mutual understanding and trust; at the other extreme contact is confronted by difference as pure incommensurability, the absolute lack of shared culture, language and therefore of possibilities for communicative action. Put simply, at one extreme is the point at which words *need not* be spoken, whilst at the other is the point at which words *cannot* be spoken. Between them are the actual lived conditions in which difference, for the sake of the present argument, is no more than what all communication is designed to alleviate: contact here is the fact of life, emblazoned with

¹²⁸ Although it may seem counterintuitive that discourses once dispersed may not have been in some way originally linked, I think Foucault's concern is to move outward and forward. To trace back to origins is always impossible, as Derrida shows. As for Foucault, he states: "the principles of the individualization of a discourse" must be sought in "the points of choice that the discourse leaves free" (36), or in the possibilities for "different games" (37), i.e. not in its origins.

the Western concept of humanity and the indigenous concept of “all my relations.” Below I focus on each end of this spectrum of contact; each is the opportunity for a language-*less* speech act in the Austinian sense, in this context as both the beginning and the end of colonialism, as its origin, and as the way, in the words of Patricia Tuitt, (post)coloniality will be superseded. This thought experiment is in one sense an exploration of entelechy, in the Burkean sense. The speech act in the absence of language is a place of beginning and of return, the initial peril and the ultimate possibility of contact genres.¹²⁹

For literary examples that posit these two extremes we could revisit *Baby No-Eyes*, which posits two instances of communicative tension that have their expression in languagelessness: the first is Maori elder Gran Kura’s refusal to speak in English, a refusal of cross-cultural contact; the second recounts the way her ancestors Billy Silk and Hinemoa come together in a workable non-coercive marriage contract without the benefit (or hazard) of a shared language. For them a shared language both cannot and need not be spoken. To this theoretical category of performative I also add the Maori cultural practice of te wero. My goal is to provide a vocabulary for talking about contact that fits with a poststructuralist conception of the role of language in indigenous settler relations, which some could argue are presently dominated by multiple legal genres in lieu of trust. In current Maori traditional practice, the ritual called te wero, or the challenge, is an abbreviated form of that which took place historically whenever strangers met. A senior challenger would approach the stranger, wielding weapons in a way that would demonstrate his fighting prowess. After this message of caution,

¹²⁹ For Burke, entelechy differs from Aristotle’s view of the inherent perfection of objects in the natural world (a sort of perfect essence) to extend it to mean “a principle of perfection implicit in the nature of symbol systems” (*Language* 17). There are Freudian elements to entelechy, drawing on the neurotic’s “repetition compulsion,” but for Burke it is “a kind of ‘terministic compulsion’ to carry out the implications of one’s terminology” (19). I’m sure he would agree that it is best to do this in theory first.

the challenger lays down the taki, a sprig from a tree or shrub, which is intended to communicate to the approaching strangers an offer of peace; this they may accept by bending down to pick up the taki—a submissive posture presumably indicating their peaceful intentions; failure to do so indicates a rejection of the offering, signifying enmity. This is a profound moment of uncertainty and possibility; if strangers do not have peace on their minds, or if during the proceedings some insult is delivered, the ceremony could turn into out-and-out war (Salmond, *Hui* 132-133).¹³⁰

Although in theory we cannot say this practice has an origin, and in practice much of te wero's symbol system is shared, my goal is not to explore it anthropologically, but rather as a conjecture in the service of understanding contact as my key term. This ritual brings together the matter of the sign, the matter of translation, and indeed the matter of materiality itself—the materiality of experience, of the sign, and of contact as encountering. As an encounter te wero, at least in its archetypal form, is a language-less performative, reflecting those instances when the ear of the other does not understand one's language.¹³¹ I do not intend here to contribute to what Derrida demonstrates as a history of the disdain for writing in Western philosophical thought, a disdain based on a fetishization of affective material presence, and on a sort of pre-literate aboriginal innocence which he demonstrates in his deconstruction of Rousseau's "Essay on the Origin of Languages" and Lévi-Strauss's "The Writing Lesson" respectively.¹³² But

¹³⁰ Today te wero is included in the welcoming ceremony only for high ranking and powerful guests to ascertain their intentions.

¹³¹ Indeed, during James Cook's first voyage to New Zealand, the story goes, the Europeans were so unsettled by this ceremonial challenge that they shot the warrior dead (Salmond, *Two Worlds* 125), before, presumably, he had time to lay down the taki on the intervening space.

¹³² Derrida argues against the idea that the linguistic sign operates immaterially in the first place. Saussure sees the signifier, made up of the sound-image, as purely psychological, but Derrida points out that in order to be apprehended by the mind it requires physical and physiological manifestations en route. Saussure sees writing as debased speech, but the dilemma is that we cannot think of language and speech without thinking about writing. This creates a tacit natural connection between the linguistic phoneme and the graphic sign. In seeing writing as

what one could also notice about these two anthropological positions—Rousseau’s celebration of vision, touching, gesture, movement and voice; and Lévi-Strauss’s validation of oral traditions in small communities untainted by the Western paradigm of written language—is that they seem to have had some residual currency in subsequent discourses of postcolonial critique. If there is a challenge in the theory of deconstruction, it will be that such residues are brought to the surface, unsettled and taken to their limits.

An archetypal instance of *te wero* would be premised on the condition that addressor and addressee share no system of signification. To draw from J.L. Austin’s famous title, it is an example of how to do things *without* words, or without any shared communicative history.¹³³ Still, one could speculate (and here I take the risk of sounding very much like Rousseau) that those “visiting” in the language-less conditions of *te wero* could intuit that the *taki* is a “sign” of the offer of peace,¹³⁴ even though the gesture cannot rely on any shared social semiotic. Perhaps again it is in the significance of the stoop of the body required to place the piece of greenery on the ground, showing vulnerability. The reply, then, would draw on the same signification (one must either stoop to pick up the *taki*, or reject it and be ready for the consequences of such an insult). What would come of such a speculation about situations of first contact between absolutely disparate groups or persons? One could either move in the direction of cognitive linguistics, which argues that “central aspects of language arise evolutionarily from sensory, motor, and other neural systems that are present in ‘lower’ animals” (Lakoff and Johnson 6), to

other than the tyrannical supplement to innocent speech, Derrida does not aim to show that writing is innocent, however, but rather that “there is an originary violence of writing because language is first, in a sense . . . writing” (*OG* 37). Whether written or spoken, all language is writing; it is repeatable and citational.

¹³³ Communication without language in cases of first contact is in reality known to be efficacious on some occasions. For example Salmond describes an encounter in which the first French explorer to land on the New Zealand coast, Jean-François-Marie de Surville, communicated successfully through signals to the local chief a request to be shown to a source for fresh water (*Two Worlds* 324). But we must also keep in mind another instance during which a Maori challenger was shot to death by Cook.

¹³⁴ More likely, I would predict, if one side does not have access to firearms.

conclude that bodies themselves are the resources for proto-communication and have therefore remained so. Or one could invoke Derrida to say that there was never any beginning to this or any other citational chain, and that such proto-communication was always already writing.

But from a postcolonial perspective, it may appear counterintuitive to redeem writing to discuss languages that have only recently acquired—as part and parcel of a whole system of colonial domination—written forms, and are for the most part—and historically in all ways—considered oral. Yet Derrida does not reserve his grammatology for only those languages with long written histories. Indeed, he criticizes Saussure for drawing such “hard and fast frontiers” around his linguistics (*OG* 33).¹³⁵ Saussure’s self-imposed blind spots are the result of and reinforce both phonocentrism and logocentrism, which interact to see sound and word as central to language, a discussion of which is warranted because such an imposition has occurred for all those languages of the world that have been coded according to an alphabet derived from Greek, and phoneticization into discrete words. (The primacy of the discrete word is one way that writing has infiltrated our thinking about language.) Derrida defines logocentrism as “nothing but the most original and powerful ethnocentrism” (3). The word as the central sign of meaning controls the concept of writing and hides the fact of this control: “phoneticization dissimulates its own history as it is produced,” says Derrida. To draw these terms together, phonologocentrism relies on the fortification of a supposedly natural link between sound, senses and word, and a writing that is secondary, “derivative, accidental” (*OG* 29). Interestingly, one of the features of Grace’s use of language in *Baby No-Eyes* is how she runs words together as if to disrupt phonologocentrism.

¹³⁵ Also, in *Positions* Derrida, in his move to replace the notion of the sign with that of *gram* to escape phonocentrism, says it can apply to “history and systems of writing beyond the bounds of the West” (27).

So grammatology—what Derrida calls the science of writing—is necessarily at once both undetermined, its “efforts . . . discrete, dispersed, almost imperceptible” (4), and also highly determined, in that “relationships between speech and writing have *already* been assigned”(4). Writing has subsumed language; it “*comprehends* language” as “signifier of the signifier”(7). The idea that writing is anterior to speech overtakes the idea of writing as a supplement to speech promulgated by Rousseau and continued by Saussure. This particular deconstruction resists the privileging of the phoneme that results by virtue of us hearing ourselves speak: speech “presents itself as non-exterior” (7), as non-contingent, and as not requiring empirical verification. This privileging is tied to how writing is seen as developmentally secondary, as a technique in the service of spoken language (8), as unable to rival the immediacy of speech. This sense of writing infiltrates attitudes: on the one hand writing has been brought into the service of oral traditions all over the world, as a means to salvage and protect indigenous customs, culture and language. On the other hand the advent of writing on the history of a language means issues of standardization, the equation of writing with “civilization,” and other politics of language arise. James Douglas’s careful transcriptions of Indigenous names over the course of writing the Fort Victoria treaties and the differences between each treaty discussed in chapter two, betray his experiments with phonetic marks such as dashes and circumflexes as he developed and/or learned a system for turning phonemes into syllables, or vice versa, as settlers learned how to turn what they were hearing into a written form. The signatories of the treaties were either not far enough along in literate practices to have signed their own names, or Douglas did not want them to mess with his tidy deeds.¹³⁶

¹³⁶ From a historical vantage point, such deeds and treaties become a means with which to gauge the spread of Western literate practices amongst indigenous peoples (Evison, but cf. McKenzie).

A literate tradition is not always picked up by indigenous communities in ways that Eurocentric discourses of preservation would have liked. What may have looked like literacy and even a love of reading from the outside was in many cases more a ritualistic attachment to an object (McKenzie 30; see also van Toorn). There are also records of some Maori elders who would carry around notebooks to write down chants they hear that they liked, or “miscellaneous bits of information and family history as well as genealogies” (Salmond 121), but some of them were “reluctant to pass on their knowledge to the younger generation” (121). Unlike in Western epistemological systems in which the most read and cited texts are the most valued, it is the most wise and the rarest chants that are the most prized, and they are rarely given out; notebooks full of information could be buried with elders before the younger generation has reached the status necessary to be delivered of the knowledge within (122). Grace’s Gran Kura tells a similar tale, of an elder who was “too unordinary” (255) for ordinary people to inherit his belongings, and whose “letters and writings and books ... were buried” along with him in his grave (256). As an interesting reversal to the currency in citation that saturates academic spaces, in which knowledge is something that *has* to be shared, this is also writing that refuses to partake of the anthropological imperative, and constitutes an epistemology in which knowledge made, or at least its written form, can also be purposefully lost forever. Speech and writing are disunited and not commensurable here, as valued speech does not necessarily translate into valued writing.

Derrida aims to overthrow the relationship between speech and writing “for better and for worse ... for blindness as well as for productivity” (29), so for him too the accumulation of knowledge is not an uncritical good. Nor, for him, is literacy a devolution of orality. There may be a tendency in postcolonial critique to see literacy as a violent act, as it subsumes a language present in the spoken utterance into and under a writing premised on the absence of the speaking

subject (which resulted in the idea that aboriginal people were incapable of abstract thought). But the tendency to value presence over absence is itself ideological. In Derrida's critique of Lévi-Strauss's debasement of writing in his discussion of the Nambikwara, what is implied as "enslavement" . . . "can equally legitimately be called *liberation*" (italics in original 131).

Derrida doesn't want to stop the oscillation between the terms in this binary. Writing is not the violence done to speech but is the "originary violence of a language which is always already a writing" (106).

For Rousseau too, as Derrida points out, the journey toward writing was one of natural degradation. He also upholds "figurative language" as original language preceding what we call literal, "the first to be born" (271). Metaphor was the first to occur; it is the process of the idea, originating out of and generated in passion and feeling. Rousseau also uses an example of a first contact to illustrate his point: when primitive man first encountered the unknown other and in fear uttered a sound, the first signifier, it was already a metaphor. In his thinking, the instantaneous connection of fear coupled with the sight of an unknown stranger created the emotionally saturated signifier "giant." In an echo of the integrational linguistic position that language is formed with its contexts attached, "giant" represents a metaphor that has no precedent in literal language: it is "preceded by nothing either in experience or language"; it is impossible for our senses, which are natural, to deceive us, by Rousseau's account (*OG* 276), and this leads him to say of language in general: "the illusory image presented by the passions is the first to appear, and the language that corresponded to it was also the first invented" (in *OG* 276).¹³⁷

¹³⁷ A suggestively similar description of this is recounted by Ann Salmond. In a passage written about NZ in 1670, *La Monde* contributor Pierre Duval states: "they say there are tall men there; whether they are really so or whether

Thus Rousseau, like Saussure, creates a hierarchy of value based on immediacy and presence. Language emerges first from feeling and passion to create speech; then comes the hieroglyph, then writing. Derrida speculates that to see writing as supplemental is to lose sight of the possibility that speech itself is a supplement; thus, he takes Rousseau's conception of writing and applies it to speech. Speech, he thence argues, is a supplement akin to that from another source: onanism. Both leave a trace; both are a form of auto-affection, either giving oneself presence, or giving oneself pleasure: "Speech and the consciousness of speech ... are the phenomenon of auto-affection lived as suppression of differance ... that presumed suppression of differance, that lived reduction of the signifier, are the origin of what is called presence" (166).¹³⁸ In relation to languages in postcolonial settings, the history that has been written, that has written us all, cannot be discounted or be given a blind eye. Within the work of these three authors who each in their own way present writing as debased speech—Rousseau, Saussure, and Lévi-Strauss—Derrida indeed points to metaphysical closures, but they have lent themselves well to his questioning, and for that he acknowledges a debt. We can keep in mind that what has resulted from these interrogations is grammatology itself: a linguistics without phonocentrism, a science without logocentrism, and a notion of language without speech. The latter can deconstruct the binary that vacillates between speech that is less civilized than writing and speech that is more original and more authentic than writing.

fear made them seem so to the Dutch, they are in any case mysterious about giving a full description of them" (299).

¹³⁸ Meaning is made, says Derrida, "within the opposition of presence and absence, positive and negative . . . , within the horizon of presence and re-appropriation" (314)

“An impossible counsel”

In *Monolingualism of the Other*, in which he tells of his relationship to the French language, Derrida is considering what happens when languages come into contact. He writes: “In a sense, nothing is untranslatable; but *in another sense*, everything is untranslatable; translation is another name for the impossible” (italics in original, 56-57). He is himself at once affiliated and not affiliated with the French language, rendering that language both hostile and hospitable (22-23). Similar scenes have been playing out wherever colonial relationships have ensued: Maori were forbidden to use their own language in schools for one hundred years (Salmond 129). First Nations were similarly schooled over the same period. Countless numbers worldwide were and still are speaking a language at home that is discounted and/or forbidden at school. In all of these cases relationships to dominant languages are ambivalent, notably in the tensions between the protection of indigenous languages and the exigencies of wider political processes that are enabled by a lingua franca. Again the tendency in wanting to preserve the endangered language, and therefore the endangered culture, extrapolates from the point of contact as a point at which purity is at risk, but it is a purity which never existed, as those who study pre-contact language change can attest to.

As a point in time in discussions of language change, contact is enmeshed with the discourses of colonialism.¹³⁹ But Derrida, extrapolating from his own experience as an Algerian Jew, says that “[a]ll culture is originally colonial” and “every culture institutes itself through the unilateral imposition of some ‘politics’ of language” (*Monolingualism* 39). A useful direction for further research would explore the language politics in Indigenous language education,

¹³⁹ Trudgill (1983), for example, argues for two kinds of language change, termed “natural” and “non-natural” (in Syea 223, in Gilbert) based on whether they are the result of contact or not.

where already, anecdotal evidence suggests, the work of standardization for purposes of education comes into conflict with the preservation of some dialects.¹⁴⁰ Within this tension is the need to recognize, as I think Derrida is doing, the ways in which all languages are “against heterogeneity, and for the sovereignty of monolingualism” (39). As Deborah Cameron argues in “Cultural Politics and the ‘Dream of a Common Language,’” given that it is thought that a nation can have unity in a common language, any attempts to fragment language are (legitimately) seen as attempts to fragment a nation, and express themselves as political actions on the part of minority groups; debates about language “draw attention to a lack of social consensus” (160), and are always worth consideration. Any attacks on the idea of consensus disturbs conservatives’ “melting pot” idea of how to get along, and also disturbs the liberals’ “cultural pluralism” that for them requires at least a common language. For liberals, then, if consensus is not possible because of cultural differences, at least if we share a common language, we can engage in rational debate and come to a civil compromise (160-161). Radical verbal hygiene, Cameron contends, threatens this utopian view, upsetting the liberal stomach by suggesting that a common language has never existed, and never will; radicals believe that any consensus or compromise that uses the dominant language will always happen according to the values of those who make the rules. She concludes that the idea of a common language is a myth and an impossibility. But because “there is no language without normativity” (163), we need to look at the norms that underlie languages in their written and spoken forms. Not debates about whether there should be norms (they’re unavoidable), but debates about the value of the norms invoked within genres in use, rejecting first and foremost the conservative view that

¹⁴⁰ Larry Grant, personal conversation.

language is a neutral medium that reflects reality, and also rejecting the liberal goal of a democratically decided upon “group contract” about what words mean.

Contemplating his own sense of identity accrued through the French language, Derrida posits three possibilities: disintegration into madness, adopting and desiring the stereotype of the “‘average’ or dominant French person,” or, finally, to “commit ... to traces—traces of writing, language and experience—which carry anamnesis beyond the mere reconstruction of a given heritage, beyond an available past. [...] beyond any knowledge that can be taught” (60). Here I believe Derrida is seeing his own connection to language in terms that get beyond, around, and behind that of its history of colonial expansion and linguistic imperialism; *that* particular history is not all there is to a language. Derrida’s is a view that seems, in fact, to care little even about the possibility of language loss. Indeed, he plays with the possibility that there is no inherent value in saving languages, asking:

...is it good? ‘Good’ in the name of what? What if, in order to save some humans lost in their language, in order to deliver the humans themselves, at the expense of their language, it was better to renounce the language, at least to renounce the best conditions for survival ‘at all costs’ for the idiom? ... today, on this earth of humans, certain people must yield to the homo-hegemony of dominant languages. They must learn the language of the masters, of capital and machines; they must lose their idiom in order to survive or live better, a tragic economy, an impossible counsel. I do not know whether salvation for the other presupposes salvation for the idiom. (30)

This “impossible counsel” is making *uncommon* what has been commonsense for postcolonial studies. We would say of course it is good to save languages (it is often likened to genetic diversity). We would say of course identity and “mother tongue” are linked.¹⁴¹ But nonetheless, Derrida’s goal is to redeem French—perhaps to redeem language, or to *rescue* languages from their violent pasts, to look to the future of languages, to *almost* say that language can be neutral, which runs against postcolonial reasoning, including my own in this thesis.

Derrida’s is an argument, seemingly, against the power/knowledge nexus of Foucault which enabled Foucault to parcel off ages, stages and disciplines into huge swaths of discontinuous power-laden discourses. But I think, as Rabinow points out, Foucault’s is not a philosophy of discontinuity; it is through his difficult and tenuous concept of discursive formations that he attempts to acknowledge and display the “longer lines of continuity in non-discursive practices” (Rabinow 9). How this lines up with Derrida’s critique of Foucault¹⁴² is beyond the scope of this discussion, but suffice it to speculate that their approaches might not be that far apart when considered in this rarefied space of theorizing about language and discourse. I like to think that such speculations are a way to keep premature conclusions about settler-Aboriginal relations in abeyance in a political climate that seeks certainty and finality. An archaeological analysis, says Foucault, does not look to discover a more “fundamental level” nor “a point of conciliation” for all discourses; rather, “one defines the locus in which ... two discourses are juxtaposed” (*Archaeology* 152), and uncovers the “principle of their

¹⁴¹ Derrida says, too, of course French is a colonial language and a vehicle of oppression, but nonetheless, he admits to so much preferring standard unaccented French, and he defends it “[a]s if I were its last heir, the last illustrator of the French language” (47). It is his confession: “I cannot bear or admire anything other than pure French,” he says (46), even though he knows it does not exist.

¹⁴² Derrida says reason traps Foucault; he doesn’t see how his own archaeology is an “organized language” too. For example his interrogation of the category of madness can only happen from within the dominant discourse—“in the language of the jailer” (37)—such that “the revolution against reason can be made only from within it” (36). Fissures for the ungrounding of discourse are and were already in place before Foucault began his treatise on madness; madness is always already present in reason, and this is the nature of discourse.

compatibility” (152). This asks us to step back and consider how the larger constellations of power and resistance, of conservatism and liberalism, of science and the humanities, of the centre and the periphery, are held in place. “Archaeological analysis does not try to discover in their place a common form or theme, it tries to determine the extent and form of the gap that separates them” (152) ... "a space of multiple dimensions; a set of different oppositions whose levels and roles must be described. Archaeological analysis, then, erects the primacy of contradiction that has its model in the simultaneous affirmation and negation of a single proposition” (155). The dream of a common language is the necessary hope for contact genres, and it is also their undoing.

Te wero as (post)colonial archetype

Derrida’s hope for language is in a promise. “Each time I open my mouth, each time I speak or write, I *promise*” (*Monolingualism* 67). If we were to draw from Austin’s speech act theory here, we would say that language for Derrida is therefore always already perlocutionary: what is promised, what is called for in each utterance is a language made afresh. Furthermore, this promise of a language to come “is not to be opposed to the other, nor even distinguished from the other. It is the monolanguage *of* the other” (68).

Indigenous languages and their oral traditions have been subjected to two prongs of speculation: first that the shift from oral to written is a shift from simple to complex systems of thought; second that it reflects a debasement, as reflected in Lévi-Strauss’s observation that “the primary function of writing ... is to facilitate the enslavement of other human beings” (OG 130). Through *Baby No Eyes* and in keeping with Derridian thought, I think Grace intervenes in the latter, not to restore writing to innocence, but to put it on par with speech. The problems with

post-colonial interventions is that they can get mired in essentializing moments whereby once it is asserted that Aboriginal cultures have complex systems of knowledge rooted in lore, myth and a holistic respect for nature, it tends to reinforce an other-ness that was established by Western epistemologies in the first place. Lee Maracle rallies a cry against this sort of sentimental salvaging, even against Natives who collaborate with the notion of themselves as a spiritual as opposed to a political people. In response she writes “I did not expect our own people to parrot the racist formulators of sociology and cultural anthropology and call it ‘spirituality’” . . . “Politics arises from law. To be without politics is to be lawless. . . . To say that we were lawless is to say that, indeed, we were savages” (39). Hers, I would argue, is a savage response to savagery. So is Alan Duff’s *Once Were Warriors*, which maintained its exploratory status through its affront to Pakeha literary and other sensibilities, a status retroactively lost in its adaptation in film.

It could be argued that some of the useful assumptions of postcolonial theory and Aboriginal activist discourse are undermined by deconstruction, especially if we see advantages to devaluing writing in favour of endangered oral traditions, to favouring the small community (the *marae*, the potlatch)¹⁴³ over pan Indigenous coalitions (and potential dilutions), to valuing a Creole over standard French, or to saving a language at all costs. But deconstruction merely takes them each one by one and troubles them to see what they reveal, akin, as even Derrida has noted, to how literature “in principle allows one to say everything” (“Strange” 36).

Derrida has speculated further on this topic in his more extended essay *On Forgiveness*, but before this was written, he spoke on a visit to the Waipapa Marae in Aotearoa New Zealand

¹⁴³ Although Derrida sees the small community as also vulnerable to “demagogic harangue” (*OG* 137).

where, seemingly to demonstrate the points at which language doesn't matter, he responded to his welcome, or *powhiri* (which included *te wero*):

Tena koutu katoa. I am very grateful. I wanted to tell you very simply that in every act of hospitality there are, of course, rituals and coded gestures, but there is also a moment of absolute singularity which is processed with the heart. (qtd. in Simmon and Worth 26)

As a moment at the beginning and at the entelechial end of discourse, *te wero*, the challenge, is an embodied, ceremonial performance that brings together a set of terms and metaphors which theorists since Saussure, Austin, Burke, Perelman and others have drawn from to talk about how language works. Performativity, speech acts, ceremonials, uptake, even critical stance are a few terms I have used in the chapters above that map on to this ritual. We have moved theoretically from seeing language “as a dress that thoughts put on” (Samuel Johnson’s dictionary) to seeing written and spoken utterances as actions in the world, and also to seeing all human actions in the world as speech/text. Finally Derrida has confronted the specter of writing to point out “what was chased off limits, the wandering outcast of linguistics, has indeed never ceased to haunt language as its primary and most intimate possibility” (*OG* 44).

I come back, finally, to the notion of fragility. In an essay on the future of the humanities, Derrida argues for a “university without condition,” connoting here both a lack of power and a lack of defense: “Because [a university without condition] is absolutely independent, the university is also an exposed, tendered citadel” (“Future” 236). This idea of a university as a vulnerable offering juxtaposed with the connotations of a fortress holds a fitting resemblance to what is held up to be an essential feature of a salient scientific theory—that it is

fragile: a theory gains its strength from its vulnerability to the first sign of counterevidence.¹⁴⁴

The possibilities ritualized in te wero point to the multifariousness and open-endedness of contact genres, with their mix of aggression and passivity, strength and fragility, play and tactical maneuver. I leave it as a gesture towards the future of deconstruction, of maoritanga, and of indigeneity.

Haere atu ra!

¹⁴⁴ Indeed, it seems that Derrida goes on to find fault with performativity as a theory on the basis that it lacks fragility. But not on the basis of counter-evidence, rather on the basis that it is a barricade against that which would overtake us by surprise: “In the face of what arrives to me, happens to me and even in what I decide (which ... must involve a certain passivity, my decision always being the decision of the other), in the face of the other who arrives to me, all performative force is overrun, exceeded, exposed” (246). For Butler this is the potential of performativity, as each speech act can potentially “challeng[e] existing forms of legitimacy [thereby] breaking open the possibility of future forms” (*Excitable* 147). It is only through the repeated performance that meanings are maintained and that meanings are open to change.

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Appendix A: The Kemp and Douglas texts

Kemp Deed¹⁴⁵¹⁴⁶

12 June 1848

Know all men. We the Chiefs and people of the tribe called the "Ngaitahu" who have signed our names & made our marks to this Deed on this 12th day of June 1848, do consent to surrender entirely & forever to William Wakefield the Agent of the New Zealand Company in London, that is to say to the Directors of the same, the whole of the lands situate on the line of Coast commencing at "Kaiapoi" recently sold by the "Ngatitua" & the boundary of the Nelson Block continuing from thence until it reaches Otakou, joining & following up the boundary line of the land sold to Mr. Symonds; striking inland from this (The East Coast) until it reaches the range of mountains called "Kaihiku" & from thence in a straight line until it terminates in a point in the West Coast called "Wakatipu-Waitai" or Milford Haven: the boundaries & size of the land sold are more particularly described in the Map which has been made of the same (the condition of, or understanding of this sale is this) that our places of residence & plantations are to [be] left for our own use, for the use of our Children, & to those who may follow after us, & when the lands shall be properly surveyed hereafter, we leave to the Government the power & discretion of making us additional Reserves of land, it is understood however that the land itself with these small exceptions becomes the entire property of the white people for ever.

We receive as payment Two Thousand Pounds (2000) to be paid to us in four Installments, that is to say, we have this day received 500, & we are to receive three other Installments of 500 each making a total of 2000. In token whereof we have signed our names & made our marks at Akaroa on the 12th day of June 1848.

Signed

Here follow Forty Signatures

Witnesses signed

True translation H. Tacy Kemp

¹⁴⁵ http://www.publicaccessnewzealand.org/files/ngai_tahu_sales_deeds.html accessed May 22, 2005

¹⁴⁶ There are competing translations of the Kemp Deed, which are discussed by Harry C. Evison

Sample text of Douglas deed¹⁴⁷

Swengwhung Tribe - Victoria Peninsula, South of Colquitz.

Know all men, we, the chiefs and people of the family of Swengwhung, who have signed our names and made our marks to this deed on the thirtieth day of April, one thousand eight hundred and fifty, do consent to surrender, entirely and forever, to James Douglas, the agent of the Hudson's Bay Company in Vancouver Island, that is to say, for the Governor, Deputy Governor, and Committee of the same, the whole of the lands situate and lying between the Island of the Dead, in the Arm or Inlet of Camoson, where the Kosampsom lands terminate, extending east to the Fountain Ridge, and following it to its termination on the Straits of De Fuca, in the Bay immediately east of Clover Point, including all the country between that line and the Inlet of Camoson.

The condition of or understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed, hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people forever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

We have received, as payment, Seventy-five pounds sterling.

In token whereof, we have signed our names and made our marks, at Fort Victoria, on the thirtieth day of April, one thousand eight hundred and fifty.

(Signed) Snaw-nuck his X mark and 29 others

Done before us,
(Signed) Alfred Robson Benson, M.R.C.S.L.
Joseph William McKay

¹⁴⁷ There were some variations amongst the 14 Douglas conveyances; analyzing their significance is the topic of my second chapter

Appendix B: Full data for expansion analysis

	DE start n=20pp	A implicit	totals	DE finish n=29pp	A implicit	totals	CE start n=27pp	A implicit	totals	CE finish n=28pp	A implicit	totals	
a only	120	n/a		68	n/a		117	n/a		105	n/a		not in tally
AorA+app	129	n/a		70	n/a		122	n/a		111	n/a		
A+1/2R	21	3		12			8	1		16	1		
1/2 R + A	3			4			4			0			
R+A	11	2		1	2		5	8		2	2		
A+R	11		180	3		92	3		151	7		139	
R+A+E	2	1		5	1		0	7		1	2		
A+R+E	9			3			1			6			
E+A+R	1			0			1			0			
R+E+A			64	1		31	0		38			37	
E+A	7	7		4	13		1	14		6	23		
A+E	28		55	29		56	24		48	22		59	
E	30	n/a		33	n/a		17	n/a		18	n/a		
Q	5	n/a		4	n/a		4	n/a		11	n/a		
TALLY	257	13	270	169	16	185	190	30	220	200	28	228	n=903
percentages													
A only	44			37			53			46			
A or A+opp	63			38			55			49			
all A's no E	66.66			49.73			68.86			61			
all A+E	20.04			30.27			21.81			25.88			
E	11.11			17.83			7.73			7.89			
Q	1.85			2.16			1.81			4.82			
TOTAL	99.66			99.99			100.21			99.59			
R or 1/2 R	23.7			16.7			17.3			16.2			
A implicits	4.81			8.65			13.64			12.28			
CE=Cross examination													
DE=direct examination													
A=short answer													
app= appositive													
R=repetition													
E=Expansion													
Implicits refers to when a short answer is not stated explicitly, but it can be implied from other aspects of the answer, such as the expansion.													