COLONIAL TEXTS IN POST-COLONIAL CONTEXTS: A GENRE IN THE CONTACT ZONE

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ABSTRACT: This paper uses genre theory to analyze nineteenth-century deeds used to appropriate land from indigenous people in British Columbia, Canada, and in Aotearoa New Zealand. These deeds have been the subject of intense scrutiny in legal and other settings via twentieth century interpretive strategies complicated and modified by cross-cultural pragmatics. Although focusing mainly on one deed used in B.C. in 1854, the paper also has in its purview other deeds and treaties in NZ and Canada. The subsequent analysis of these documents’ actions in colonial and postcolonial contexts concludes with a framing of genre that is not based on the mutual recognition of form and situation by genre participants, and indeed may even preclude it. This necessitates a further discussion of Miller’s (1994) conditions for making a genre claim, and ends with the positing of a special category of genres called contact genres.

KEYWORDS: Genre; Language; Law; Treaties; Canada; New Zealand

A retelling of a story from the oral tradition of the Tsawout, a Vancouver Island First Nation: 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” (from Salt Water People, cited in FOSTER 1989: pp. 632-3).

1. Introduction

The above account captures many of the concerns of this paper, and also represents the entry into mainstream historical scholarship of indigenous records of the colonizing processes through which they had so much to lose, and did. The story I will tell here involves the document of which the Tsawout speak, and begins in the mid nineteenth century when, as part of the Hudson’s Bay Company’s plan to begin the resettlement of Vancouver’s Island, HBC Factor James Douglas arranged to “purchase” lands from its indigenous inhabitants using fourteen deeds. These documents 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 to buy land from the Maori 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, 2003). The following account aims to capture and exemplify the degree to which the meaning and significance of this pair of texts can diverge despite the careful attention given to them in legal settings using similar legal hermeneutics, and to frame this divergence in terms of genre theory.

In the simplest sense, deeds consist of words on a page of a legal agreement, which legal framers work to ensure are clear and consistent in their meaning. The documents

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considered here, though, operated over a period in which nothing 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 is part of the action of the genre. Complicating things even more 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, Carolyn Miller’s (1994 [1984]) description of how texts can fail to constitute a genre when the rhetorical situation is construed differently by rhetor and audience, or when differences in audience or exigence render the genre incoherent, a situation that can indeed result from “conflicting interpretive contexts” (p. 38). Whether and how I can make a genre claim depends on an exploration of just these issues.

This study begins with an assessment of the compositional and interpretive strategies associated with the textual regularities of these texts, what Miller calls “first line evidence” for a genre claim. Next I use Speech Act Theory, because the instantiation of deeds and treaties in writing is sealed via signatures that stand in for the “hereby” of legal speech acts. 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, and the widely divergent values, beliefs and practices in colonial and postcolonial contexts that seek to disrupt them, and therefore disrupt the genre. I speculate that documents such as these—situated in times of rampant colonial expansion and the perils and possibilities of the contact zone, in which colonial encounters are “interactive, provisional” and “often with radically asymmetrical relations of power” (PRATT, 1992, p. 7), and which signify as they do over long periods of time—lie at the limits of genre stability.

**Background**

The question of what indigenous participants were recognising when they were confronted with these documents seems a good place to begin, and the quote with which I begin this paper is one illustration. As well as providing such insights into the assumptions of indigenous participants in practices mostly 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 time immemorial, or “as long as there is sun, [and] the river flows in this land” (HILDERBRANDT et al., 1996, p. 71). Indigenous people drew on these antecedent genres as they struggled to maintain lands, power, and dignity in their dealings with settler populations (CULHANE, 1997, p. 50) at the same time as entering into agreements using unfamiliar vocabularies and routines in contexts rife with translation difficulties. The tribes of the Canadian prairies, for one typical example, had no terms for, or conceptions of, the ideas of surrendering or ceding title (ibid. xi, p. 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 First Nations those pieces of paper were more often understood as peace treaties rather than as the permanent conveyance of title. And for many of them putting any agreements in writing on paper represented a breech of trust (CHAMBERLAIN, 1997, pp. 36-7).

Both countries were the focus of imperial schemes for colonisation that peaked in the nineteenth century. Out of touch with local contingencies, the colonial office could often do no more than sanction practices that had already occurred, 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, 2003). 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 Ngai Tahu, the Maori of the South Island of NZ. 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. These documents (see appendix one), like many others pertinent to aboriginal rights, 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, phrases and clauses 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 on the basis of these interpretations.

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 they reconstitute indigenous lives and histories. In the B.C. 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” (p. 52). First Nations of Vancouver Island “helped to frame these assumptions” by dividing themselves into groups of exclusive “landowners” according to definable boundaries (p. 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 (p. 53). Under typical legal circumstances one could imagine that the accuracy of boundaries, the certainty of original ownership as represented by signatures, and the clarity of monetary arrangements would all be paramount to the status of a deed. And, interestingly, it is just such issues in the Kemp Deed that are the impetus for intense scrutiny and are to this day the topic of debate, a topic to which I return below.

To recap, the Kemp Deed from the 1848 Canterbury purchase from Ngai Tahu in NZ was mined for its wording for a group of land conveyances used by Governor James Douglas to purchase land from the Indian tribes of Vancouver Island in 1850-54 in B.C., representing a typical case of legal mimesis wherein explicit legal terminologies and wordings need not be reinvented every time an act is repeated. In the table below I have stripped the texts in question of their particularities to show this core structure and content. (N.B. Differences between the documents are italicised, and the details eliminated. These and other particularities to do with the documents are considered in the larger project of which this is a part.)

<table>
<thead>
<tr>
<th>Kemp 1848</th>
<th>Douglas 1850-54</th>
</tr>
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<tr>
<td>Know all men. We [X] who have signed our names &amp;</td>
<td>Know all men, we, [X], who have signed our names and</td>
</tr>
<tr>
<td>made our marks to this Deed on [DATE], do consent</td>
<td>made our marks to this deed on [DATE] do consent to</td>
</tr>
<tr>
<td>to surrender entirely &amp; for ever to [COLONIAL</td>
<td>surrender, entirely and for ever, to [COLONIAL POWER] the</td>
</tr>
<tr>
<td>POWER], the whole of the lands [DESCRIPTION OF</td>
<td>whole of the lands [DESCRIPTION OF AREA].</td>
</tr>
<tr>
<td>AREA] the boundaries &amp; size of the land sold are</td>
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<tr>
<td>more particularly described in the Map which has</td>
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<tr>
<td>been made of the same</td>
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<tr>
<td>(the condition of, or understanding of this sale</td>
<td>The condition of or understanding of this sale is this,</td>
</tr>
<tr>
<td>is this) that our places of residence &amp; plantation</td>
<td>that our village sites and enclosed fields are to be kept</td>
</tr>
<tr>
<td>are to [be] left for our own use, for the use of</td>
<td>for our own use, for the use of our children, and for the</td>
</tr>
<tr>
<td>our Children, &amp; to those who may follow after us,</td>
<td>those who may follow after us; and the land shall be</td>
</tr>
<tr>
<td>&amp; when the lands shall be properly surveyed hereafter, we leave to the Government the power &amp; discretion of making us additional Reserves of land, it is understood however that the land itself with these small exceptions</td>
<td>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</td>
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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 deeds and treaties as rhetorical genre, illustrating again how legal contexts provide an excellent display of reasoning and assumptions behind particular uptakes (c.f. FREADMAN 2002). At issue is the relationship between these documents’ status as legal entity, as accurate historical, anthropological and cultural records, and as genre, all in this politically fraught cross-cultural and postcolonial context.

**Legal interpretation**

Numerous frameworks have been proposed to explain processes of interpretation in legal contexts—literal versus purposive meanings are sought; charges of foundationalism versus pragmatism (which at its extreme becomes judicial activism) are made; and judges are thought to have either declarative or interpretive functions. 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, terms and phrases, are read in the courts can be thought to fall generally into the two poles of literal versus figurative interpretations in literary theory. Sometimes, in the reading of historical documents for the purposes of ascertaining or recuperating aboriginal treaty rights mention is made of these frameworks. When Canadian principles of treaty interpretation deem that ambiguities in language should be resolved in favour of First Nations, this can often result in a figurative interpretation. For example in one landmark Canadian case the interpretation of a Mi’kmaq treaty clause that restricted them to bringing the products of their hunting and fishing to “truck-houses” was broadly taken to mean a treaty right to take the products of their hunting and fishing to market. “Truck houses” refers to specially built company trading posts that no longer exist in Eastern Canada, but thought of as a metonymy, it was taken to mean the market in general. In other words, what was intended to restrict Mi’kmaq to trading only with the British colonists in the 18th C, ended up in the 20th C permitting them to not only 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 those resources in order to have a reasonable income in the first place. All of this transpires while maintaining a guise of the straightforward interpretation of terms, while overseeing the transformation from one type of legal speech act (that of restricting) to another (that of permitting).

Literalist interpretations such as that of the term “truck-house” above are often said to serve conservative interests. They rely on documentation to the exclusion of other factors; and meaning is ascertained from words on the page without consideration of their historical contexts, or other extrinsic evidence. In the process, less time and fewer resources are expended in coming to decisions. Whether conservative or not, it makes sense that the courts always hope a literalist interpretation will suffice.

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The Douglas Deeds first came to the attention of the justice system in a British Columbia Court of Appeal case *Regina v. White and Bob*, and one key issue was, in a sense, their genre status. The case named two native men from the Saalequun tribe who were convicted of hunting deer without a permit and outside of the hunting season as designated by the *Game Act*. Their defence involved a reading of their 1854 agreement with Douglas, which used the basic structure of the text above to state that the Indians were “at liberty to hunt over the unoccupied lands, and to carry on [their] fisheries as formerly.” Native hunting and fishing rights were protected under the *Indian Act* in those contexts where treaties between settlers and First Nations have been made. That the Douglas documents were treaties as defined in such acts and legislations, rather than merely land conveyances or deeds, was paramount to this First Nation who wanted to retain traditions of hunting and fishing. Suffice it to say here that they were successful, and this document along with the thirteen others between Vancouver Island First Nations and the colonial government have been called the Douglas Treaties ever since.

Both prosecution and defence pondered over interpretations of the terms “deed” and “treaty.” And in the dissenting opinion one judge invoked a literalist interpretation in his reading of a clause from an earlier document, the 1763 *Royal Proclamation*, which aimed to protect the interests of “the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection.” Justice Shepard argued against seeing this as applying to First Nations on Vancouver Island, and he based his reasoning on the tenses of the verbs I have underlined. This cannot mean Indians of Vancouver Island, Shepard opined, because Vancouver Island was unknown to the Crown in 1763. In essence this would mean that the foundational protection supplied by the proclamation to the indigenes of the “New World” did not apply to BC First Nations, and whether the text was a deed or a treaty was a moot point.

But literalist interpretations do not always serve conservative interests. Justice Norris wrote at length on the status of the documents as treaties. In his judgment he first took note that the verb “to treat” was used in the correspondence between Douglas and the Colonial secretary, then he 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 consults the shorter Oxford dictionary to find no such “absurdity, repugnance or inconsistency,” thus the deed became the treaty it needed to be for the Saalequun to be able to hunt for food on unoccupied lands.

Moving from Canadian contexts and scholarship to the second context of interpretation for the text of these deeds, we turn to 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.” 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 lead to the Ngai Tahu land claim (Wai 27). 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). This contrasts considerably to the attention paid to the Douglas conveyance, 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 list of very neat crosses were subsequently added (DUFF 1969, p. 13); also, in nine of the fourteen Douglas Deeds, much of the text of the deed was itself completely absent, having not at that point arrived from the
Colonial Office (HARRING, 1998, p. 378, fn 24). Lastly, the text for the deed at issue in *R. v. White and Bob* was and still is absent from all records, if it ever existed at all. None of this detracted from the status of the “deed” in the B.C. court.

An account of the colonial treaty as genre must satisfactorily explain such divergent genre readings 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 to not only bring these products to market but also to access these now much scarcer resources in the first place; and it must explain the rendering of the differences between a deed of sale and a treaty as immaterial. These 19th century texts reverberated in 20th century contexts in ways the original signatories could never have imagined. In each case a different constellation of felicity conditions was assembled and seen as relevant. It seems there were limits to how far reasoning about language and law could take these documents, and these limits were exceeded by their social action at the level of speech acts.

### Legal Speech Acts

Charles Bazerman (1994) 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. Sometimes a text completes its rhetorical purpose in a single instantiation, and is filed away; other texts have recurring actions as they are re-read, reapplied, and even reinterpreted, but, as Bazerman puts it, “genre recognition usually limits interpretive flexibility” (p. 90). Freadman’s (2002) 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” (p. 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” (p. 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” (p. 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” (p. 155), and “commit us to the consequences of an act” (p. 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” (p. 156); they are “an assuming of an obligation or declaring of an intention” (p. 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). But ever since Austin described these categories—even as he wrote about them—they begin to fall apart. For example he describes the link between commissives and exercitives thus: “The connexion between an exercitive and committing oneself is as

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4 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)
close as that between meaning and implication” (p. 155). A succession of people have endeavoured to resolve these problems by burdening Speech Act Theory (SAT) with more specific categories (see HANCHER, 1979 for a useful summary). Still others venture back into legal contexts to seek to understand just what it is that judges do when they use language (KURZON, 1986). Some scholars focus more on the required 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, he explains, 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 (pp. 222-224). 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. 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” (p. 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 (so contentious in the Searle-Derrida debate). The first case still has illocutionary intent (even if it fails in regard to sincerity); the second does not. 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” (p. 215). This seems to bring legal hermeneutists back to their starting point. But it also echoes the position taken by integrationist linguistics, who argue against the code model of language meaning. Rather than resort to complicated theories of meaning rooted in what are really “myths” about language (HARRIS, 1981; 2002), 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, 2002, p. 145). Dieter Stein (2005) prefers the term “language ideology” to language myth, to get at

5 This raises the issue of his other shaky (by his own account) dichotomy, that between constatives (which are either true or false), and performatives (which are either felicitious or infelicitious).

6 “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 1990). In Anglo-Saxon times, verbal repertoires needed to be carefully articulated, without stammering, for an agreement to have legal force (Tiersma 1999, 13).

7 Freadman’s 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 priori aspect of speech acts, instantiated in the uptake, such that meaning comes in part from the hearer’s inference of the speaker’s intention.
unreflected upon beliefs at the “subliminal level of metapragmatic awareness” about language norms shared by groups such as law practitioners, and of how these norms are socially valued. (Verscheuren, in STEIN, p. 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” (p. 196).

Returning to legal hermeneutics’ golden rule, exemplified by Justice Norris above, 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 the perspective above, coming from more recent research, suggests there is no such succession of events, “the stages are superfluous” (TOOLAN, 1996, p. 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. Rather, says Toolan, we “learn and store lexical items, and even whole utterances, with contexts attached” (p. 46). Applying this to legal texts is to say that, even though the replication through rereading underlies a somewhat stable transfer of meaning, “[c]ontinually changing circumstances [also] guarantee the incompleteness of replication” (p. 241), and therefore allows for shifts in meaning. (c.f. FISH, 1989.)

What appears to be the end result is that legal practitioners are coming up against the same issues that Austin did, issues that natural language philosophers who come after 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, 1996). 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—Austin’s and other SA 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.

Bringing Austin and Tiersma to the present discussion leads us to see that an offer and its acceptance together can 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 treaty8 because the illocutionary intent is still there. But the second problem we encounter is that, like genres, speech acts also “depend on conventions and procedures which are valid for both addressee and addressee” (HENDERSON, 1993, p. 236). Contracts are bi-directional legal speech acts (KURZON, 1986), and this creates problems in cross-cultural and cross-linguistic contexts, problems that have not gone unnoticed. Freadman points out when she notes how SAT has been picked up by 20th century communication theories, but not in a way that allows for contextual or cultural specificity (pp. 40-41). Mary Louise Pratt similarly concedes that SAT fails to account for culture 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. Lastly, Sperber & Wilson (2001), in their discussion of speech acts, note how institutional speech acts require the mutual recognition of the institutional or social norms to work (p. 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” (fn 28, 290).

One could rightly argue that the national and cultural contexts differ enough to explain the different uptakes of the Kemp and Douglas texts, especially the presence in the NZ context of the Treaty of Waitangi, which satisfies the rhetorical exigence for the treaty genre

8 WALTERS, 2001, pp. 104-107
and therefore eliminates the need for such documents as the Kemp Deed to fulfil that requirement. And in one important sense the Tsawout’s Douglas Deed was always a treaty; it just took the Western legal tradition over one hundred years to catch up. The names we give to categories are worth some consideration but can only take us so far; they are based on those formal features and are the “first line evidence” mentioned above. When a legal tradition invests so much in the code model of language, it takes a supreme effort to move a text from one category to another. And despite the resulting divergent uptakes of the deeds, their interpretation drew on a uniform monolithic Western tradition of legal reasoning (involving the regular exchange of precedents). Such struggles over meaning, constrained by the code model of language, 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, 2001, p. 34); capitalism, in short, may end up supplying what Kenneth Burke (1962) would describe as the “ultimate vocabulary” (p. 204) for treaty interpretation. Such wranglings are also a part of the action of this genre. Given the strength of genre theory as being able to bridge the space between sentence level pragmatics and these broader workings of discourse, power, capital, and culture, I now attempt to integrate the two phenomena described above (the constraints of the code model of language in the face of far-reaching socio-political and legal transformations; and the tenacity of the treaty genre in the face of its failure to meet “normal” genre requirements) into that theory.

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 (land; resource rights; self-government), 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. Janet Giltrow (1994) argues that some of the background knowledge necessary for the interpretation of a genre is “in the domain” of that genre. She divides 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 itself, 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 psycho-therapeutic explanations, especially those to do with the family background of the criminal being sentenced. This leads me to the suggestion that there are particular interpretive contradictions in the domain of the colonial treaty genre. In other words, as the work of legal reasoning about deeds and treaties goes on, ameliorated by a 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 actually constitute the genre. At the outer levels of the genre are strategies common to all legal interpretation, which I outlined briefly above as the interplay between the instantiation of legal “acts” through language and the future literal and figurative interpretations of those acts. What this genre creates—and this is what I am arguing is genre-bound—is an essential disconnect between interpretations of words according to these interpretive strategies and ideologies, and the wildly divergent uptake of new genres and speech acts. In other words the gap between the code and the act seems to be about at its limits in these cases. And it is the tenacity of this genre—through the exigence of a contemporary rhetorical situation—that renders it so. Perhaps it is at these moments of the increased salience of pure text that myths...
(or ideologies) of language are put in relief. It is the moment when the ordinary work of interpretation begins to look a little, well, arbitrary.

This genred activity was originally responding to rhetorical exigencies of at least two disparate cultural groups: the European colonists needed permanent access to land in ways sanctioned by colonial policies and laws, and aboriginal groups needed to define and have some control over their own fate and their ongoing relationships with a dominating power. This situation was recurring around the world. When Paré and Smart define genre as "typified rhetorical actions and recurrent situations" (1994, pp. 153-4, emphasis in original), they aim to draw in and validate those observable material conditions of a situation—for them the materiality of the social action of genre in terms of composing practices, reading practices, and social roles (147)—and make them a part of genre. For the present discussion those material conditions involve both the colonial thirst for land and resources and the indigenous need for economic and political power. Despite that the goals and perspectives on the situation conflicted, they still functioned as a pair; and they were sustained over a long period of time (to this day, in fact).

I also speculate that the mutual recognition of speakers and listeners, readers and writers, that the discourse type fits the rhetorical situation 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: We have routine responses to routine situations within communities of practice that are somewhat naturalised, and we give some of these genres names. What could be true of both the contact genres of colonial times, and those being formulated, for example, in British Columbia today, is that not only is shared recognition not a given, nor can it be an outcome. Shared recognition must be developed in the face of its own impossibility, functional only in its ongoing presence on the ever distant horizon. The necessary impossibility of recognition has its raison d'être in resistance to assimilation into the dominant culture.

Despite this 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 (2003) 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.

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 recurring rhetorical situation, but in which recognition of that rhetorical situation is not shared. The term brings together the concerns of 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

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9 Miller calls these “de facto genres.” Bakhtin (1986) talks about primary genres. They function routinely based on shared recognition. Secondary genres, which are structured and institutionalised, are constellations of primary genres that are defamiliarised in some way, through being quoted, or contrived, and become routine only and as long as institutional contexts are stable.

10 Another conceptualization of recognition that has promise for work in genre theory 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 & FEATHERSTONE, 2002).
traditions\textsuperscript{11} 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 is still a question asked by legal scholars. Nonetheless, inherent to a contact genre, I will add drawing from Freadman’s use of Lyotard’s work, is the notion of \textit{le differend}. 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. 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” (p. 235). But like all language everywhere, it will not be contained to do the work planned for it, especially when the realities on the ground and in a sense of what is just require otherwise.

\textbf{Appendix}

\textbf{KEMP DEED}

\textit{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 & for ever 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 "Ngatifoa" & 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 "Kaikuku" & 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 Instalments, that is to say, we have this day received 500, & we are to receive three other Instalments 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

\textsuperscript{11} A more detailed consideration of the rhetorical traditions of indigenous communities is beyond the purview of this paper.
SAMPLE TEXT OF DOUGLAS TREATY

Saanich Tribe – South Saanich.

Know all men, we, the chiefs and people of the Saanich Tribe, who have signed our names and made our marks to this deed on the sixth day of February, one thousand eight hundred and fifty-two, do consent to surrender, entirely and for ever, 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 Mount Douglas and Cowichan Head, on the Canal de Haro, and extending thence to the line running through the centre of Vancouver Island, North and South.

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, Forty-one pounds thirteen shillings and four pence.

In token whereof, we have signed our names and made our marks, at Fort Victoria, on the 7th of February, one thousand eight hundred and fifty-two. (Signed) Whut-Say-Mullet his x mark. and 9 others

Witness to signatures,

(Signed) Joseph William McKay. Clerk HBCo’s service RICH’D GOLLEDGE, Clerk.

References


BRITISH COLUMBIA. Papers Connected with the Indian Land Question: 1850-1875, Victoria.


