

“Innocent Legal Fictions”: Archival Convention and the *North Saanich Treaty* of 1852



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RÉSUMÉ Le projet colonial britannique a généré des documents d’archives situés entre deux cultures (« *culturally-mediated* ») décrivant les populations autochtones de l’Amérique du Nord et leurs terres. Ces récits, registres et enquêtes sont devenus les principaux documents d’archives qui témoignent du contact colonial. Des décisions récentes de la Cour suprême du Canada en matière de droits autochtones ont déterminé que la mémoire sociale des populations autochtones avait une valeur de preuve suffisante, à la fois comme une ressource complémentaire aux documents d’archives textuels et comme une représentation qui respecte les nuances culturelles (« *culturally-sensitive representation* ») de l’expérience autochtone face au colonialisme. Comme pour la jurisprudence canadienne, la pratique archivistique doit reconsidérer ses paradigmes pour aborder la matérialité non-textuelle et partager l’autorité contenue dans les traces de l’expérience coloniale autochtone. Cet article examine le cas du *North Saanich Treaty*, et conclut que les interprétations archivistiques conventionnelles identifient les silences et les différences des documents coloniaux textuels. Toutefois, les critiques notent que la méthode archivistique traditionnelle demeure liée à ses paradigmes textuels. Elle n’aborde pas les liens souvent vagues et incertains entre le document d’archives et les diverses structures de pouvoir, les cultures et les traditions qui entourent la création du document et la disposition archivistique.

L’archiviste ne peut pas interpréter les multiples vérités relatives au pouvoir et à l’autorité qui inspirent la création d’un document donné; il peut, cependant, aborder l’absence du rôle des Autochtones dans le contexte de création des documents d’archives coloniaux. À mesure que nos descriptions archivistiques s’inscrivent dans un contexte archivistique détaché et inter-relié sur le plan numérique, ce travail devient plus réalisable. Le contenu d’un tel contexte juxtaposé pourrait mettre en évidence les langues

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et les visions du monde décrites dans des représentations autochtones appropriées. Cela empêcherait de décrire à nouveau les documents coloniaux et les place dans un contexte plus clair puisqu'ils pourraient être inscrits à la fois dans l'environnement de création des documents coloniaux ainsi que dans le discours des descriptions contemporaines. Cela fournirait également un espace pour l'histoire orale des aînés autochtones qui n'entre pas facilement dans le format de nos normes nationales de description.

ABSTRACT The British colonial project created culturally mediated records to depict the land and Aboriginal peoples of North America. Such narratives, registers, and surveys became the predominant archival record of colonial contact. Recent Supreme Court of Canada decisions on Aboriginal rights have determined that traditional Aboriginal methods of social memory have necessary evidential value as both a countervailing resource to the archival textual record, and a culturally sensitive representation of the Aboriginal experience of colonialism. Not unlike Canadian jurisprudence, archival practice must reconsider its paradigms to address the non-textual materiality and distributed authority embodied in colonial Aboriginal evidence. As a case study, this article examines the *North Saanich Treaty*, concluding that conventional archival interpretations identify the silences and discrepancies of the textual colonial record. But critics note that conventional archival method remains tied to its textual and sovereign paradigms. It does not address the often vague and uncertain relationship between the record and the manifold power structures, cultures, and traditions that surround the record's formation and archival disposition.

Archivists cannot interpret the multiple, relative truths of power and authority that inspired a record's creation. Archivists can, however, address the absence of Aboriginal roles in the context of colonial records creation. As our archival descriptions move toward a detached and digitally interconnected archival context this becomes more practical. The content of such a juxtaposed context could depict relevant languages and worldviews as described by appropriate Aboriginal representation. This avoids re-describing colonial records and puts them in a deeper context of both the colonial records creating environment and the discourse of the contemporary descriptions. It also provides for the participation of oral histories of Aboriginal elders that do not easily fit the format of our national descriptive standards.

In 1583, Sir Humphrey Gilbert, the half-brother of Sir Walter Raleigh, sets out in search of a passage to the Orient, but settles for claiming Newfoundland in the name of Queen Elizabeth I. Upon leaving Newfoundland for England, he takes with him a piece of turf and a small twig, symbols of ownership which, unlike him, remain afloat when his ship sinks in the mid-Atlantic.¹

Introduction

The British colonial project required unique documents to legally enshrine the sovereign relationship between the British Crown and Aboriginal peoples. As the Crown developed its modern colonial empire, it constructed and recycled a repertoire of documents and procedures designed to produce legal evidence of imperial sovereignty. These assertions of sovereignty evolved from the ideological taproots of English common law rights of tenure and custom, and the interpretive framework for *dominium* of Roman imperial law.² By the mid-nineteenth century, modernism brought a positivist focus to common law. Common law colonial jurisprudence, and its documentary by-products, became at once more detailed and encompassing. The new positivist perspective introduced a more doctrinaire and intrusive tone to colonial expressions of sovereignty. Whereas pre-nineteenth-century British expressions of imperial sovereignty recognized and even collaborated with the endemic polity, through the lens of nineteenth-century legal positivism, sovereignty's focus became increasingly absolutist and assimilating. This new perspective found expression in legal instruments such as codes, land acts, and surveys – modernist devices designed to detail both the nature of native custom and British colonial sovereignty's broadening control. Considering treaties, “sovereignty's positivization” compelled British representatives and Aboriginal societies to reconcile and articulate their expansive social differences in more measured textual detail.³ Struggling to negotiate such fundamental elements of identity as land and culture, Aboriginal and Crown representatives created legal fictions: documents purporting evidence of mutual expressions of rights and title where none existed. From the British perspective,

- 1 Wayne Johnson, *The Colony of Unrequited Dreams* (Toronto, 1999), p. 44. For the “official” non-fiction version of this event see Richard Hakluyt, *Principal Navigations, Voyages, Traffiques, and Discoveries of the English Nation*, 12 vols., Extra Series (Glasgow, 1904), vol. VIII, pp. 53–54.
- 2 A.W.B. Simpson, *An Introduction to the History of Land Law*, 2nd ed. (Oxford, 1986); D.J. Seipp, “The Concept of Property in the Early Common Law,” *Land and History Review* 12 (Spring 1994), pp. 29–91; P.G. McHugh, *Aboriginal Societies and the Common Law* (Oxford, 2004); Ken MacMillan, *Sovereignty and Possession in the New World: The Legal Foundations of Empire, 1576–1640* (Cambridge, 2006); P.G. Monateri, “Black Gaius: A Quest for the Multicultural Origins of the ‘Western Legal Tradition’,” *Hastings Law Journal* 50 (2003), pp. 1–72; Peter Stein, *Roman Law in European History* (New York, 1999).
- 3 McHugh, pp. 149–52; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York, 1995), pp. 9–10.

these documents were a kind of *deus ex machina*: devices designed to depict a desired, but no less imagined, sovereign colonial reality. From the perspective of Aboriginal signatories, their innocence, as Wilson Duff cleverly implied, is at best uncertain.

In all eras of the first contact narrative, considerable legal fiction infused the documents of the British colonial project. The evidence of jurisdictional legitimacy embodied brokered and negotiated representations of colonial contact.⁴ Such imperial brokerage greatly contributed to the inconsistent character of many Canadian Aboriginal treaties. When documentary and legal inconsistency characterize documents of such historic weight, the debate is inescapable. This explains in part why Canadian Aboriginal treaties number among the most politically charged archival documents to represent Canada's collective identity. And the debate is ongoing: academics and political pundits have recently referred to Canadian Aboriginal treaties as, *inter alia*, "real estate conveyances";⁵ "forms of contract";⁶ "constitutional documents";⁷ "a kind of legal self-annihilation";⁸ "Indian *Magna Carta*";⁹ and "the hidden constitution of Canada."¹⁰ Such strong and conflicting opinions indicate the wide spectrum of legal and political values attached to, and enflamed by, these cultural representations of colonial experience.

Looking beyond the rhetoric, by describing these documents, in an archival sense, as Aboriginal treaties, archivists elide several traditional assumptions. First, in a traditional archival view, a treaty is a dispositive document – meaning the document is the embodiment of a completed transaction involving wilful participants. The document should be perceived and understood within the social worldview of the participants. Titling such documents as "treaties" is an elision of the native participation.¹¹ Second, archival documents acquire

4 For brokered representations of colonial contact in a Vancouver Island context see Daniel Clayton, *Islands of Truth: The Imperial Refashioning of Vancouver Island* (Vancouver, 2000), chapters 2–4.

5 Thomas Flanagan, *First Nations, Second Thoughts* (Montreal, 2000), p. 142.

6 *Statement of the Government of Canada on Indian Policy, 1969 (White Paper)* (Ottawa, 1969). Cited in Peter Cumming and Neil Mickenburg, *Native Rights in Canada* (Toronto, 1972), p. 331.

7 *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2, "Restructuring the Relationship," pt. 1, p. 20 [hereinafter *R.R.C.A.P.*].

8 J.G.A. Pocock, "Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the *Treaty of Waitangi*," *McGill Law Journal* 43 (1998), p. 485.

9 Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Vancouver, 1999), pp. 28–29.

10 Brian Slattery, "The Hidden Constitution of Canada: Aboriginal Rights in Canada," *American Journal of Comparative Law* 32 (Spring 1984), p. 361.

11 This is not to deny the value of colonial treaties for issues of Aboriginal rights; they are, to quote *Worcester v. State of Georgia*, "a compact formed between two nations or communities, having the right of self-government." Rather, I wish to expand on the implications of examining these documents with traditional archival approaches. See *Worcester v. State of*

evidential values within the interpretive context of a uniform juridical system, a system not found on the colonial frontier. Few archivists have engaged in questions of Aboriginal evidence.¹² However, archivists are experienced in issues of documentary procedure; they can offer an interpretive framework to appraise evidence of Aboriginal identity. They should be capable of both acknowledging inconsistency and cultural relativity in the records of colonial settlement and expanding their traditional textual paradigms to account for non-textual Aboriginal remembrance of the colonial experience. In short, they should be capable of contextualizing the elisions in the archival records of colonial contact.

This essay will consider how conventional archival paradigms interpret colonial records possessing evidence of Aboriginal culture and identity. It argues that it is the archivist's responsibility as recordkeeper to make transparent his/her role in presenting the often vague and uncertain relationships between the record and the manifold power structures, cultures, and traditions that surround the record's formation and archival disposition. Archivists remain trapped in a duality where colonial records are both a discursive monument to colonial settlement and a muniment to contemporary Aboriginal rights.¹³ The documents that selectively found their way into public archives to describe the collision of colonial era societies cannot resolve the destiny of these societies, but in their faithful and accountable representation, they may provide insight and support for our multicultural constitutional identity.¹⁴ Our archival paradigms lack the cultural authority to account for Aboriginal participation in the memory of colonial experience in a meaningful way; the best response is to insinuate Aboriginal participation into the representation of the colonial archival record.

This approach builds in particular on the work of two archival writers. Mary Ann Pylypchuk broached this issue in 1991 when she examined how the Canadian judicial system addresses evidence of Aboriginal societies.¹⁵ She argued the courts' attenuating use of Aboriginal evidence as fragmented sources, de-

Georgia, [1832] 8 U.S. (6 Peters) 515 at 559–561, available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=31&invol=515> (accessed on 10 May 2010).

- 12 See Shauna McRanor, "Maintaining the Reliability of Aboriginal Oral Records and Their Material Manifestations: Implications for Archival Practice," *Archivaria* 43 (Spring 1997), pp. 64–88; Mary Ann Pylypchuk, "The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources," *Archivaria* 32 (Summer 1991), pp. 51–77; Pylypchuk, "A Documentary Approach to Aboriginal Archives," *Archivaria* 33 (Winter 1991–92), pp. 117–24.
- 13 John L. Comaroff, "Colonialism, Culture, and the Law: A Foreword," *Law and Social Inquiry*, vol. 26, no. 2 (2001), p. 308.
- 14 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, 1995). I have presupposed Aboriginal participation in the Canadian constitution. Should Aboriginal groups select sovereignty, another paper would be needed to address the archival implications.
- 15 Pylypchuk, "The Value of Aboriginal Records."

tached from their formative context to solve particular court matters, undervalues and misrepresents Aboriginal mnemonic traditions. She maintained that “such information – interpreted within its aboriginal context – might form part of a society’s only trusted proof of the continuity of its traditional laws, the society’s sacred historical memory, and the main means of transmitting its cultural heritage ...”¹⁶ Shauna McRanor elaborated on Pylypchuk’s observation. She wrote that, “since the dominant juridical system of Canada is firmly rooted in the Western model, the rights and privileges of First Nations – as these are conceived by aboriginal rules – have been seriously compromised by alien laws which devalue their oral records as proof for establishing their facts.”¹⁷ McRanor suggested that there was a place for traditional archival theory in the examination of Aboriginal records, but that it belonged in the hands of the Aboriginal records creating society. Combined, Pylypchuk and McRanor point to a reinterpretation of colonial Aboriginal evidence as *sui generis* and best appraised in its multicultural context. Although this is a new evidentiary paradigm that has been acknowledged in Canadian jurisprudence, it remains poorly addressed in our dominant archival methods.¹⁸

This paper will consider two conventional archival paradigms through an archival interpretation of a single colonial document, the *North Saanich Treaty* of 1852. First, the traditional European archival method of diplomatics will be used to examine the elements of the document’s form and gain insights into its creation;¹⁹ second, a “provenance refreshed” approach is employed to highlight the symbolic context of the actors committed to making the document.²⁰ Both interpretations have demonstrable limits. The diplomatic approach, in focusing on the document’s elements and their relationship to juridical accountability, will reveal inconsistencies and point to paths of further investigation. In the juridical plurality of the colonial frontier, however, the Aboriginal voice is lost in a separate, unaccounted worldview. In contrast, the contextual emphasis of the provenance refreshed approach drifts through potential references without the interpretive focus of the record’s documentary composition. Nevertheless, these archival interpretations demonstrate that the archival record of the colonial experience is a relativized truth, and only an Aboriginal interpretation of

16 Ibid., p. 51.

17 McRanor, “Maintaining the Reliability of Aboriginal Oral Records and Their Material Manifestations,” p. 66.

18 Several Supreme Court decisions acknowledge the *sui generis* quality of “Aboriginal evidence.” See for example, *Guerin v. R.*, [1984] 2 S.C.R.; *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. 14 (S.C.C.); *R. v. Van der Peet*, [1996] 2 S.C.R.; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

19 For a general overview of diplomatics see Luciana Duranti, “Diplomatics: New Uses for an Old Science,” Parts I–VI, *Archivaria* 28–33 (Summer 1989 – Winter 1991–92).

20 Terry Cook, “What Is Past is Prologue: A History of Archival Ideas Since 1898, and the Future Paradigm Shift,” *Archivaria* 43 (Spring 1997), p. 35.

the document can address this cultural relativism.

Between 1850 and 1852 Sir James Douglas arranged eleven Aboriginal treaties on southern Vancouver Island. In total he concluded fourteen agreements on the west coast, representing the only treaties he wrote before British Columbia entered Confederation. The *North Saanich Treaty* has been chosen for what can be learned from its hybrid, discrepant qualities. In the unusual process of its making, the unclear conceptual representation of land title, and the discordant elements of its form, the treaty is an “interesting and significant exception in the colonial period.”²¹ This treaty was also chosen for analysis because, as Bernard Barbiche has remarked, archivists have not applied diplomatics to records from the early modern era (from the seventeenth to the nineteenth centuries) in part because an explosion of records creation makes it impossible to give close consideration to individual documents.²² Further, it is appropriate to use diplomatics, a method built to analyze the authenticity of fraudulent medieval land titles, to study the creation of a dubious land conveyance document on mid-nineteenth-century Vancouver Island. Also, the treaty has been well studied from a historical and judicial perspective, but has never been closely examined from an archival view.²³ And finally, although no minutes were taken during the negotiation of the treaty, there are important WSÁNEĆ (Saanich) oral histories of the encounter. These facts taken together make an archival examination of the *North Saanich Treaty* a rewarding example in the consideration of conventional archival paradigms. This paper will conclude that western archival praxis will reveal not only the treaty’s discrepancies, but also the limits of current archival method. There is a need to insinuate a sovereign native role into our archival appraisal, description, and arrangement of records of the native colonial experience.

- 21 Hamar Foster, “The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title,” *UBC Law Review*, vol. 23, no. 3 (1988–89), p. 632.
- 22 Bernard Barbiche, “Diplomatics of Modern Official Documents (16th–18th Century): Evaluation and Perspectives,” *American Archivist* 59 (Fall 1996), p. 423.
- 23 James E. Hendrickson, “The Aboriginal Land Policy of Governor James Douglas, 1849–1864” (paper delivered to the 5th BC Studies Conference, November 1988); Foster, pp. 629–50; Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver, 2002); Denis F.K. Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa, 1981); Duff, pp. 3–57; Janet Poth, ed., *Salt Water People, as told by Dave Elliot, Sr.* (Saanich, 1983); *Saanichton Marina Ltd. v. Claxton*, [1988] 1 W.W.R. 540 (B.C.S.C.); affirmed 36 B.C.L.R. (2d) 79 (C.A.); *R. v. Bartleman*, [1984], 55 BCLR, 78 at 90; Richard S. Mackie, “The Colonization of Vancouver Island, 1849–1858,” *BC Studies* 96 (1992–93), pp. 3–40; Robert Morales, “James Douglas Meet Delgamuukw: The Implications of the Delgamuukw Decision on the Douglas Treaties,” prepared for the Delgamuukw/Gisday’wa National Process of the Assembly of First Nations (Vancouver, 2000).

The Archival Context of Colonial Records

Like all colonial documents, two thematic threads dominate the archival interpretation of the *North Saanich Treaty*: the implications of imperial sovereignty and the centrality of the textual paradigm in European historical understanding. An all-encompassing and undivided European concept of sovereignty enfolded Native peoples on Vancouver Island in the mid-nineteenth century. It was premised on the coalescence of authority developed in Enlightenment European jurisprudence.²⁴ By the time colonial expansion reached Canada's west coast, a hothouse effect had developed the European sovereignty of statist monarchies into a plurality of legal principles. "[I]nternal and external sovereignty, ordinary and absolute prerogatives, and common and Roman law," – England's composite empire incorporated various sources, including Aboriginal legal ideals, to improvise a hybrid legal framework suitable to support taking possession of New World lands in a manner justified both to English subjects and to the European community of sovereign states.²⁵ As one legal commentator observed, "constitutional ideas and imperial expansion developed simultaneously and reciprocally."²⁶

Although imperial sovereignty employed a plurality of legal principles on Vancouver Island, it was no less encompassing and homogenizing under the ultimate authority of the British Crown. As settler states coalesced in the nineteenth century, they demanded clear colonial jurisdictions and related rights. The positivization of common law was influential in this coalescence of state authority. Legal positivism highlighted precisely documented instruments such as statutes, charters, and land surveys – modernist devices designed to detail in precise legal terms the nature of colonial sovereignty. Local custom and tradition, when acknowledged, became strictly codified and legislated within the parameters of "bounded, internally uniform" nation states.²⁷ As a consequence the distributed communal rights of Aboriginal societies gained inaccurate colonial legal recognition as organized, uniform social jurisdictions in state-purposed treaties.

European notions of assimilating, single-state sovereignty translated unevenly to the colonial context. Likewise, principles for examining the reliability of documentary evidence and the criticism of historical method were impracti-

24 Jean Bodin, *On Sovereignty: Four Chapters from Six Books on the Commonwealth*, ed. and trans. by Julian H. Franklin (Cambridge, 1992), p. xiii. See also Daniel Engster, *Divine Sovereignty: The Origins of Modern State Power* (DeKalb, 2001), chapter 2.

25 MacMillan, p. 18.

26 Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review*, vol. 21, no. 3, p. 3 (Fall 2003), <http://www.historycooperative.org> (accessed on 17 May 2010).

27 Tully, *Strange Multiplicity*, pp. 9–10. See also, McHugh, pp. 108–11.

cal for capturing the experience of colonial encounters.²⁸ For two hundred years – from Jean Bodin to Leopold von Ranke – European historiography evolved, invariably anchored to the textual paradigm and the inflexible provenance of original sources. French jurist Jean Bodin, expressed the seed of this approach: “such is the multiplicity and disorder of human activities, such the abundant supply of histories, that unless the actions and affairs of men are confined to certain definite types, historical works obviously cannot be understood.”²⁹ During the course of Canadian Aboriginal/European encounter, the dominant paradigm of historical narrative was textual documentation: orderly provenance, a prescribed relationship to source material, linear narrative, and textual materiality. In response to colonialism’s limiting textual by-products, their relativity and materiality, contemporary historians have noted colonial historiography has become “a struggle against the perspective imposed by the sources.”³⁰

With a common genealogy, archival and legal disciplines have embraced both the modernist paradigms of textuality and assimilating sovereignty. In their encounters with Aboriginal cultures, the result has been an under-privileging of the collective, non-textual models of native remembrance. Aboriginal oral testimonies are offered in a communal performance in which an audience receives and, in an archival sense, gives authenticity to the evidence; the historical sources often have a detached (i.e., non-textual), changing form; and they have a non-linear, heterogeneous provenance.³¹ Contemporary Supreme Court of Canada decisions concerning the non-admissibility and unreliability of Aboriginal evidence continue to focus on traditional, western models of source criticism emphasizing custody, juridical authority, linear provenance, and other textual and juridical criteria of authenticity. In short, the Supreme Court continues to rely on a *bodiniste*, interpretive evidentiary framework to critique the weight and admissibility of Aboriginal oral testimonies of knowledge and heritage.³² In considering the archival appraisal of Aboriginal evidence, no other genre of archival record is so deeply affected by the legacy of imperialism’s innovations on sovereignty and evidentiary reliability.³³

28 Heather MacNeil, *Trusting Records: Legal, Historical, and Diplomatic Perspectives*, (Dordrecht, 2000), pp. 14–17; Julian Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (New York, 1963), pp. 138–52. For the relativity of the documented first contact experience on Vancouver Island see Clayton.

29 Jean Bodin, *Method for the Easy Comprehension of History*, trans. Beatrice Reynolds (New York, 1966), p. 28. See also chapters 3–5.

30 Jacques Le Goff, *History and Memory* (New York, 1992), p. 182.

31 Luciana Duranti, “Archiving Modernism,” Conference address, Department of English and Film Studies, University of Alberta, 24 July 2003. See also McRanor, “Maintaining the Reliability of Aboriginal Oral Records,” and Pylypchuk, “The Value of Aboriginal Records as Legal Evidence in Canada.”

32 The best example of this is Justice MacEachran’s observations in *Delgamuukw v. British Columbia*, [1991], 79 D.L.R. (4th) 185 (C.B.C.S.C.).

33 The term “Aboriginal evidence” describes the symbolic items, oral testimony, and documen-

To address the admissibility of Aboriginal evidence, recent Supreme Court decisions concerning Aboriginal rights and titles recognize non-textual Aboriginal evidence as *sui generis*, suggesting that new legal paradigms flowing from “the unique historical presence of Aboriginal peoples in North America” are required to admit this testimony under common law rules of evidence.³⁴ But whereas Canadian jurisprudence acknowledges the probative challenges of the materiality of testimony and the distributive sovereignty of Aboriginal communities, contemporary archival practice has been slower to respond to this interpretive challenge. Like Canadian jurisprudence, archival practice must consider innovating traditional concepts of evidential reliability and authenticity to accommodate the *sui generis* character of non-textual, colonial Aboriginal evidence. Aboriginal participation in the appraisal of Aboriginal records is vital. The positivist underpinnings of authenticity can be reinterpreted and attenuated to involve Aboriginal roles in the performance and reception of oral histories and other mnemonic methods.³⁵

The North Saanich Treaty: Human and Physical Geography

By the late eighteenth century, a repertoire of Enlightenment technological advancements transformed the Pacific Northwest into colonial spaces where capital and empire competed. Vancouver Island formally entered the European field of imperial rivalry during the Nootka Sound Crisis of 1789–1794. The

tary evidence collected for the site- and fact-specific purposes of a discrete, Aboriginal legal claim. Michael Jackson, a lawyer for the plaintiffs, coined the term “Indian Evidence” in his opening statement during the *Delgamuukw v. B.C.* land-claims trial.

- 34 *Guerin v. R.*, p. 382. See also *R. v. Van der Peet*, 507 at para. 68; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 93. *Black’s Law Dictionary* defines *sui generis*, as “of its own kind or class.” *Black’s Law Dictionary*, 6th ed. (St. Paul, 1990), p. 1434.
- 35 Battiste and Henderson argue that Canadian law’s reliance on western concepts of evidence to admit with weight non-textual Aboriginal transmission of knowledge and heritage lead to charges of “cognitive imperialism.” Marie Battiste and James (Sa’ke’j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon, 2000), p. 13. For Canadian courts wrestling with the admissibility of Aboriginal traditional evidence, see for example *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, at para. 31 and 34; *R. v. Jacobs*, [1999] 3 C.N.L.R. 239 (B.C.S.C.) at paras. 57–59; and *Wasauksing First Nation v. Wasausink Lands Inc.*, [2002] 3 C.N.L.R. 287 (Ont. Sup. Ct.) at paras. 133–65. In traditional archival practice, a reliable record is true to the facts it attests to. This value is encapsulated in its form and procedures of creation: “A record is regarded as reliable when its form is complete, that is, when it possesses all the elements that are required by the socio-judicial system in which the record is created for it to be able to generate consequences recognized by the system itself. A record is authentic when it is the document that it claims to be.” Luciana Duranti, “Reliability and Authenticity: The Concepts and Their Implications,” *Archivaria* 39 (Spring 1995), pp. 6–7. For the idea that the archival quality of authenticity is a social construction thereby opening the possibility to attenuate its traditional interpretive archival model, see Chris Duncan, “Authenticity or Bust,” *Archivaria* 68 (Fall 2009), pp. 97–118.

Nootka Sound Crisis represented a transition in the European competition for imperial possession on the northwest coast of North America.³⁶ In the Spanish abduction of British vessels and the murder of local Nuu-chah-nulth leader Callicum, the crisis highlighted two colonization variables that found expression in the *North Saanich Treaty*: the meaning and expression of sovereign authority on the colonial margins, and the rapidly changing native trade economies. Without a clear resolution, the crisis limited Spanish imperial ambitions on the northwest coast of North America.³⁷ It highlighted colonial settlement over itinerant trading as the new model of Aboriginal trade economy. It therefore marked the encroaching “sequestration of Native land and life.”³⁸ The United States inherited Spanish regional claims in 1819 with the *Adams-Onís Treaty*. Subsequently, the 1846 *Oregon Treaty* resolved British and American jurisdictions in the Pacific Northwest, and outlined the regional framework of a colonial “sovereignty and government.”³⁹ At the end of this period of international negotiation, future Governor of Vancouver Island James Douglas, then a Hudson’s Bay Company (HBC) official in the Columbia Department, ironically foreshadowed his difficulties with the Vancouver Island treaties when he despaired that the *Oregon Treaty* annulled legitimate, English land claims through a legal manoeuvre.⁴⁰

In 1849, with imperial rivalries accounted for, if not resolved, the British government delegated exclusive competencies by charter to the HBC to develop and settle Vancouver Island as an English Crown colony. With an exclusive right to trade with the Aboriginal peoples, the renewable grant offered one of the first official colonial declarations of concern over “the protection and welfare of the native Indians” of Vancouver Island.⁴¹ Acting on the Charter’s responsibilities, in the spring of 1850, Douglas made nine treaties accounting

36 For summaries of the international events see J.M. Norris, “The Policy of the British Cabinet in the Nootka Crisis,” *English Historical Review* 70 (October 1955), pp. 562–80, and Frederick Merk, *The Oregon Question: Essays in Anglo-American Diplomacy and Politics* (Cambridge, MA, 1967). For the British process of colonizing Vancouver Island see Clayton, pp. 168–89; Mackie; Paul Knaplund, “James Stephen on Granting Vancouver Island to the H.B.C., 1846–1848,” *British Columbia Historical Quarterly*, vol. IX, no. 4 (October 1945), pp. 259–71; Jeremy Mouat, “Situating Vancouver Island in the British World, 1846–49,” *BC Studies* 145 (Spring 2005), pp. 5–31.

37 For the Spanish imperial perspective see Patricia Seed, “Taking Possession and Reading Texts: Establishing the Authority of Overseas Empire,” *William and Mary Quarterly*, vol. 49, no. 2, 3rd series (1992), pp. 183–209.

38 Clayton, p. 189.

39 The *Delgamuukw* Supreme Court decision has concluded this sovereignty was expressed in the *Oregon Treaty*. See *Delgamuukw v. British Columbia*, [1998].

40 Hudson’s Bay Company Archives [hereinafter HBCA], Hudson’s Bay Company, Columbia District Fonds, vol. A.11/70, files 262–262d, Douglas to Barclay, 29 April 1847.

41 *Charter of Grant of Vancouver’s Island to the H.B.C.*, 13 January 1849, in O.S. Scholfield and F.W. Howay, *British Columbia from the Earliest Times to the Present Day*, Vol. 2 (Vancouver, 1914), pp. 678–79.

for the area of Victoria, Mentchosin, and Sooke; in 1851, he made two at Fort Rupert; in February 1852, he made two for the Saanich Peninsula; and in 1854 he made one at Nanaimo.

For the purpose of examining the *North Saanich Treaty*, important cultural, linguistic, and geographic features of the southern Vancouver Island Native peoples should be noted. The WSÁNEĆ (Saanich) people of southern Vancouver Island form part of a larger cultural group often referred to as Coast Salish. The WSÁNEĆ Nation consists today of five first nations: Tsawout, Tsartlip, Pauquachin, Malahat, and Tseycum.⁴² Members of these groups are the descendants of the “Saanich Tribe” Douglas listed as signatories in the *North Saanich Treaty*. Each First Nation has a unique word for their common language based on their spoken dialect: SENĆOFEN, Malchosen, Lekwungen, Semiahmoo, and T’Sou-ke. The SENĆOFEN (pronounced Sun-cho-thun) dialect has the largest number of current speakers. Like all societies, the WSÁNEĆ organize themselves according to a social complex of laws, customs, and values – a worldview or *Čeláŋen*. In SENĆOFEN, the social community or society that flows from their *Čeláŋen*, is known as the *Texta’n*.⁴³

Earliest western records locate the WSÁNEĆ on the east and west coasts of Saanich Arm on southern Vancouver Island and in the multitude of islands off the southeast coast in the Georgia Strait. At the time of Douglas’s *North Saanich Treaty*, the WSÁNEĆ lived in three main wintering villages: Brentwood Bay, Union Bay (Patricia Bay), and Saanichton Bay.⁴⁴ They also maintained a series of surrounding temporary sites for harvesting resources and practising trade. Population estimates for the WSÁNEĆ in the treaty period are at best vague. British Navy Lieutenants Warre and Vavasour described their impressions of the HBC lands on the northwest coast of the Oregon Territory in a report dated 1845, estimating the population of “Sanetch Indians” to be 194 men, 152 women, 99 children under 12, and no slaves.⁴⁵ James Douglas supplied another population estimate in his notebook dated c.1853. In this assembled census titled “Original Indian Population, Vancouver Island,” he es-

42 See <http://www.tsawout.com/> (accessed on 18 May 2010).

43 *Handbook of North American Indians*, Vol. 7, “Northwest” (Smithsonian Institution: Washington, DC, 1998). See also, Wayne Suttles, *Coast Salish Essays* (Vancouver, 1987); Nicholas Claxton, “The Douglas Treaty and WSÁNEĆ Traditional Fisheries: A Model for Saanich Peoples Governance” (Master’s thesis, University of Victoria, 2003); Janice Knighton, “The Oral History of the 1852 Saanich Douglas Treaty: a Treaty for Peace” (Master’s thesis, University of Victoria, 2004).

44 *Tsawout Indian Band v. Saanichton Marina Ltd.* (B.C.C.A.), [1989] B.C.J. No. 563, pp. 3–4. Duff observed that Douglas loosely organized the list of signatories on the *North Saanich Treaty* by these three village sites. Duff, p. 22.

45 Extract of a Report by Lieutenants Warre and Vavasour, 1 November 1845, addressed to the Secretary of State for the Colonies, relating to Soil, Climate, Minerals and Harbours in *Copies and Extracts of Despatches and other Papers Relating to Vancouver Island*, Ordered by the House of Commons, 1 March 1849 (London, 1849), p. 103.

timated the “Sanich” of the “Sanitch Arm” at 118 men, 130 women, 210 boys, and 225 girls.⁴⁶ The same number of men is cited in the treaty. John Elliot, an elder of the Tsartlip (WJOŁEŁP) First Nation estimated “Salish” numbers at the time of the treaty were around 7,000.⁴⁷ None of the contemporary HBC estimates accounts for the 1782 smallpox and subsequent epidemics that depopulated Northwest Coast Native peoples. Beyond the difficulty of conceptualizing a “permanent village site” in SENĆOFEN, at the time of the treaty the WSÁNEĆ would still be recovering from diseases that fragmented their communities’ locations and reduced their numbers by an estimated 45 to 95 percent only a generation before.⁴⁸

Reading the text of the *North Saanich Treaty*, one would assume the treated region was not surveyed. In fact, all fourteen Douglas treaties contain the phrase: “. . . the land shall be properly surveyed hereafter. . .”⁴⁹ Archibald Barclay, London Secretary of the HBC, despaired that the delay in undertaking the surveys was a fundamental mistake in asserting sovereignty on Vancouver Island.⁵⁰ Douglas had tried in vain to retain a permanent surveyor in the employ of the HBC in the period when he created his series of treaties.⁵¹ But the comment in the treaty regarding the survey is not accurate. By the time the *North Saanich Treaty* was prepared, surveyor J.D. Pemberton, under Douglas’s direction, had already surveyed a portion of the area identified in the treaty. Douglas wrote to Barclay on 2 November 1851: “Mr. Pemberton is still busily engaged with the survey being now employed on the Coast of the Canal de Arro, North of Mt. Douglas, and as the weather is fine he expects to get a good deal of work before the winter sets in.”⁵² Douglas also mentioned that this area was planned for a sawmill in which he had invested. The mention of the mill and the description of Pemberton’s survey approximates the *North Saanich Treaty* region. One year later, Douglas explained the *North Saanich Treaty* in a letter

46 Duff, pp. 22–23.

47 Knighton, p. 18.

48 Cole Harris, “Voices of Smallpox Around the Strait of Georgia,” in *The Resettlement of British Columbia: Essay on Colonialism and Geographical Change* (Vancouver, 1997), pp. 3–30. A recent estimate combines the Songhees and Saanich peoples, and places them at a pre-epidemic number of 1,050 in 1770 and 486 in post-epidemic 1840. Robert T. Boyd, “Demographic History, 1884–1874,” in *The Handbook of North American Indians*, ed. Wayne Suttles, Vol. 7, “Northwest Coast” (Washington, DC, 1990), pp. 145–46.

49 “*North Saanich Treaty*,” *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875), p. 10. For the original letterbook version, see BC Archives, MS-0772, “Fort Victoria documents; Saanich Tribe; North Saanich, 11 February 1852.”

50 Margaret Ormsby, *Fort Victoria Letters: 1846–1851*, “Introduction” (Winnipeg, 1979), pp. xciv–xcvi.

51 Library and Archives Canada [hereinafter LAC], Sir James Douglas Fonds, MG24–A35, Letterbooks, vol. III, May 1850–November 1855, Douglas to Achibald Barclay, 16 May 1950.

52 *Ibid.*, Douglas to Achibald Barclay, 2 November 1851, received in Colonial Office, March 12, On Affairs of Vancouver Island, 9 December 1851.

to Barclay. He commented on a subsequent Pemberton survey near Esquimalt, west of the *North Saanich Treaty* area, and noted “[h]e will then commence on the Sanitch District including the land lately purchased from the Natives of that Tribe, a part of which has already been surveyed.”⁵³ The Aboriginal representatives listed on the *North Saanich Treaty* discussed with Douglas the treaty’s location when they visited Fort Victoria on 11 February 1852 to enact the transfer of land rights.⁵⁴ The negotiations of the geographic details of the treaty were the result of an undocumented discussion at Fort Victoria. If Douglas mentioned the ongoing survey of the *North Saanich Treaty* region, it was not captured in the oral history. If he wrote the treaty with reference to the survey, it is difficult to understand the treaty’s vague geographic description.

While these ethnographic boundaries of language and cartography hold immense value, they do not entirely capture the WSÁNEĆ identity. As Brian Thom has observed,

delineating territories based strictly on land use and occupancy is inadequate to take into account broader relationships between people and place. Property, language, residence and identity are categories ... appropriate to Coast Salish understandings of territorial boundaries ... [but] ideas and practices of kin, travel, descent and sharing make boundaries permeable ... Indigenous leaders are faced with an ontological challenge in expressing their property and territorial claims to the state, while rooting these claims in the varied expressions and experiences of place ...⁵⁵

The remuneration promised in the treaty is also unclear. The original treaty is incomplete, ending in the words, “We have received in payment...” The 1875 published edition of the *North Saanich Treaty* added the phrase “amount not stated” in square brackets. Some of the Douglas treaties identify leaders, “chiefs,” (e.g., the Klallam and Sooke) who represented their peoples and distributed the treaty payment, but this was not possible in the two Saanich treaties. Payment for the land was difficult to quantify. Whereas Douglas presumably paid chiefs or representatives for the *South Saanich Treaty*, he paid each individual man (payment was only made, according to Douglas’s 1853 census, to “men with beards,” or adult males) rather than group representatives, for the *North Saanich Treaty*.⁵⁶ He originally intended to purchase the entire Saanich Peninsula from local representatives, his method in the other Vancouver Island treaties, but he could not reach a conclusion on representation and land use. He compromised. He treated with ten men for the *South Saanich Treaty* on 7

53 Ibid., Douglas to Achibald Barclay, 18 March 1852.

54 See appendix for copy of original treaty. For published version, see “*North Saanich Treaty*,” p. 10.

55 Brian Thom, “The Paradox of Boundaries in Coast Salish Territories,” *Cultural Geographies* 16 (2009), p. 179.

56 “*North Saanich Treaty*,” p. 10.

February. On 11 February he initiated “a general convention of the tribe,” and paid 118 men for the remainder of the Saanich Peninsula. Duff observed there was some confusion on payment for the area: “[t]he ten South Saanich men ... seem to have received more than their share, about £4..3..0”; the North Saanich tribe, on the other hand, was paid the same amount as the Songhees (averaged £2.10.0).⁵⁷ However, Douglas wrote to Archibald Barclay in March 1852 that he paid the *North Saanich Treaty* recipients the overall sum of £109.7.6 “in woolen goods which they preferred to money.”⁵⁸ This amount conflicts with the Aboriginal oral history, which put the amount at “about 200 pounds,” an average of about £1.7 sterling per person.⁵⁹ Adding to the confusion, if we cross-index the Fort Victoria expense ledger with the prices of the blankets, it appears that Douglas did not honour the amount promised in the treaty, even after accounting for the 300 percent mark-up the HBC placed on the goods traded with the Natives.⁶⁰

The *North Saanich Treaty*: A Diplomatic Look at a Colonial Document

The formative context of the treaty has been well studied. The contribution of diplomatics is to reverse the viewpoint and dissect the document’s form to understand its creative context. To shift the focus onto the record, we can posit the discrepant relationship, the interplay of legal-administrative rules and the relevant society, which results in mediated documentation.⁶¹ This paper is therefore concerned with the study of a single document’s elements of form and content, and how they relate to the formative, social-administrative matrix: “the political, legal, administrative, and economic structures, culture, habits, myths, ... [that] constitute an integral part of the written document.”⁶² As this exercise will show, a diplomatic study reveals important details about the creation of this unusual document, but it is silent on the native role in the making of the record. This is not to suggest that the study is a failure; rather, such an examination suggests, but cannot address, avenues for pursuing the native worldview as a contributing factor in the item’s creation. Such is the limit of this particular

57 Ibid., p. 25.

58 BC Archives, Fort Victoria – Correspondence outward to H.B.C. on the Affairs of the Vancouver Island Colony, Douglas to Barclay, 18 March 1852, AC v.12, cited in Duff, p. 8.

59 Poth, *Salt Water People*, pp. 69–71.

60 Conversation with Richard Mackie, April 1999. The 300 percent mark-up was intended not only for Aboriginal peoples. Although it did not apply to goods sold to HBC employees, Governor Blanshard complained of having to also pay this mark-up. *Report from the Select Committee on the H.B.C.*, [London: HMSO, 1858], original issued in series [Parliamentary Papers/Great Britain Parliament (1857–1859), House of Commons], p. 288.

61 Duranti, “Diplomatics” pt. IV, *Archivaria* 31 (Winter 1990–91), p. 23.

62 Duranti, “Diplomatics” pt. I, p. 15.

archival convention for the study of colonial era documents.⁶³

The *North Saanich Treaty* is a dispositive document in diplomatic terms; that is, a document that embodies an act. The main elements of diplomatic analysis break down the treaty as follows:⁶⁴

Table 1: Diplomatic Analysis of the *North Saanich Treaty*

<i>Extrinsic Elements:</i>	Annotation of Registration: “11”
<i>Intrinsic Elements:</i>	
<i>Protocol:</i> ⁶⁵	Title: “ <i>North Saanich</i> ”
<i>Text:</i>	Entire text: “ <i>Know ...formerly.</i> ”
	Notification: “ <i>Know all men ...</i> ”
	Exposition: “... <i>that we ...fifty-two,...</i> ”
	Disposition: “... <i>consent to surrender ...boundaries.</i> ”
<i>Eschatocol:</i> ⁶⁶	Entire Eschatocol: “ <i>We ... clerk.</i> ”
	Clause of obligation: “ <i>The Condition ...formerly.</i> ”

63 Strictly speaking, such a study of a single document is known as “special diplomatics.” “General diplomatics” is a body of concepts and principles and “the application of them to infinite individual cases constitutes the function of diplomatic criticism, that is, of special diplomatics.... The latter, analyzing specific situations, uses the former; the former guides and controls and is nourished by the latter.” Duranti, “Diplomatics,” pt. I, p. 9. Another, larger study is the examination of how this particular treaty relates to other Aboriginal treaties, particularly those in more expansive contexts.

64 The five elements of diplomatic analysis include the juridical system, persons, an act, the procedures, and the documentary form. See Duranti, “Diplomatics,” pt. IV, p. 10. The subsequent analysis is based on the method outlined in all six of Luciana Duranti’s articles concerning diplomatics.

65 The protocol “contains the administrative context of the action (i.e., indication of the person involved, time and place, and subject) and initial formulae.” See Duranti, “Diplomatics,” pt. V, p. 11.

66 The eschatocol “contains the documentation context of the action (i.e., enunciation of the means of validation, indication of the responsibilities for documentation of the act) and the final formulae.” See Duranti, “Diplomatics,” pt. V, p. 11.

Clause of Corroboration:
"We have received as payment ..."

Attestation:
Hotuistun ... [117 marks and phonetic renderings of members of the WSÁNEĆ].

Persons: Qualification of Signatures:
*"... McKay ... R. Golledge ..." ... Clerk, H.B.Co's service."; "... Clerk."*⁶⁷

Author of the act:
British Crown;

Author of the document:
British Crown;

Addressee of the act:
James Douglas in his capacity as "agent of the H.B.C.";

Addressee of the document:
"... all men ..."

Writer:
James Douglas

Witness(es):
Joseph MacKay and Richd. Golledge

Type of act: *Compound act on procedure.*

Name of act: *"Sale" of land title.*

Relationship between document and procedure: *Treaty concluding the execution phase of a compound act on procedure.*

Type of document: *Land Rights conveyance, Public, Dispositive, copy.*

Diplomatic description: 11 February 1852. The Southern Vancouver Island Aboriginal group contemporaneously identified as the "North Saanich" convey land title rights to the HBC representing the British Crown.

67 For information on the career of Richard Golledge, see Lorne F. Hammond, "Historians, Archival Technologies, and Business Ledgers," *Archivaria* 28 (Summer 1989), pp. 122–23.

Looking at the persons involved in making the treaty, it is important to examine is who is the addressee of the act and who is the addressee of the document. The addressee of a document is the person(s) to whom the document is directed. All the Douglas treaties begin with a common notification, a diplomatic element used to identify the document's addressees and declare their interest in the act embodied in the text: "Know all men..." This clause begins the treaty with an assertion of sovereignty directed to both domestic and international audiences. These abstract audiences are meant to bear witness to Crown sovereignty and must therefore acknowledge the European concept of an imperial legal forum. Used to enter this forum, and incorporate the native signatories, "Know all men ...," is an invocation of natural law.⁶⁸ In this sense, the phrase derives from the work of one of the earliest influential thinkers on international law, Francesco Vitoria, who argued that by virtue of the principle of natural law, Aboriginal peoples held, as Thomas Aquinas claimed, *dominium*, which attached to all rational beings. Moreover, Vitoria noted, since Aboriginal peoples had "the *accoutrements* of natural law" – communities, families, hierarchical government, legal institutions, and a religion (albeit infidel) – they had rights under natural law.⁶⁹ "All men" in Vitoria's sense, brings Aboriginal peoples into the jurisdiction of international law where unique cultural orders become susceptible to common rules of land title and governance.⁷⁰ But incorporating Aboriginal peoples into the legal domain of international law is not the same as recognizing their rights. Within the interpretive framework of English common law, land title possession demanded evidence of settlement and improvement. By this standard, the Colonial Office, without making a definitive statement, recognized that the Aboriginal peoples of Vancouver Island held a limited, inchoate form of "qualified *Dominium*."⁷¹ The notification is a clear declaration of Crown sovereignty without direct reference to the original possessors of the land. The notification at once declares the document's ad-

68 Natural law is "A philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action ..." *Black's Law Dictionary*, 8th ed. (St. Paul, 2004), p. 1055.

69 Peter Fitzpatrick, "Terminal Legality: Imperialism and the (de)composition of Law," in *Law, History, Colonialism: The Reach of Empire*, eds. Diane Kirkby and Catharine Coleborne (Manchester, 2001), pp. 9–11. This implication of natural law also accords with John Locke's rationalization of the individualization of the commons. See James Tully, *A Discourse on Property: Locke and His Adversaries* (Cambridge/New York, 1980), p. 3.

70 Anthony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law," in *Laws of the Postcolonial (Law, Meaning and Violence)*, eds. Eve Darian-Smith and Peter Fitzpatrick (Michigan, 1999), pp. 89–104; see also Richard Waswo, "The Formation of Natural Law to Justify Colonialism, 1539–1689," *New Literary History*, vol. 27, no. 4 (1996), p. 743.

71 Great Britain, Parliamentary paper 1836, no. 538, *Report from the Select Committee on Aborigines (British Settlements), with the Minutes of Evidence, Appendix and Index*, Great Britain, Parliamentary paper 1837, no. 425.

dressee and asserts English sovereignty, thereby providing “familiar ground from which to define the Aboriginal.”⁷²

The notification also directs us to another fundamental diplomatic concern: identification of the juridical system, the essential prerequisite to identify a juridical fact. The notification “Know all men . . .,” embodies in three words the doctrine of discovery: the legal convention fashioned over two centuries to legally codify settlement for colonial land acquisition. In the context of imperial English common law, the method of colonial acquisition determined both the law applied at acquisition (English or local, i.e., “municipal”) and the related responsibilities of the British government. The doctrine of discovery recognized that colonial settlement was not a legitimate vehicle for introducing the entire British legal system to colonial lands unless the lands were uninhabited. It instead offered British colonists, to quote a contemporary Australian justice, “the colour of title”⁷³ – a contrived legal palette of common law property tenures and common law rights. But the idea of common law applying to “lands obtained by plantation or settlement” emerged suddenly in English imperial law.⁷⁴ “[S]ettlement was too much of a historical fiction to succeed as a legal fiction. North America did not satisfy the prerequisite for settlement: it was inhabited when ‘discovered’.”⁷⁵ Two decades before Douglas struggled with a colonial charter to codify title on Vancouver Island, American Chief Justice Marshall articulated the doctrine of discovery to accommodate the European judicial interpretation of property and sovereignty with Aboriginal land possession.⁷⁶ The Chief Justice argued for the reality of Aboriginal peoples’ cultural independence, and their ability to hold and convey title. He questioned the notion that settlement produced title and directly confronted Locke’s argument that dispossession is a necessary consequence of “improper” land use.⁷⁷ This

72 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto, 2002), p. 59.

73 Peter Karsten, “‘They seem to argue that Custom has made a Higher Law’: Formal and Informal Law on the Frontier,” in *Land and Freedom: Law, Property Rights, and the British Diaspora*, eds. A.R. Buck, John McLaren, and Nancy E. Wright (Ashgate, 2001), p. 64.

74 McHugh notes “It was not until *Blankard v. Galdy* [(1693) Holt 431, 90 ER 1089] that the common law recognized settlement as another legal mode of territorial acquisition.” McHugh, p. 69.

75 Hulsebosch, p. 15.

76 Marshall’s *Worcester v. the State of Georgia* decision best summarizes the doctrine of discovery; see p. 31.

77 In a similar fashion, the *Royal Proclamation* acknowledges Aboriginal rights to the lands in their possession and explains that only the Crown can receive these rights. Marshall’s formulation continues today in the *Canadian Charter of Rights and Freedoms*. The *Charter* recognizes the *Royal Proclamation* stating the *Charter* shall not “abrogate” or “derogate” both treaty rights and “any freedoms recognized by the *Royal Proclamation of Oct. 7 1763*.” Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials* (Saskatoon, 2004), p. 14.

confusion over the introduction of legal sovereignty has continued in modern jurisprudence. In his excoriated BC Supreme Court decision, *Delgamuukw v. BC*, Chief Justice Allan McEachern ruled that Aboriginal law and claims to sovereignty simply “gave way” on the assertion of British sovereignty. “After that, Aboriginal customs, to the extent they could be described as laws before the creation of the colony, became customs....”⁷⁸ “Know all men ...” the notification in all fourteen Douglas treaties, is therefore a poetic summary of the doctrine of discovery. It introduces the legal parameters for the colonial juridical system that will reduce the juridical worldview of the WSÁNEĆ people, its Célānen, to a cursory, textual definition of “custom.”

Finally, the notification’s absolutist overtones suggest its feudal origins in letters patent. It reminds us that the origins of such legal instruments are the prerogative writs that English sovereigns issued to declare absolute control over property. For this purpose all letters patent were addressed to a general readership. This is explicit in the word’s Latin root, “*patente*,” meaning open.⁷⁹ However, in a colonial context, it combines this internal purpose of *dominium*, and the external *imperium* of internationally acknowledged sovereignty.⁸⁰ English colonial charters and treaties reproduced the language of the monarchy’s feudal instruments such as writs of possessory assizes. As the English colonial project expanded, the Crown distributed these notifications across the Empire. Queen Elizabeth I had accused the Spanish of merely planting flags to articulate their colonial sovereignty; ironically, by the mid-nineteenth century, English Crown charters and treaties were planted like Spanish colonial flags across West Africa, Australia, New Zealand, and North America to proclaim English colonial sovereignty. The *North Saanich Treaty*’s notification was not only common in most Canadian Aboriginal treaties,⁸¹ it is also found in many nineteenth-century colonial documents such as the “*Agreement with the chief of Battaré, February 18, 1858*,” concerning the West Coast of Africa.⁸² Similarly, the no-

78 *Delgamuukw v. British Columbia*, [1991].

79 MacMillan, pp. 6-16. See also M.T. Clanchy, *From Memory to Written Record: England 1066–1307* (Oxford, 1993), p. 85.

80 MacMillan, p. 80. *Black’s Law Dictionary* defines the idea of *imperium* as “... power or dominion, esp. the legal authority wielded by superior magistrates under the Republic, and later the emperor under the empire” (p. 757). It defines *dominium* as: “Absolute ownership including the right to possess and use. This term gradually came to also mean merely ownership of property, as distinguished from the right to possession or use” (p. 502). *Black’s Law Dictionary*, 8th ed. (St. Paul, 2004).

81 For example, the predominant number of the 202 documents in *Indian Treaties and Surrenders*, shared this notification. *Indian Treaties and Surrenders, From No. 281 to No. 483, Vol. III* (Ottawa, 1912). See also *Canada: Indian Treaties and Surrenders: 1680–1890 in Two Volumes* (Ottawa, 1891).

82 *Hertslet’s Commercial Treaties: A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations at Present Subsisting Between Great Britain and Foreign Powers* [Short title], Vol. XII (London, 1871), p. 71.

tification of the *Charter of Vancouver Island*, “To All to Whom these Presents Shall Come...”⁸³ is also reproduced in such diverse colonial contexts as land title documentation on the West Coast of Africa in the *Convention with Barra, Cession of Territory November 18, 1850*. There are considerable similarities between the colonial land transfer documents of West Africa and the *New Zealand Treaty of Waitangi*, a template for the Douglas Treaties.⁸⁴ The scope of the distribution and the similarity of these charters indicate that they were domestic Crown templates of possession. The indigenous element was filled in for appropriate legal articulation; the mixed endemic/colonial juridical system applying to this heterogeneous legal environment was not immediately clear.

Questions remain concerning the authors of the act documented in the treaty and the act’s addressee. In cases such as patents and licenses, the addressee of the document is whoever is concerned with the fact attested in it, while the addressee of the act is the person whose name appears in the document.⁸⁵ From this we can say that James Douglas, “the agent of the Hudson’s Bay Company,” and by grant of the British Crown, is the addressee of the act. Douglas is identified in the treaty as the person to whom the *WSÁNEĆ* people are “surrendering” their lands. It is at this point that diplomatics reveals one of the great discrepancies in the document. The disposition, understood in diplomatics as the expression of the will or judgement of the author, identifies “the Chiefs and People of the Saanich tribe” as the authors of the act as they “consent to surrender their lands ...”;⁸⁶ in diplomatic terms, however, the author of the act is the juridical person whose “will gave origin to the act.” HBC correspondence with Douglas and Colonial Office records tell us the HBC’s volition, acting on advice of charter, inspired the Treaty’s origin.⁸⁷ One final detail adds to the fictive character of the Treaty’s disposition: some *WSÁNEĆ* spoke Chinook, the local native trading language on the west coast, as did J.W. McKay, HBC secretary to Douglas and signing witness on the document. Douglas also knew some Chinook. However none of the HBC representatives knew *SENĆOTEN*. And Chinook, a jargon developed for itinerant trade, does not possess the vocabulary for land sale.⁸⁸ It may also seem possible to depict the land conveyance as a private land sale:

Sometimes, the person competent to document an act is different from the author of the act itself. This is more common in the sphere of private law, when acts accomplished by

83 *Charter of Grant of Vancouver’s Island to the H.B.C.*, in Scholfield and Howay, p. 676.

84 *Ibid.*, p. 45. See M.P.K. Sorenson, “Treaties in British Colonial Policy: Precedents for Waitangi,” in *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, ed. William Renwick (Wellington, 1991), pp. 17–19.

85 Duranti, “Diplomatics,” pt. III, p. 7.

86 See appendix for copy of treaty.

87 Knaplund, pp. 206–70.

88 Knighton, pp. 26–28. See also Harris, *Making Native Space*, pp. 23–27.

private persons are documented by public officers, lawyers, or notaries. For example, in a contract of sale created by a lawyer, the author of the act is the seller, while the author of the document is the lawyer.⁸⁹

But in the colonial juridical context of Vancouver Island, it is hard to envision a “sphere of private law,” where Native peoples initiated a sale.

It may seem odd that the WSÁNEĆ people are nowhere mentioned with certainty in the diplomatic analysis of participants involved in creation of the document. In 1987, land developers challenged the Native peoples’ ownership of the Saanich Peninsula foreshore on the subject of the treaty’s authorship. The developer’s legal argument claimed the HBC, not the Crown, created the *North Saanich Treaty*.⁹⁰ By tracing the genesis of the document, it is clear this was not the case: the HBC may have been the writer, responsible for the tone and articulation of the document, but both the author and the addressee of the act were the British Crown. Christopher Tomlins summarized the scenario: for colonial settlers, it was in England “that territory was created, contained, and divided, rights recognized, usages planned, and outlined; and disputes settled. Ceremonies of possession in the New World were ceremonies of culmination not initiation.”⁹¹

This interpretation is also borne out in the diplomatic element known as the eschatocol. Two confused diplomatic elements make this the most egregious section of the treaty. First, the names of WSÁNEĆ people “participating” in the act appear on the treaty in the attestation. This is traditionally defined as “... the subscription of those who took part in the issuing of the document (author, writer, countersigner) and of witnesses to the enactment or the subscription...”⁹² Douglas wrote poor phonetic renderings of native names. These were “signed” by the 118 Aboriginal participants with a suspiciously uniform “X”; absent is any form of qualification of signature (unlike the qualifications for the witnessing signatures of Douglas’s clerks). Only the first name of the list is included in the published version.⁹³ This is another reason why it is difficult to identify the Aboriginal signatories as authors or addressees of the document although they are “cited” in the document. We know from Douglas’s correspondence with the HBC that the Douglas agreements created in 1850 were “signed” blank

89 Duranti, “Diplomatics,” pt. II, p. 6.

90 Foster, p. 633.

91 Christopher Tomlins, “The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century,” *Law and Social Inquiry*, vol. 26, no. 2 (2001), p. 33.

92 Duranti, “Diplomatics,” pt. V, pp. 14–15.

93 There were 118 representatives cited in the copy of the treaty published in the 1875 publication. See *North Saanich Treaty*, p. 10. This first published copy of the treaty cites only the number of representatives and not the phonetic renderings of the names of Aboriginal signatories.

pieces of paper to which he later added text.⁹⁴ Douglas likely continued this practice in 1852. In the *North Saanich Treaty*, the uncertain legal status of the Aboriginal participants resulted in the notarial duties supplied by the addressee of the act.⁹⁵ The dubious character of the attestation is ultimately proof that that the *WSÁNEĆ* people played an unclear role in the conveyance of land rights. Moreover, it illustrates that in colonial, English common law, the rights attached to the land were proven through the registered documentation, not physical possession. Finally, the innovation in the attestation is another example of legal and documentary practice borrowed and adopted to a fictive extent to accommodate the local colonial context.

The second discrepant element in the eschatocol adding to the fictive character of the document is the lack of a full clause of corroboration. This clause or formula holds significant value:

... to ensure the execution of the act, to avoid its violation, to guarantee its validity, to preserve the rights of third parties, to attest the execution of the required formalities, and to indicate the means employed to give the document probative value.⁹⁶

In all the other Douglas treaties there is a clause of corroboration intended to validate the document. In the *Sooke Treaty*, for example, the document reads: “We have received as payment forty-eight pounds, six shillings and eight pence; in token whereof we have signed our name and made our marks at Fort Victoria on the first day of May, one thousand eight hundred and fifty.”⁹⁷ The *North Saanich Treaty*, however, fails to employ the corroborating clause, stating only “we have received as payment” and ending abruptly. The *North Saanich Treaty*’s incomplete corroboration is undated and missing the vital final clause. It also seems to be written in a different hand indicating the document was composed at different times. Since this final clause is designed to validate the document, it is reasonable to question the document’s dispositive value. In the court case that most closely examined the *North Saanich Treaty*, the judge questioned the validity of the attestation because of the dubious rendering of Aboriginal names, but failed to mention the missing corroborative clause.⁹⁸

Another interesting question concerns the treaty’s writer. Diplomats describes the writer as “the person responsible for the tenor and articulation of

94 HBCA, A.11/72, Fort Victoria Correspondence, Douglas to Archibald Barclay, 16 May 1850, cited in Ormsby, p. 95.

95 The documentary precedent for illiterate participants in European medieval documents is the “X” conventionally arranged by a notary. Clanchy, pp. 310–15.

96 Duranti, “Diplomatics,” pt. V, p. 14.

97 *British Columbia Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875), p. 9. Douglas gave the treaty the full title “Sooke Tribe–North-West of Sooke Inlet.”

98 *R. v. Bartleman*, 78 at 88.

the writing.⁹⁹ To inform the content, in 1850 HBC Secretary Archibald Barclay sent Douglas a copy of the *Kemp Deed*, a New Zealand Company conveyance document written for transferring land title from New Zealand Maoris. Barclay explained he was sending a “form of conveyance.”¹⁰⁰ Douglas incorporated sections of the agreement into the treaties, thereby deriving content and articulation from a source beyond the immediate context of the act. Barclay had instructed Douglas that the “Aboriginal peoples [of Vancouver Island] had a possessor’s right only to their village sites and cultivations.” This sounds like common tenure, yet Barclay’s advice does not match the wording of the *North Saanich Treaty*: “all the land described ... becomes the entire property of the white people forever.” As legal scholar Hamar Foster notes, “the wording suggests the Indians owned or had a possessor’s right to much more than their villages and gardens and that they were conveying title.”¹⁰¹ Douglas took key phrasing out the New Zealand document and inappropriately incorporated it into his various treaties. Although responsible to the dominant and formative context of colonial authority and capital, Douglas is nevertheless identified in diplomatics as the writer, immediately accountable for the treaties’ inconsistencies.

Although most usefully examined in the original,¹⁰² some notes on the extrinsic elements of the treaty merit mention because they reveal useful details of the documentary process. Annotations are the “extrinsic element, which most clearly reveals the formative process of a document, the way in which it participates in a transaction or procedure and its custodial history.”¹⁰³ There are three diplomatic categories of annotations referent to the phases of documentary procedure: administrative, handling, and management. Each is apparent on the other Douglas treaties but only one is on the *North Saanich Treaty*.¹⁰⁴ At the top left of the *North Saanich Treaty*’s first page is the number “11,” which is probably an annotation of management, citing the act of placing the document in reference to the other treaties in the register for future reference. Other treaties carry sequential numbers in a similar hand. It is part of the complexity of procedure designed to ensure control and thereby reliability of a document. For this purpose there is usually a unique, independent office charged with this function.

Douglas wrote, or directed the writing of, eleven treaties directly into a

99 Duranti, “Diplomatics,” pt. III, p. 7.

100 HBCA, Fort Victoria Correspondence, A.6/28, at folder 161d, Barclay to Douglas, 16 August 1850, cited in Foster, p. 633.

101 Foster, p. 633. I am grateful to Shurli Makmillan for pointing out to me the extent to which Douglas used the Kemp Deed as a template.

102 For an excellent analysis of the extrinsic form of HBC records see Alicia (Ala) Rekrut, “Reconnecting Mind and Matter: Materiality in Archival Theory and Practice” (Master’s thesis, University of Manitoba/University of Winnipeg, 2009).

103 Duranti, “Diplomatics,” pt. V, pp. 9-10.

104 For the three types of annotations, see *ibid.*, p. 9.

bound register titled “Register of Land Purchases from Indians” kept at Fort Victoria. When Richard Blanshard, the first Governor of Vancouver Island, arrived at the fort in 1850 to administer the colony, there was opportunity to establish a registration office. He possessed the legal training Douglas lacked. But the volume of documents created and the on-site control by the HBC, rather than by the Colonial Office, limited the opportunity. Blanshard chafed at the local authority of Douglas; he was unable to set up a colonial assembly with the predominantly HBC-employed settlers, or initiate other legal and administrative activities. Among his many complaints, he reported on Douglas’s inconsistent record-keeping practices. Douglas confessed his inexperience concerning the HBC’s record-keeping instructions for land title records and admitted his inexperience in legal administrative procedure. On Douglas’s request, the HBC sent Richard Golledge, a signatory to the *North Saanich Treaty*, as a clerk to assist in recordkeeping.¹⁰⁵ Douglas made the following observation in a letter dated the same day as his communication reporting his first purchases of land from Aboriginal peoples on Vancouver Island:

I observe the instructions respecting the Registers to be kept here, but confess with regret, that I do not understand them, as I have never seen any Books of the kind except the simple forms of Registering lands used in the Columbia. I have therefore to beg that a pro-forma entry for each of the Books which it is intended to keep say the “Original Sale Book” and “Division Sale Book” may be sent out ... as this will save much future trouble and inconvenience.¹⁰⁶

The letter of 16 May 1850 depicts the hesitant connection between indigenous land dispossession and its legal documentation. A year and a half later, Douglas again expressed his confusion to Barclay over the administration of the law of tenures in attempting to answer questions concerning legal and administrative process for settlers’ titles.

I am not sufficiently acquainted with the Law of Tenures [*sic*] to decide as to the weight of the ... [settlers’] objections and whether this would at all impair or affect the validity of the Titles in question. I would therefore take the liberty of requesting you to furnish me as soon as possible with a legal opinion as to the validity of the Titles ...¹⁰⁷

Douglas made several more inquiries to Barclay during his tenure at Fort Victoria concerning the method to record and process land sales. The insuffi-

105 HBCA, Fort Victoria Correspondence, A.II/72, folders 201–206d, Douglas to Archibald Barclay, 3 April 1850, cited in Deidre Simmons, *Keepers of the Record: The History of the Hudson’s Bay Company Archives* (Montreal & Kingston, 2007), p. 135.

106 Douglas to Archibald Barclay, Fort Victoria, 16 May 1850, cited in Ormsby, p. 94.

107 LAC, Sir James Douglas Fonds, MG 24–A35, Letterbook, vol. 3, May 1850–November 1855, Douglas to Barclay, 2 November 1851.

ciency of a single type of documentary annotation, a simple page number in the register, suggests the limited administrative procedure Douglas used, or was capable of using, when creating the Douglas Treaties.

Continuing with extrinsic elements of form, there are three more interesting features of the document. First, the document is missing a great seal. As a standard practice, the Crown distributed a great seal for creating authentic versions of significant administrative and legal documents in colonial jurisdictions. Richard Blanshard was issued such a seal in June 1850 as the Governor of Vancouver Island.¹⁰⁸ Conrad Swan attributes the design to Benjamin Wyon; it holds a hallmark dated 1849–50.¹⁰⁹ Following Blanshard's departure, Douglas was appointed Governor of Vancouver Island by Colonial Secretary Earl Grey; Grey sent Douglas his commission in May 1851.¹¹⁰ Douglas, therefore, had opportunity to use the great seal on the *North Saanich Treaty*. In fact, the Colonial Office warned him of his profligate use of the seal in documentary transactions.¹¹¹ Douglas wrote to Barclay that he was unclear of his administrative role as Colonial Governor; he did not always distinguish this role from his responsibilities as HBC Chief Factor.

I beg to say that my appointment to the office of Governor of Vancouver's Island, affords me any thing but pleasure. I accept it entirely from a sense of duty to the Company, though I greatly fear that it will be out of my power to discharge the responsible duties of the office, either with satisfaction to myself, or advantage to the Colony.¹¹²

As HBC Chief Factor on Vancouver Island and senior member of the Board of Management of the Columbia Department, Douglas was experienced in developing settlements in HBC outposts. He understood the HBC's practical needs to settle Vancouver Island.¹¹³ However, the nature of the native burden to title on Vancouver Island was poorly understood in both the Colonial Office

108 LAC, Colonial Office Fonds, 1849–1869, C.O. 410, MG 11, Vancouver Island Entry Books, Earl Grey to Governor Richard Blanshard, 29 June 1850. This is the Colonial Office letter announcing the seal's transmission. Blanshard acknowledged receipt in a colonial despatch to Earl Grey, C.O. 305/3, MG 11, Colonial Office Fonds, Vancouver Island Colonial Correspondence, p. 18, Blanshard to Earl Grey, 12 May 1851.

109 Conrad Swan, *Canada: Symbols of Sovereignty* (Toronto, 1977), p. 181. The seal's contemporary home is the British Museum where it was placed by the Lord President of the Council in 1876 after it ceased usefulness, and was returned to England upon the union of British Columbia and Vancouver Island in 1866. I am grateful to the anonymous *Archivaria* reviewer for this citation.

110 LAC, Colonial Office Fonds, 1849–1869, C.O. 410, MG 11, Vancouver Island Entry Books, Earl Grey to James Douglas, 19 May 1851.

111 *Ibid.*, Despatch from London: Labouchere to Douglas, 19 November 1857, p. 115.

112 Douglas to Archibald Barclay, 7 August 1851, cited in Ormsby, pp. 206–207.

113 Hamar Foster and Allan Grove, "'Trespassers on the Soil': United States v. Tom and a New Perspective on the Short History of Treaty Making in Nineteenth-Century British Columbia," *BC Studies* 138/139 (Summer 2003), pp. 51–67.

and the HBC management.¹¹⁴ HBC executive directors understood the *Oregon Treaty* as giving the Crown sovereignty over Vancouver Island.¹¹⁵ Therefore, at least for the ten-year duration of the charter, Douglas acted on the assumption that settlement was the purview of the HBC, and that the colonial great seal was not required to unburden the Native peoples of their land rights.

Another extrinsic detail is the handwriting of the document. Although only two paragraphs, the first is in Douglas's hand and the other appears inexplicably to be in a different hand.¹¹⁶ This pattern occurred in every treaty; Douglas wrote the predominant amount of text, including the crucial disposition and annotations, and an unidentified hand wrote the remaining text.

Finally, like the other treaties, the *North Saanich Treaty* was recorded in a register at Fort Victoria. The eleven treaties made to cover southern Vancouver Island were entered directly into the register. The register has holes where it appears the other Douglas Treaties (two for Fort Rupert and one for Nanaimo) were attached. The BC Archives holds the register with the identifying title "Hudson's Bay Company, Fort Victoria." It was originally described in the "old manuscripts collection" of the BC Archives under the number A01285(6). The material was re-described in the late 1970s by Terry Eastwood and given the identifier MS-0772.¹¹⁷ Included with the register are the Nanaimo and Fort Rupert agreements in loose paper, now unattached and kept in files. There are also agreements made at Barkley Sound in 1859, and Port Alberni in 1860, by Vancouver Island Government Agent William Banfield. These documents also have holes indicating they were possibly attached to the register but are now kept together in a separate file. Adding to the inconsistency, although contemporaneous to the Douglas Treaties, the latter agreements carry wax seals.¹¹⁸

The earliest medieval precedent for Douglas's use of a register is the cartulary, defined by Clanchy as "a collection of title deeds copied into a register for greater security."¹¹⁹ Importantly, Clanchy describes cartularies as edited collections "compiled from primary sources from separate pieces of parchment."¹²⁰ These types of registers were compiled as guides documenting records in the writer's possession; the original documents carried requisite authenticity and

114 LAC, Colonial Office Fonds, Public Offices document CO 305/1, MG 11, British Foreign Office to [None], Foreign Office, March 1849 Confidential Document, p. 635.

115 Knaplund, pp. 206–70.

116 Willard Ireland, former Provincial Archivist of BC, identified Douglas's hand on the treaties.

117 Ann ten Cate of the BC Archives supplied the history of descriptions of registers at the BC Archives.

118 BC Archives, Fort Victoria Correspondence, Hudson's Bay Company, MS-0772, Fort Victoria Originals, 1850–1860, [A01285(6)].

119 Clanchy, pp. 101–103. See also McRanor, "Maintaining the Reliability of Aboriginal Oral Records," p. 70.

120 *Ibid.*, p. 103.

authority. Another contemporaneous form of register was the chancery roll which carried authenticity as a recording of significant outgoing documents. From the latter use evolved the method of employing registers for original title deeds that held the value of authenticity. Clanchy cites the “earl of Chester’s Domesday roll” as the earliest example of this practice.¹²¹ In this sense the Fort Victoria register is Vancouver Island’s Domesday Book; like its prototype, it is an original register of documents recorded to reference and preserve evidence of sovereign rule and colonial control. But while this comparison is compelling, Douglas did not apply the usual colonial Crown symbols of authority on the treaties (e.g., seals, copies for signatories). Douglas most likely created the register for documenting HBC land conveyance. The inconsistent details of extrinsic form indicate that there was a particular uncertainty to the formative process of the document, the type of act documented, and the actors’ role in the documentary procedure.

A final note on annotations: absent from the *North Saanich Treaty* but on several other Douglas treaties is a short paragraph at the top of the documents written in Douglas’s hand. It is an annotation of execution summarizing the location of lands addressed in the treaty. As mentioned above, the Aboriginal groups participating in the Douglas treaties in 1850 “signed” blank pieces of paper by placing an “X.” Douglas later wrote the text and the annotations. It may be that the annotations represent the input of the native representatives and was done in their presence¹²²; more likely, Douglas later wrote the paragraphs as both an *aide mémoire* and a means of clarifying an area he had not entirely surveyed. The descriptions of ceded territory were not written in the presence of the Aboriginal signatories nor mutually understood.¹²³ Moreover, as previously noted, Douglas struggled to identify particular representatives to cite ownership, and resorted to “a general convention of the tribe.” Therefore, the annotations are made “in the course of carrying out the subsequent steps of the transaction in which the document participates.”¹²⁴ That such an annotation is missing from the *North Saanich Treaty* suggests an absence of concern for the Aboriginal interests in the region. It adds to the *North Saanich Treaty*’s significance as the most inconsistent and incomplete of the fourteen treaties.¹²⁵ A piece of jurisprudence supports this diplomatic interpretation. In the 1984 *R. v. Bartleman* case, in reference to the Douglas treaties, Justice Lambert of the

121 Ibid., p. 104.

122 Duff, p. 11.

123 Harris, *Making Native Space*, p. 25.

124 Duranti, “Diplomatics,” pt. V, p. 8.

125 Duff suggests that by 1851 Douglas had decided to no longer wait for a template from London to use for the agreements. He wrote the Fort Rupert treaties in 1851 “in one sitting,” and continued this practice in 1852. But the *Treaty of Waitangi* template was sent in August 1850, predating the Fort Rupert Treaties. There is doubtless more information to explain the missing “prologue” from the *North Saanich Treaty*, but this detail is lost. Duff, p. 21.

BC Court of Appeal wrote:

There are many common law rules about the importance that is to be attached to the text of an agreement that has been reduced to writing. But where the text of the agreement was created by one party long after the agreement was made, and where the text is written in a language that only one party can understand, I do not think that any of those rules relating to textual interpretation can have any application.¹²⁶

Lambert goes on to point out that the signatures of chiefs were “crosses on the document [that] were not put there by the Indians.”¹²⁷ Reflecting on the significance of the annotations, the *Report of the Royal Commission on Aboriginal Peoples*, in reference to *Bartleman*, argued that the Douglas Treaties were, in fact, contracts of adhesion.¹²⁸

The *North Saanich Treaty*'s Formative Procedures: A Diplomatics View

The discrepancies in the *North Saanich Treaty*'s intrinsic and extrinsic form, its confusion over the type of act documented, and the uncertain accountability of the actors participating in the document's formation, lead us to question the process that created the *North Saanich Treaty*. Diplomatics posits that a transaction is a linear set of procedural phases, a conceptual model of consultation and inquiry resulting in documentation. We have established that the document's form reveals its function; similarly, the enabling authority is laid bare in the “provenancial and documentary relationships embodied in organizational structures and bureaucratic procedures.”¹²⁹ As MacNeil explains, “it is only when provenancial relationships have been delineated and elucidated that the documentary forms that embody them can be understood and appraised in a coherent and defensible manner.”¹³⁰ In this way, a closer look at the related chain of developments leading to the creation of the *North Saanich Treaty* highlights the degree of control of the Colonial Office and the HBC Board of Governors over the document's creation. Deconstructing the document's formative procedures underscores the Treaty's inherent improvisation. It is revealed as a legal document designed to establish colonial space for British settlement on an in-

126 *R. v. Bartleman*, 78 at 88.

127 *Ibid.*, at 90.

128 *R.R.C.A.P.*, Vol. 2, p. 30. Such contracts of adhesion are defined as “[s]tandardized contract form offered to consumers of goods and services on essentially ‘take it or leave it’ basis without affording consumer realistic opportunity to bargain and under such conditions that the consumer cannot obtain desired product or services except by acquiescing in contract.” *Black's Law Dictionary*, 6th ed. (St. Paul, 1990), p. 40.

129 Heather MacNeil, “Weaving Provenancial and Documentary Relations,” *Archivaria* 34 (Summer 1992), p. 197.

130 *Ibid.*, p. 192.

habited, foreign island known only through incomplete and misrepresentative documentation.

The Initiative Phase

The document's genesis begins on 3 September 1849, when James Douglas wrote to Barclay expressing the need to purchase Aboriginal lands on Vancouver Island. In diplomatics this is known as the *initiative phase* of the *North Saanich Treaty's* creation, the point when the creative process begins.

Some arrangement should be made as soon as possible with the native tribes for the purchase of their lands and I would recommend payment being made in the shape of an annual allowance instead of the whole sum being given at one time; they will thus derive a permanent benefit from the sale of their lands and the colony will have a degree of security for their future good behaviour. I would also strongly recommend equally as a measure of justice, and from a regard to the future peace of the colony that the Indians fisheries, village sites and fields, should be reserved for their benefit and fully secured to them by law.¹³¹

In this letter, Douglas still referred to "their lands" (i.e., Aboriginal), whereas the 1849 chartered grant for the Island called them "our territories" (i.e., English). He also noted that the treaty would promote justice and peace, not normally a function of a land title "sale."

The Inquiry Phase

From a diplomatics perspective, "every transaction begins with an initiative and manifests itself by means of a deliberation."¹³² The consultation and assessment that followed Douglas's initiative, was in fact unresolved in the subsequent diplomatic *inquiry phase*. This is a period when actors collect relevant data and assess the issue. The 1846 *Oregon Treaty* had already decided the Crown's sovereign authority. When the Colonial Office granted the right to colonize Vancouver Island to the HBC in an 1849 charter, the Crown had completed its assessment, with considerable parliamentary debate and public profile, of how best to establish necessary legal and administrative parameters to initiate British settlement.¹³³ To critics, the HBC Charter represented a return to Elizabethan-style, private Crown patents. But the question of how to administer settlers' titles and the pre-existing rights of native communities would

131 HBCA, Fort Victoria Correspondence, A.11/731849, Douglas to Barclay, 3 September 1849, para. 24.

132 Duranti, "Diplomatics," pt. IV, p. 12.

133 See Mouat.

continue unresolved for years as the newly created colonial space of Vancouver Island encountered the reality of native communities. Of the manifold series of despatches and studies, the *Copies and Extracts of Despatches and other Papers relating to Vancouver's Island* ordered by the House of Commons to inform itself on the state of the new colony is one of the best examples of the Crown and council's attempts to assess the settlement implications of this vaguely understood, inchoate colonial space.¹³⁴ We learn from this period of inquiry that the Crown process for colonial development was a London-based exercise performed through textual abstraction, complicated by distance and cultural relativism.

The Consultative Phase

In the *consultative phase* opinions and advice were compiled to reach informed opinion concerning the documentation. Here, again, the distinction between the act of transferring sovereignty and the act of applying *dominium*, or settlers' rights of tenure, was not clear because the Colonial Office could not make a definitive statement on the legal status of Aboriginal rights on Vancouver Island. Douglas was reluctant to accept responsibility for colonial policy. The "pro-forma" entry he requested in May 1850 to document land transfer was likely the copy of the *Kemp Deed* he received in August that same year. In December 1849, Barclay sent Douglas the general principles he should use to treat with the Native peoples of Vancouver Island:

With respect to the rights of the natives, you will have to confer with the chiefs of the tribes on that subject, and in your negotiations with them you are to consider the natives as the rightful possessors of such lands only as they are occupied by cultivation, or had houses built on when the Island came under the undivided sovereignty of Great Britain in 1846. All other lands is [*sic*] to be regarded as waste, and applicable to the purposes of colonization ... 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 of them to any private person, the right to the entire soil having been granted to the Company by the Crown. The right of fishing and hunting will be continued to them....¹³⁵

This letter represents the central element, along with Douglas's "pro-forma" request, of the *consultative phase*. It is clear from this advisory letter that the

134 "*Copies and Extracts of Despatches and other Papers relating to Vancouver's Island; also, Copies of Charter of Grant of that Island to the Hudson's Bay Company, with Correspondence thereon; and Report of Committee of Privy Council for Trade on the Grant,*" ordered by the House of Commons, to be Printed 7 March 1849; see also *Colonization of Vancouver Island* (London, 1849).

135 Derek Pethick, *James Douglas: Servant of Two Empires* (Vancouver, 1969), pp. 77–78.

Colonial Office had already assumed Crown sovereignty over Vancouver Island through the *Oregon Treaty*, and in the procedural narrative of documentary creation, Douglas was compiling the text of the treaty in consultation with HBC London offices before meeting with the WSÁNEĆ people. However, as previously noted, the rights the treaty recognized were significantly more generous to the WSÁNEĆ people than those Barclay advised.

The Deliberation Phase

Two letters constitute the core element of the *deliberation phase*, or in diplomacy, the final decision-making phase, of the *North Saanich Treaty*. First, Douglas wrote to Barclay on 16 May 1850 explaining that he had “summoned to a conference” representatives of the “Songees Tribe.” Upon explaining his wish to purchase their lands, he gave “a quantity of goods” to each family head. He then “attached their signatures ... to a blank sheet.”¹³⁶ He told Barclay he awaited a deed of contract to write into the document. On 16 August, Barclay sent Douglas the approval of the HBC Governor and Committee. Along with this approval he included “the form of Contract or Deed of Conveyance to be used on future occasions when lands are to be surrendered to the Company by the Native Tribes.”¹³⁷ Here we find the decision-making of the Aboriginal peoples and the Colonial Office separated by months. The distance and record-keeping practices complicated the phases of procedure; the distinction between phases was blurred as Barclay was sending consultative correspondence after the agreement. Moreover, without notes from Douglas’s meeting with the WSÁNEĆ people, it is almost impossible to acknowledge a decision from the Aboriginal perspective. The decision in this phase of the procedure is documented in Douglas’s letter. It is significant that Barclay referred to the *Kemp Deed*, a deed of conveyance and form of contract. His articulation indicated sovereignty was already established, and in an address to the House of Lords on 29 July 1849, Earl Grey referred to the HBC as “trustees for the sale of [Vancouver Island lands] to individuals who wished to settle.”¹³⁸ All of this implies that the deliberative phase, designed to formulate a decision on an act, was done abroad as part of the “spatial strategies of commercial capital.”¹³⁹ The act, previously articulated, was later explained to the “Songees Tribe.” In the abstracted phases of diplomatic procedure, this is the point at which the

136 LAC, Sir James Douglas Fonds, MG 24-A35, letterbook vol. 3, Douglas to Archibald Barclay, 16 May 1850.

137 BC Archives, Fort Victoria Correspondence, A/C/20/Vi7, Barclay to Douglas, 16 August 1850.

138 *Colonization of Vancouver's Island* (1849), p. 27.

139 Cole Harris, “Social Power and Cultural Change in Pre-Colonial British Columbia,” *BC Studies* 115/116 (Autumn/Winter 1997–98), p. 55.

Aboriginal peoples “participated” in drafting the agreement, supposedly documented with X’s. Little distinction is made for the input of other Aboriginal regional groups.

The Deliberative Control Phase

From a diplomatic standpoint, the next step in the procedural narrative is the *deliberative control phase*. “It is constituted by the control exercised by a physical or juridical person different from the author of the document embodying the transaction, on the substance of the deliberation and/or on its forms.”¹⁴⁰ As with all the treaties, this step seems to have occurred in a verbal context. The document’s disposition tells us that the WSÁNEĆ people were the authors of the act. This was the principal fictional moment of the treaty’s process: Douglas had Crown delegated authority to create this document; but his warrant to create the document required some form of WSÁNEĆ assent. The textual record of these deliberations is the cursory depiction in Douglas’s correspondence with Barclay. If we are to believe that the WSÁNEĆ signed the document, this was the moment of deliberation and circumspection leading to Aboriginal inscription; however, the oral testimony of WSÁNEĆ elders summarily denies deliberate participation in a land sale.

The Execution Phase

Finally, the *execution phase* is the completion of the text of the treaty. This step reaffirmed Douglas as the writer and the Crown as the author of the treaty. There is no way to know when Douglas completed the text. He returned to his Fort Victoria offices, added it, or instructed his clerk to add it, to the register and stored it at the Fort.

The procedural narrative of the *North Saanich Treaty* concluded with Douglas’s composing the document lacking the native signatories, with principal advice and consultation occurring abroad.¹⁴¹ This consultation recognized the HBC’s original 1670 Crown charter rights and the 1838 provisions of Royal license of exclusive trade with the Indians in parts of North America.¹⁴² A Crown-appointed governor in local council would handle the civil and criminal

140 Duranti, “Diplomatics,” pt. IV, p. 14.

141 The immediate procedural context was framed by a more general juridical context. This legal prologue to the *North Saanich Treaty* has been studied in detail. See Knaplund, pp. 259–71, and Mouat, pp. 5–31. For the application of Wakefield’s colonial development theories on Vancouver Island, see Mackie.

142 For a depiction of the HBC’s terms and conditions of trading rights in Rupert’s Land and the North-Western Territory, see Kent McNeil, *Native Rights and the Boundaries of Rupert’s Land and the North-Western Territory* (Saskatoon, 1980).

jurisdictional responsibilities. A Wakefieldian settlement model informed the 1849 Vancouver Island grant.¹⁴³ While the Colonial Office under Colonial Secretary Earl Grey was confident in advising on the model of colonial development, it did so without full knowledge of the settlement context. In particular, a confidential document written as part of Colonial Office grant deliberations depicted the Crown as being uncertain of the local Native peoples' claim to title. It recommended that the HBC use its experience with Aboriginal peoples to fashion a settlement process under the condition that the Company address "Indian title" as conditional to the Crown's grant.

With regard to the Indians it has been thought on the whole the better course to make no stipulations respecting them in the grant. Little is in fact known of the natives of this island, by the Company or by any one else. Whether they are numerous or few, strong or weak; whether or not they use the land for such purposes as would render the reservation of a large portion of it for their use important or not, are questions which we have not the full materials to answer. Under these circumstances, any provisions that could be made for a people so distant and so imperfectly known, might turn out impediments in the way of colonization, without any real advantage to themselves. And it is thought the more safe to leave this matter to the Company, inasmuch as its dealings with and knowledge of the North American Indians are of course very extensive; and inasmuch as, notwithstanding the many accusations of which that Company has been the object, no distinct charges of cruelty or misconduct toward the Indian tribes under its control have been made out by reasonable evidence; while every year brings painful accounts of mutual wrongs and mutual revenge between Indians and whites from the neighbouring regions not under their control. It must however be added that in parting with the land of the island Her Majesty parts only with her own right therein, and that whatever measures she was bound to take in order to extinguish the Indian title are equally obligatory on the Company.¹⁴⁴

The Colonial Office's Vancouver Island land policy comprised unclear and often conflicting principles of free trade, Wakefieldian colonial development, social Darwinism, and the liberal humanitarian belief in the civilizing influence of colonial encounters.¹⁴⁵ This letter illustrates that the nature of the act

143 LAC, Colonial Office Fonds, Public Offices document C.O. 305/1, MG11, Foreign Office, Confidential Document, British Foreign Office to [None], March 1849 p. 635. Economist Edmund Gibbon Wakefield advised that colonial settlement should replicate English society through strict imperial control over emigration, land policy, and labour markets. His classical political economy predicted that a colonial economic system would eventually balance itself if land, labour, and capital were properly apportioned. But the restrictive costs imposed on land and the unforeseen shortage of labour failed to replicate the desired economic model. For a detailed depiction of Wakefield's failed political economy on Vancouver Island see Mackie.

144 Ibid., Colonial Office, 305/1.

145 Herman Merivale, *Lectures on Colonization and Colonies Delivered Before the University of Oxford in 1839, 1840, & 1841 and Reprinted in 1861* (London, 1928); Part One 1836,

embodied in the treaty and the roles of its actors, were deliberately unclear because there remained considerable uncertainty over the juridical environment to provide for colonial settlement. This uncertainty was reproduced in the improvisational and unstructured quality of the administrative procedure and its resulting documentation.

The *North Saanich Treaty*: Provenance Revisited

It should be clear from this diplomatic examination of the *North Saanich Treaty* that no small amount of improvisation and inaccuracy informed the document's creation. It is at the point of these inconsistencies that we can situate the current archival debate between commentators who wish to update and apply traditional tools of archival science and those who would argue that a new interpretive paradigm is required to address the modern records environment. Advocates of traditional diplomatics argue that such inconsistencies do not undercut diplomatic categorizations of procedures.

On the contrary, an analysis of the procedures [,] which begins from their final products allows verification of the discrepancies between rules and actuality and of the continuous mediation taking place between legal-administrative apparatus and society, and makes the reality attainable.¹⁴⁶

Medieval scholar Armando Petrucci agrees with this assessment but cautions against making “the mistake of reducing the always projecting and variegated density of documentary sources to the pure and simple connection with the juridical event.”¹⁴⁷ It is here that we find the “new paradigm” challenge to the diplomatists’ argument. Couched in postmodernist rhetoric, this alternative perspective acknowledges Petrucci’s caveat and takes the interpretation of the treaty in the opposite direction. Whereas diplomatics finds in the record, or more specifically its component parts, a window on the realities that directed its production, the postmodern archival interpretation views the record as a

Imperial Blue Book, v. II, no. 538, Great Britain Parliamentary Paper 1836, *Report from the Select Committee on Aborigines (British Settlements), together with the Minutes of Evidence, Appendix and Index*; Part Two, 1837, Imperial Blue Book, v. II, no. 425, *Great Britain Parliamentary Paper 1837, Report from the Select Committee on Aborigines (British Settlements), together with the Minutes of Evidence, Appendix and Index*; Government of Canada, House of Commons, *Hansard*, Proceedings of the Select Committee on New Zealand (23 July 1844); James Edward Fitzgerald, Esq., *Vancouver's Island, the H.B.C., and the Government* (London, 1848), pp. 3–32. See also Mouat; Mackie; and Harris, *Making Native Space*, chapters 1 and 2.

146 Duranti, “Diplomatics,” pt. IV, p. 23.

147 Armando Petrucci, “The Illusion of Authentic History: Documentary Evidence,” in *Writers and Readers in Medieval Italy*, ed. and trans. by Charles M. Radding (New Haven, 1995), p. 248.

symbol of its creative context “rather than a source of information.”¹⁴⁸ By problematizing the processes of remembering and writing, one can deconstruct the record for signs of the multi-contextual environment that inspired its creation. Our analysis, therefore, moves – pun intended – from the record “in-word” to the record “out-word.”

Aware of Hugh Taylor’s advice that “we should be wary of hypertext’s siren song luring us onto the reefs of lost provenance,”¹⁴⁹ I return to the *North Saanich Treaty* with a postmodern archival perspective. Hayden White tells us that in order to interpret a narration of events (or procedures), we must first conceptualize the idea of narration.¹⁵⁰ The relationship between language and fact is neither linear nor simple; it is a composite of signs chosen from, and formed by, the language that we use to conceptualize reality. The germ of this idea was current in the formative halls of European empires. When asked to explain his work, Antonio de Nebrija, author of *Gramática de la lengua castellana*, the first grammar of a modern European language, explained, “language is the perfect instrument of Empire.”¹⁵¹

From this postmodernist view, the *North Saanich Treaty* is the product of a multi-narrative mediation of tradition and authority. The treaty was couched in languages of tradition and authority on both sides. In this view, Native peoples negotiated the treaties to obtain some leverage (i.e., power) to resist the intrusion of cultural pluralism. As Edward Chamberlin, a leading participant in the Royal Commission on Aboriginal Peoples, wrote, “traditions are non-negotiable; authority was always open to negotiation (moreover it tolerated competition within clearly defined boundaries).”¹⁵² Thus, the important question becomes: How much can one read into the fact that Native peoples agreed to the treaty, miscommunication notwithstanding? Was it a rear-guard manoeuvre to protect non-negotiable tradition from a militarily superior and technologically overwhelming foreign entity? Or, as others have argued, were the concepts of private property and the documentary formalities of treaties so foreign that the Aboriginal signatories were not aware of what, if anything, they were sign-

148 H. Lovblad, “Monk, Knight or Artist? The Archivist as a Straddler of a Paradigm,” *Archival Science*, vol. 3, no. 2 (2003), p. 151.

149 Hugh A. Taylor, “Recycling the Past: The Archivist in the Age of Ecology,” *Archivaria* 35 (Spring 1993), p. 210.

150 Hayden White, “The Politics of Historical Interpretation: Discipline and De-Sublimation,” in *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore, 1987), pp. 58–62.

151 Robert A. Williams, *The American Indian in Western Legal Thought* (New York, 1990) p. 74.

152 Edward Chamberlin, “Culture and Anarchy in Indian Country,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver, 1997), p. 5.

ing away?¹⁵³ If one takes the former approach, one can deduce much from the fact that Aboriginal peoples were signatories in a transaction. In the latter approach, the document is a one-sided European legal instrument; and trying to understand the will of the Aboriginal signatories from a diplomatic analysis of the treaty is like the proverbial Buddhist imagining the sound of one hand clapping.

Some native oral histories of the *North Saanich Treaty* exist. They have been handed down through generations of WSÁNEĆ. WSÁNEĆ elders Dave Elliot Sr., Gabriel Bartleman, and John Elliot Sr. recite similar narratives of the treaty event. Three important facts inform their oral testimonies. First, the people believed they held a form of ownership over the resources of the Saanich peninsula. Second, tense confrontation provoked the treaty negotiations. Third, the WSÁNEĆ people viewed the treaty as a peace measure, not a land sale. Combined, these testimonies are a counterbalance to the traditional archival record of the *North Saanich Treaty*'s genesis.

Dave Elliot Sr. is a member of the WJŌĒĒP First Nation who related his testimony as part of a resource book for the Saanich Native Studies Program of the Saanich School District 63. He recounted that in February 1852, an armed band of WSÁNEĆ men forced HBC workers to stop felling trees on nearby Songhees land in Cadboro Bay near Victoria. Soon after, white settlers killed an Aboriginal boy near Mount Douglas. With tension uncomfortably high, the WSÁNEĆ were invited to come to Victoria.

When they got there, all these piles of blankets plus other goods were on the ground. They told them these bundles of blankets were for them plus about \$200 but it was in pounds and shillings.... They asked each head man to put an X on the paper. Our people didn't know what the X's were for. One man spoke up ... "I think these are peace offerings ... I think these are the signs of the cross ... This was the sign of their God." It was the highest order of honesty. It wasn't much later they found out actually they were signing their land away.... Our people were hardly able to talk English at that time and who could understand our language?¹⁵⁴

Gabriel Bartleman, an elder from the WJŌĒĒP First Nation, gave his testimony as an expert witness in September 1987 in the BC Supreme Court for the case *Claxton vs. Saanichton Bay Marina, B.C.L.R.* (1989). His childhood memories of the treaty came from attending meetings of WSÁNEĆ people held by Chief David Latesse to discuss perceived violations of "Douglas's word":

At that time, the people recognized that Chief David Latesse came to understand some of what is called the "treaty," and that he tried the best he could to inform the people

153 Harris, *Making Native Space*, p. 25.

154 Poth, *Salt Water People*, pp. 69–71.

that he looked after. He didn't use the word "treaty," he said they called it "James Douglas' word."¹⁵⁵

Bartleman's testimony closely linked his people's Ćelánen to the land and its resources. Referencing Douglas's treaty negotiation, Bartleman said, "the understanding that [Douglas] gave the people at home was that their way of life was never ever going to be disturbed, that they would always be able to take their food and travel as they did before, that nothing would ever be taken away from them."¹⁵⁶ Bartleman noted that when he was young in the 1920s and 1930s, the provincial government frequently stopped WSÁNEĆ fishers; in 1924, after a government fish warden stopped Tommy Paul from fishing, Chief Latesse called a meeting to discuss the matter:

Again they spoke of James Douglas' promise, and they wondered what happened to Douglas, did he leave word behind for their survival, his promises, and again where could they go to hear the other part of that story. They called the people together, and told them that – I guess James Douglas' promises weren't any good, and now we have another system coming on that we don't understand.¹⁵⁷

Bartleman relates the same facts as Elliot when describing why the WSÁNEĆ met Douglas at Fort Victoria to discuss the land deal. He stated that his people did not want to meet with Douglas. However,

[t]here was [*sic*] two instances. One of them was, that there was a messenger, a Saanich runner, sent with a message and he was running, and James Douglas' man shot that boy, fourteen years old. And the other instance was that there was some trees taken off of Cordova Bay, and I was told that these trees were especially suitable for masts – sailboat masts. And the people on the inside of the bay, that's in Brentwood Bay, now known as Brentwood Bay, they decided to stop them.¹⁵⁸

Only after this confrontation over murder and resource rights did Douglas invite the WSÁNEĆ to Fort Victoria. Upon arriving,

155 SC#2872/85, Victoria Registry, between Saanichton Marina LTD, Plaintiff, and Louis Claxton, Chief of the Tsawout Indian Band, as Representing Himself and all Other Members of the Tsawout Indian Band, Gus Underwood, Earl Claxton, John A. Doe, and John B. Doe, and the Attorney General of British Columbia, Defendants, and, SC#2873/85, Victoria Registry, between Louis Claxton, Chief of the Tsawout Indian Band, on Behalf of Himself and All Other Members of the Tsawout Indian Band, Plaintiffs and Saanichton Marina Ltd., and Her Majesty the Queen in Right of the Province of British Columbia, Defendants – Both actions were heard concurrently on 8 October 1987, in the case of *Claxton et al. (the Plaintiffs) v. Saanichton Marina Ltd. and A.G.B.C.*, cited in Knighton, p. 9.

156 Knighton., p. 10.

157 Ibid., p. 14.

158 Ibid., p. 31.

[t]here was some blankets and I believe some metal it was called – the money was called metal then, and to make a cross on a piece of paper, on a blank piece of paper, Native peoples thought that that was the sign of the [Christian] cross, and his good feelings. So they pardoned him for that, they wanted to forget that.¹⁵⁹

John Elliot Sr., another elder of the WJOŁŁP First Nation, gave his *North Saanich Treaty* testimony in an interview on 28 August 2003 at the Láu,welnew Tribal School.

We were told as children that Governor Douglas wanted to talk to the Saanich People, and that the Saanich People didn't want anything to do with him. In the place where he was staying near Victoria, near a place which is Mount Tolmie now, near that area, he lived somewhere there. And one of the Saanich boys, a young teenage boy, was walking through his field there, and he was shot by one of Douglas's men. And, that was around the same time that Douglas had some of his workers for the Hudson's Bay Company, they were looking for mast poles, and mast poles were growing over in Cordova Bay area.... our Saanich Tribe was really all as one – still. All of this commenced at that time. There were ... around 7,000 of our [Salish] people at that time. Our warriors was [*sic*] all together, and they had heard that the Governor and men were over at Cordova Bay cutting trees down and taking them away.¹⁶⁰

The WSÁNEĆ confronted the loggers who stopped logging and returned to Victoria. It was sometime after that, that the WSÁNEĆ were invited by Douglas to go to Victoria and talk about this incident. “That was our understanding that they took it as a threat of war, and they wanted to make peace with the Saanich people.... that's how our people came to this gathering where they were making ‘X's’ on the paper.”¹⁶¹ John Elliot Sr.'s testimony also references negotiations for land.

Then I think, they took them up to that mountain up there ... and pointed outward where our people could roam freely and not be bothered. And, I think that's what he was pointing out. And my understanding is, is that was the first reserve. That's my understanding of it. I could be wrong, but I think that that's what our people understood. That he was pointing out the borders of where we were free to roam and hunt, and fish. Without being bothered, and he was pointing from Douglas, Mount Douglas over to Goldstream, and that way. And that was what I was told by Manny Cooper, he's an elder cousin of mine.¹⁶²

The HBC documentary remembrance of the *North Saanich Treaty* is reliably preserved in a public archives; the WSÁNEĆ oral testimony is authenticated

159 Ibid., p. 32.

160 Ibid., p. 18.

161 Ibid.

162 Ibid., p. 33.

through generations of testimonial witness. Both offer different perspectives that demand acknowledgement. In a letter to HBC Secretary Archibald Barclay dated 18 March 1852, Douglas presented his version of events leading to the *North Saanich Treaty*. There are some conflicting points of interest: he did not mention the murdered teenager but he touched upon the value of intimidation to control Native peoples; the logging the elders described was probably linked to a proposed sawmill Douglas invested in; Douglas claimed the “Sanich” requested to meet with him; he described the document as “a deed of sale” meant to cover “only the village sites and potatoe [*sic*] patches”; Douglas mentioned a sum not included in the treaty; and finally, plans of the area proposed for treaty were already drawn. In his letter to Barclay he wrote,

... it is necessary to maintain our influence, which mainly depends on the belief of our ability to punish offenders by a display of physical force, capable of supporting the Laws ... I herewith forward a tin case containing various drawings and plans from Mr. Pemberton as per accompanying list ... The map of the Sanitch Inlet and entrance of Cowitchin River, though in great part a mere eye sketch and therefore not absolutely correct, gives a good idea of both places and particularly of the extraordinary direction of the Sanitch Inlet which extends to within five miles of Esquimalt nearly insulating the south east angle of Vancouvers Island. The Steam Saw Mill Company having selected as the site of their operations the section of land marked upon the accompanying map north of Mount Douglas, which being within the limits of the Sanitch Country, those Indians came forward with a demand for payment, and finding it impossible to discover among the numerous claimists the real owners of the land in question, and there being much difficulty in adjusting such claims. I thought it advisable to purchase the whole of the Sanitch Country, as a measure that would save much future trouble and expense. I succeeded in effecting that purchase in a general convention of the Tribe, who individually sub Scribed the Deed of Sale, reserving for their use, only the village sites and potatoe [*sic*] patches, and I caused them to be paid the sum of 109.7.6 in wool-len goods which they preferred to money. That purchase includes all the land north of a line extending from Mount Douglas to the south end of the Sanitch 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.¹⁶³

The oral testimony of WSÁNEĆ elders serves as a countervailing record of local experience to the HBC’s archival record of treaty creation. There were discourses of accommodation and negotiation in the testimonies of both cultural representatives.

Native signatories of the *North Saanich Treaty* were looking for authenticating symbolism with the perspective of a culture imbued with non-textual communication. They identified the symbolic, cultural significance of the cross

163 LAC, Sir James Douglas Fonds, MG24–A35, Letterbooks, vol. III, May 1850–November 1855, Douglas to A. Barclay, 18 March 1852.

but not the details of centuries of empire attached to it. Spiritual symbolism has been used to negotiate secular power for centuries, particularly when the written word still carried suspicion. In a strikingly similar interpretation, Clanchy observed that during the “spread of literacy and written instruments of land tenure” in eleventh- and twelfth-century England, a charter’s authenticity was strengthened with the symbol of the cross.

To Anglo-Saxons, charters signed with crosses probably looked more authentic than writs with seals because each cross, written alongside a witness’s name by a priestly scribe, recorded the subscriptions of a solemn oath made in the presence of Christ crucified.¹⁶⁴

As Clanchy noted, “signing with a cross became a symbol of illiteracy only with the secularisation of western society after the Reformation.”¹⁶⁵ In its own way, the oral memory of the North Saanich peoples’ land transfer is at least as sensitive to the power relations embodied in the document as the written text.

Pursuing this symbolism, it is recorded elsewhere that a debate over the representation of a cross encapsulated the original first contact experience with European explorers on Vancouver Island:

On 23 June 1790, Don Manuel Quimper, ensign of the Royal Armada, landed near Sooke on Vancouver Island, planted a large wooden cross, and took possession of the coast “in the name of His Catholic Majesty Carlos IV.” He buried documents of possession, fired a twenty-one gun salute, and left. When he returned a few weeks later, Native peoples had removed the cross; his crew made another that Quimper hoped would be more secure, this time by topping and limbing a small “pine” and nailing on a cross beam.¹⁶⁶

In fact, the cross was at the centre of rituals of possession and first contact across Canada.¹⁶⁷ In a postmodern sense, insights can be revealed in looking at what Hayden White described as “composite signs”¹⁶⁸ or, in the words of current, archival postmodern appraisal theory, “the context behind the content; ... the power relationships that shape the documentary heritage; and on the document’s structure, its resident and subsequent information systems, and its narra-

164 Clanchy, p. 312.

165 *Ibid.*, p. 8.

166 Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver, 1997), p. 31.

167 Henry Kelsey, in the service of the HBC, is credited with being the first European to set foot on the Canadian Prairies. To mark his 1691 arrival he planted a cross at a place he christened with a poem, “Deerings Point.” And on 4 July 1534, Jacques Cartier claimed the St. Lawrence estuary with the raising of a cross at the point of entry to the Gaspé Bay.

168 Hayden White, “The Value of Narrativity in the Representation of Reality,” in *The Content of the Form*, pp. 1–11.

tive and business-process conventions [over] ... its informational content.”¹⁶⁹

Conclusion

It should be clear from this examination of the *North Saanich Treaty* that the document is unreliable and inconsistent. The treaty is in fact a “legal fiction”: a modernist device designed to reconcile and articulate in measured textual detail, the social, geographic, and legal spaces necessary to build the colonial settlement project. Commenting on the cultural relativism of such archival records, several disciplines have questioned the objectivity of traditional archival paradigms.¹⁷⁰ They see modernist representations of dominant power and authority in our conceptual defence of a record’s reliability and authenticity.¹⁷¹ Extending this line of thought, archives represent a locale of power over public memory and history: “power over how the record is interpreted; ... power over the evidence of representation, and power over access to [evidence]....”¹⁷² Furthermore, that archivists have not actively responded in practice to this challenge is evidence of our subjective, embedded statist roles. Archivists respond reluctantly because, unlike other disciplines, the core of the archival endeavour remains the defence of the record, not its interpretive discourse. When Western archival paradigms assess a colonial document such as the *North Saanich Treaty*, the two approaches examined above take us as far as they capably can. They reveal the crucial inconsistencies of a fictive colonial document (diplomats), and examine how participants articulated their accommodation of power and authority (provenance). A public archives can document the contextual circumstances of a record, its inconsistencies and half-truths, but it cannot interpret, in a postmodern sense, the multiple, relative truths of power and authority that inspired its creation. It is true that archival documents are a product of “the formal protocols, institutional arrangements ... intentions, and historical circumstances of their formation...”¹⁷³ But within such statist confines, the records’ contexts can still be made manifest, the roles of custody,

169 Terry Cook, “Fashionable Nonsense or Professional Rebirth: Postmodernism and the Practice of Archives,” *Archivaria* 51 (Spring 2001), p. 25.

170 See, for example, Thomas Osborne, “The Ordinarity of the Archive,” *History of the Human Sciences*, vol. 12, no. 2 (1999), pp. 51–64; Richard Harvey Brown and Beth Davis-Brown, “The Making of Memory: The Politics of Archives, Libraries, and Museums in the Construction of National Consciousness,” *History of the Human Sciences*, vol. 11, no. 4 (1998), pp. 17–32.

171 *Guerin v. R.*, p. 382. See also *R. v. Van der Peet*, 507 at para. 68; *Delgamuukw v. British Columbia*, [1997], at para. 93.

172 Elisabeth Kaplan, “Many Paths to Partial Truths: Archives, Anthropology, and the Power of Representation,” *Archival Science* 2 (2002), p. 211.

173 Randolph Starn, “Truths in Archives,” *Common Knowledge*, vol. 8, no. 2 (May 2002), p. 400.

acquisition, and description transparent. As Jean de Mabillon, the father of diplomatics, wrote: “it is not authority that makes for authenticity, it is authenticity that makes authority....”¹⁷⁴

To refine an interpretive archival method for colonial records, we should recall that for centuries important archival concepts have developed to resolve contested evidence of rights and authority; that “the first archival definition of records ... clearly referred to records as sources of proof of rights ...”¹⁷⁵ In a colonial context, Edward Said has demonstrated that Europe’s Middle Eastern colonial project was also built on contested legal and cultural representations of authority.¹⁷⁶ Likewise, considering the documentary sources shaping the historical identity of Aboriginal peoples, it is important to note the colonial settlement of North America is represented in an array of legal and public archival documents often found to express cultural relativism and unreliability.¹⁷⁷ In summarizing the archival record of first contact on the west coast of British Columbia, Clayton remarked that, “colonialism is as much an ongoing, arbitrary, and variously conceived process of inscription as it is a process of physical occupation, resettlement, and domination.”¹⁷⁸

Toward resolution, a growing consensus in the legal community argues that the Supreme Court must more closely consider the provenance and reliability of records of colonial settlement.¹⁷⁹ The contact and conflict documented in European colonial records misrepresent the same Aboriginal perspective the Supreme Court has ruled it needs for determining Aboriginal rights. The countervailing perspective is most often captured in Aboriginal oral histories and other traditional, non-textual mnemonic practices. Courts, therefore, must reconcile at common law the admissibility and legal weight of evidence for Aboriginal memory perpetuated through oral testimony.¹⁸⁰ This re-conception of evidential

174 Blandine Barret-Kreigel, ed., *Brèves réflexions sur quelques règles de l'histoire* (Paris, 1991), p. 53, cited in Starn, “Truths in the Archives,” p. 399.

175 Luciana Duranti, “The Concept of Electronic Records,” in *Preservation of the Integrity of Electronic Records*, eds. Luciana Duranti, Terry Eastwood, and Heather MacNeil (Dordrecht, 2002), p. 10.

176 Edward W. Said, *Orientalism* (New York, 1978).

177 Clayton, pp. 3–63; Shauna McRanor, “The Imperative of ‘Culture’ in a Colonial and de facto Polity,” *Diversity and Equality: The Changing Framework of Freedom in Canada*, ed. Avigail Eisenberg (Vancouver, 2006), pp. 54–73.

178 Clayton, p. 63.

179 Mark D. Walters, “Towards a ‘Taxonomy’ for the Common Law: Legal History and the Recognition of Aboriginal Customary Law,” in *Law, History, Colonialism*, eds. Kirby and Coleborne, p. 125.

180 See *R. v. Sparrow*, [1990], 70 D.L.R. (4th) 385 (S.C.C.) at 411; *William et al v. British Columbia et al*, [2004] BCSC 148 at para. 24; *Mitchell v. MNR*, [2001], at para 39; see also Stuart Rush, “Use of Oral History Evidence in Aboriginal Rights Litigation,” *The Continuing Legal Education Society of British Columbia*, <http://www.cle.bc.ca/Practice%20Points/ABOR/Oral%20History%20FINAL.pdf> and Stephanie P. Lysyk, “Evidentiary Issues – Oral Tradition Evidence,” *ibid*, <http://www.cle.bc.ca/>

paradigms can lead to an “indigeneity in the courtroom,”¹⁸¹ that is, the process of production of native societal voices previously unheard in legal decisions. This is the “intersocietal law” recommended in the Supreme Court’s 1996 *Van der Peet* decision.¹⁸² The intention is an intercultural dialogue that supports “the popular sovereignty of contemporary societies.”¹⁸³ As Tully has noted, a “post-imperial” constitutional dialogue must support “popular sovereignty” in culturally diverse societies: “the dialogue must be one in which the participants are recognized and speak in their own languages and customary ways. They do not wish either to be silenced or to be recognized and constrained to speak within the institutions and traditions of interpretation of the imperial constitutions that have been imposed over them.”¹⁸⁴

How can we initiate an “indigeneity in archives”? This is the fundamental challenge of Aboriginal archives: archivists remain at the centre of a duality between colonial documents as monuments to imperial expansion and muments of Aboriginal rights and identity.¹⁸⁵ We must begin by acknowledging the unclear juridical context of Aboriginal colonial records.¹⁸⁶ In a traditional archival model, a record is created within a defined juridical system. Each act of appraisal is in itself a further assertion of juridical sovereignty. Identifying a juridical system predisposes us to recognize a particular kind of order, titling, arrangement, and description of value of records. It determines the classification of records, including the basic division into public and private spheres. But although some of the most celebrated diplomatists admit these distinctions are not always clear,¹⁸⁷ in the archival appraisal of colonial records, the indulgence of a dominant worldview or juridical system is usually assumed *a priori*. As the making of the *North Saanich Treaty* demonstrates, this perspective is problematic when applied to the distributed authority of Aboriginal societies and the

Practice%20Points/ABOR/Evidentiary%20Issues-Oral%20Tradition.pdf (both accessed on 18 May 2010); Clay Mcleod, “The Oral Histories of Canada’s Northern People, Anglo-Canadian Evidence Law, and Canada’s Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past,” *Alberta Law Review*, vol. xxx, no. 4 (1992), pp. 1276–90.

181 Jennifer A. Hamilton, *Indigeneity in the Courtroom: Law, Culture, and the Production of Difference in North American Courts* (New York, 2009), pp. 2–4.

182 Mark Walters, “Promise and Paradox: The Emergence of Indigenous Rights Law in Canada,” in *Indigenous Peoples and the Law: Comparative and Critical Perspectives*, eds. B.J. Richardson, Shin Imai, and Kent McNeil (Portland, 2009), p. 41.

183 Tully, *Strange Multiplicity*, p. 29.

184 *Ibid.*, p. 24.

185 Avigail Eisenberg, “Reasoning about Identity: Canada’s Distinctive Culture Test,” in *Diversity and Equality: The Changing Framework of Freedom in Canada*, ed. Avigail Eisenberg (Vancouver, 2006), pp. 34–50 and Shauna McRanor, “The Imperative of ‘Culture,’” pp. 54–73; *R. v. Van der Peet*, note 1 at 538 (para. 74).

186 John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*,” *Osgoode Hall Law Journal* 37 (Fall 1999), pp. 537–96.

187 A. de Broüard, *Manuel de diplomatique française et pontifical* (Paris, 1929), pp. 39–55.

chaotic collision of uncertain colonial legal domains.

The uncertainty over the legal jurisdiction in colonial societies complicates the first step in the description of colonial records. To respond, archivists must describe colonial records within the Aboriginal context of their creation as a contextual balance to their traditional description. It is possible to juxtapose a profile of contemporaneous Aboriginal societies with our descriptions of traditional, colonial records.¹⁸⁸ As our archival descriptions move toward a detached and digitally encoded archival context, this becomes more practical. The content of such a juxtaposed context could include the relevant languages and worldviews as described by appropriate Aboriginal representation. This is a pertinent approach at a time when digitization is detaching our contextual descriptions from the records described in the conventional finding aid. Furthermore, this is useful for at least three more reasons: first, it avoids dealing with the problem of redescribing colonial records and instead puts the records in a deeper context of both the records-creating environment and the discourse of the descriptions themselves; second, it opens the door to Web 2.0 interactivity in formats such as the ICA's AtoM project¹⁸⁹ or the Encoded Archival Context project (EAC)¹⁹⁰; finally, it could provide for the participation of oral histories of elders that do not easily fit the format of our existing national descriptive standards.

Such a distributed description leads us to a postmodern dilemma of contemporary archives: multicultural societies, modern bureaucracy, and information technologies are fragmenting the concept of a record and threatening to decouple the record from its traditional provenance of a single, definitive creator.¹⁹¹ The archival characterization of the challenges of electronic records mirrors the archival challenges of Aboriginal oral testimony: the meaning of custody, instantaneous reproduction and distribution, fixity of form, stability of content, heterogeneous and collaborative authorship, authenticity reinterpreted. Traditional textual concepts of authentic, trustworthy records, built on absolutist conceptions of juridical sovereignty, are inconsistent with the oral testimony of Aboriginal memory and the cultural history of apportioned Aboriginal governance. Our archival paradigms lack the sovereign, cultural authority to fully account for Aboriginal participation in the memory of colonial experience; the best response is to insinuate Aboriginal participation into the contextual representation of the colonial archival record.

Dominion Archivist Sir Arthur Doughty described the mission of the then-

188 For an example in this direction, see *The Protocols for Native American Archival Materials* (Salamanca, 2006).

189 See <http://ica-atom.org/> (accessed on 10 May 2010).

190 See <http://www.library.yale.edu/eac/> (accessed on 19 May 2010).

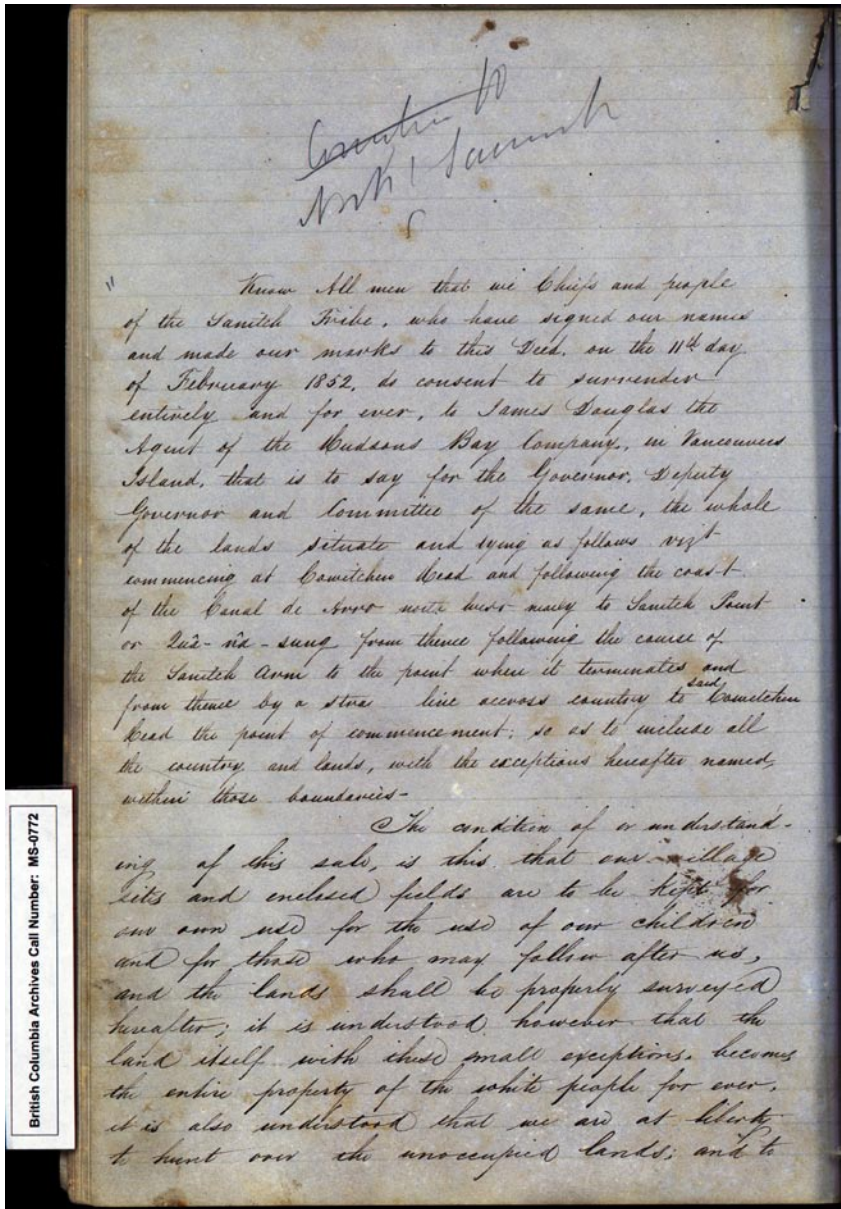
191 Hugh A. Taylor, "Transformation in the Archives: Technological Adjustment or Paradigm Shift?" *Archivaria* 25 (Winter 1987–88), pp. 12–28.

Public Archives of Canada to preserve the documentary heritage of our nation as “a noble dream.”¹⁹² Similarly, writing on Aboriginal rights in his *R. v. Côté* decision, a Supreme Court of Canada Chief Justice spoke of the “noble purpose” envisioned in section 35(1) of the *Canada Act*.¹⁹³ Our noble postures of legal purpose and archival value still pursue the genuine memory of the Aboriginal colonial experience.

192 Ian E. Wilson, “‘A Noble Dream’: the Origins of the Public Archives of Canada,” *Archivaria* 15 (Winter 1982-83), p. 16. See also Terry Cook, “W. Kaye Lamb and the Transformation of the Archival Profession,” *Archivaria* 60 (Fall 2005), pp. 185–234.

193 *R. v. Côté*, [1996] 138 DLR (4th) 385. Section 35 of the Canadian Constitution represents a kind of constitutionalization of Aboriginal rights and provides an interpretive legal framework by recognizing and affirming “existing Aboriginal and treaty rights.”

Appendix 1: Digital Reproduction of the North Saanich Treaty



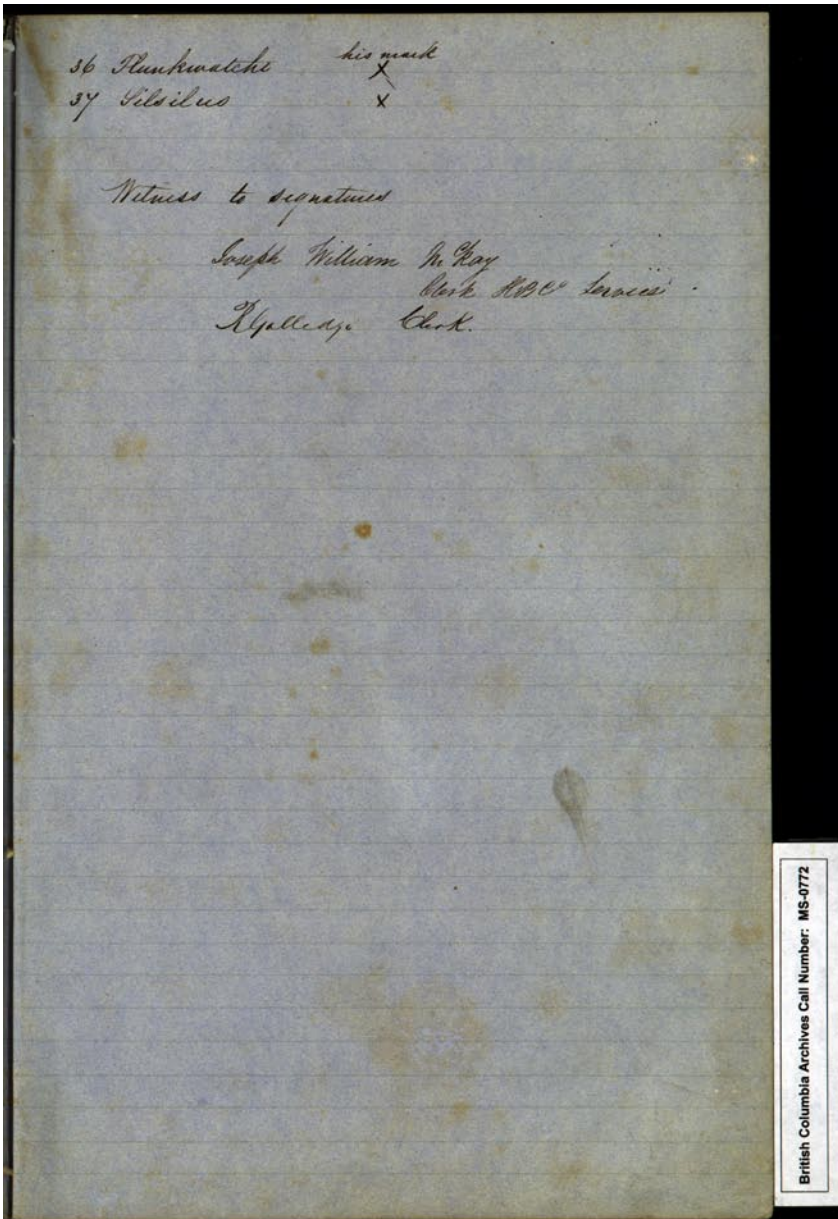
carry on our fisheries as formerly. We have
as received as payment

1	Hutted teen	^{his mark}	X	26	Sulley lum	^{his mark}	X
2	the hay - noak		X	27	Wha se - sut		X
3	this Inaguan		X	28	Pap, rough		X
4	To a - whalack		X	29	Trowenushun		X
5	Isk - lay ing		X	30	Say - noo sen		X
6	Whul a whonitch		X	31	To a - woughten		X
7	Isk - kay - mut		X	32	Whit a kunsit		X
8	May - lum		X	33	Uel ay - ho		X
9	Quel ay lum		X	34	Kanatum		X
10	Wha - whalack		X	35	Pa - rough		X
11	Is - noo - ay		X	36	Pa - whalack		X
12	Wot - a - enough		X	37	So - way - mut		X
13	Wot - a - witch		X	38	So - say - wau		X
14	Wul - quay - mullet		X	39	Say - whul ton		X
15	Who - much tun		X	40	Whay - a - nit		X
16	Hani - quay - um		X	41	Way - saluk		X
17	Sha - sha - luck		X	42	Kul - ay - mut		X
18	Kul - ay - mut		X	43	Lhay - chill		X
19	Ta - p - tun		X	44	Lu - a - mul - set		X
20	Sul - kay - lum		X	45	Whan - quay - lum		X
21	Wool - kay - mullet		X	46	Lu - ay - oos		X
22	Quay - meac		X	47	Kul - ka - lachin		X
23	Say - tuts		X	48	Su - a - tun		X
24	Samuch - alanutch		X	49	Chuy - a - uck		X
25	Sich - setun		X				

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1	So kamteen	his mark	1	Boyle's che	X
2	Kul ha luctan	X	2	Say lichten	X
3	Chu kacey	X	3	Wla-whyso	X
4	Ha-stilteen	X	4	Quatactan	X
5	Sil a-malh	X	5	Why cheay	X
6	Se-elt lack	X	6	Tuatu 7 th hum	X
7	So-wa-nuc	X	7	al guachee	X
8	Spa-hung-	X	8	Kumhumsue	X
9	Se-mast	X	9	Kapoo-witch	X
10	Ka'toa	X	10	Wey cock	X
11	Poo	X	11	Gut hay lum	X
12	Nishk	X	12	Se-naisee	X
13	Kung-kungsuck	X	13	Chawassit	X
14	Chut chenay	X	14	Tkla-las	X
15	Mao-guang	X	15	Pa quay tsing	X
16	Pa-mahud	X	16	La-tauh	X
17	Slaiph	X	17	Gowham	X
18	Pa-saynum	X	18	Loctan	X
19	Sechand	X	19	Tang oak	X
20	Kalacultas	X	20	Tulsut	X
21	Kawalacup	X	21	Plalshuna	X
22	Wa-ha	X	22	Wapool	X
23	Shawitsoat	X	23	Tei thlanugh	X
24	Quatwhasut	X	24	Quis cha'lich	X
25	Katchey multo	X	25	Kat-halachen	X
26	Nakamulto	X	26	Whasaymil	X
27	Se-kay-mum	X	27	Quatun	X
28	Kolanoo th	X	28	Chulnith	X
29	Whulay-statak	X	29	Chil guay is	X
30	Mawhuluk	X	30	Katuch	X
31	Se-a-kotau	X	31	Quasay-tanugh	X
			32	Shalhoat	X
			33	Umiteau	X
			34	Kalalawha	X
			35	Talar-shaktun	X

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