

an anonymous letter (which has been circulating around First Nations education for the past twenty years) purportedly written by "the mother of an Indian child." Miller's conclusions

call for Euro-Canadian accountability: his work is a valuable resource for those who seek a comprehensive overview of Canadian residential schools.

*Aboriginal and Treaty Rights in Canada:
Essays on Law, Equality, and Respect for Difference*

Michael Asch, ed.

Vancouver: UBC Press, 1997, in collaboration with the Center for Constitutional Studies, University of Alberta. 284 pp. \$65 cloth.

*Treaty Talks in British Columbia:
Negotiating a Mutually Beneficial Future*

Christopher McKee

Vancouver: UBC Press, 1996. 126 pp. Map. \$65 cloth, \$24.95 paper.

By MARLENE R. ATLEO, *University of British Columbia
and Ahousaht First Nation, Nuw-chah-nulth*

FIRST NATIONS PEOPLE of British Columbia talk about negotiating their way into Canada/British Columbia. How can First Nations people say this when they have been living "in" Canada/British Columbia since these legal entities were formed? It is precisely because the institutions and sociopolitical memory of First Nations peoples pre-date these legal entities that they challenge the "facts" of their relationships with the federal and provincial governments. For First Nations peoples treaties are living documents rather than unilateral, immutable historical positions. First Nations leadership is honour bound to safeguard the common good of their people — past, present, and future — in a manner consistent with the norms and values of First Nations through the principles and terms of treaty agreements. In a postcolonial world, Canada needs

to undergo internal de-colonization in order to match its mythological international stature as a champion of democracy and equality. The nation state of Canada, evolved from British colonial administrations, legitimizes the rights of non-Aboriginal Canadians. To dissect the nation state and scrutinize its nascence may seem dangerous to the average person, yet such scrutiny is necessary — particularly in the light of the unravelling of nation states that have not come to terms with their own colonial histories.

Revisiting the historical treaty process and proceeding with a modern treaty process may be seen as one aspect of Canada's coming to terms with its colonial history. The two books reviewed here focus directly on the implications of understanding First Nations as subjects of their own history rather than merely as objects of the history of colonial governments

and, through treaty negotiations, on government engagement with First Nations as agents of their own socio-historical process.

The first book, edited by Michael Asch, provides a plethora of challenges, from a historical and international perspective, to the legitimacy of the Canadian vis-à-vis Aboriginal rights and title. The second book, by Christopher McKee, analyzes conflicting points of regarding the negotiations of modern treaties in British Columbia. These two volumes provoke counter-intuitive thinking that can be disturbing because it challenges the common-sense assumptions upon which Canadians depend for their civic and social identities. The Asch collection of essays provides a legal and constitutional background for McKee's treatment of treaty negotiations in British Columbia.

In the beginning there was the legacy of British colonial law. And then in 1973 the Supreme Court of Canada found against a hereditary Nisga'a chief in *Calder*. In the *Calder* decision the court ruled that the Canadian state was required to formally recognize that, prior to the arrival of Europeans, Aboriginal peoples had their own societies complete with institutions, types of land tenure, and governments that may well have remained functioning despite the evolution of the state of Canada. The court asserted this position "notwithstanding" precedents arising from British colonial law or the understanding of the colonists, immigrants, settlers, and their descendants. Constitutional experts such as Mel Smith maintain that, since the courts found against *Calder*, the case was lost and, therefore, Aboriginal title does not exist. Where such a narrow, technical view of the law ends

is precisely the point at which Asch begins. Asch presents the multi-dimensional nature of the law by exploring the social/political/anthropological/scientific/historical implications of Justice Hall's decision in *Calder*. The law is about the application and enforcement of dominant norms and values, but it is in the substance of an actual decision, in the space between the letters of the law, that the principles of law emerge. It is in this space of interpretation and emergence that Asch sets the collection of essays that bring the law, equality, and respect for difference together in three broad areas: (1) actualizing Justice Hall's recommendations in *Calder*, (2) clarifying particular aspects of contested conceptual issues, and (3) realigning political relationships based on equality and respect within a socio-historical frame of reference.

The first three essays promote principles by which we may articulate the ideals recommended by Justice Hall in the *Calder* case. Chamberlin challenges the mainstream reading of the treaty process, maintaining that this process must be historically contextualized before it will be possible to continue it in a mutually respectful fashion. Bell and Asch argue that historical treaties can only be understood by turning away from ethnocentric historical precedents and interpreting historical facts in the light of contemporary social science and law. LaRocque cautions against (re)inventing traditions rather than choosing to develop a justice system that eschews ethnocentrism and promotes cultural equality.

The second three essays investigate particular aspects of legal issues and treaty rights in the light of Justice Hall's recommendations. Macklem

maintains that a close reading of court decisions reveals that Aboriginal views must be incorporated into treaty analyses because treaties were entered into in order to protect traditional life from further incursion by governments and third parties. McNeil argues that the true value of Aboriginal title is reduced in the legal context when it is not applied according to common law principles to provide Aboriginal peoples the support needed to meet their contemporary needs. Borrows provides compelling evidence that the Royal Proclamation of 1763 should be viewed through the lens of the Treaty of Niagara of 1764 — which promoted peace, friendship, mutual non-interference, and respect — as evidence of the British Crown's commitment to ensure that Aboriginal rights would not be undermined by colonial power.

The third section consists of two essays that explore the implications of a new relationship between Aboriginal people and the Canadian state based on principles of equality and respect for difference. A multidimensional Indigenous perspective is provided by Venne, who, with regard to Treaty 6, demonstrates that treaty-making can only be understood in the context of oral history, collective memory, cultural values, and the legacies of living reciprocities. Asch and Zlotkin pick up the theme of living reciprocities and structure it within a new constitutional arrangement that provides legitimacy for the post-modern, postcolonial nation state of Canada, with Aboriginal title as its constitutional bedrock. Asch, the anthropologist, and Zlotkin, the professor of law, provide a vision of a Canadian constitution that could withstand contemporary challenges to

the legal institutions of the nation state both from without and from within.

The space that Asch holds up as a place for the emergence of Aboriginal life seems to be defined and managed by non-Aboriginal experts. Equality of cultural status is only possible if the means exists to articulate it: in the case of First Nations, such means do not exist. The culturally different "other" who lacks resources, the development of whose justice system is tied to government funding requirements that demand a historical justification for self-management, cannot choose, as LaRocque suggests, to ignore the ways in which their traditions have been stereotyped in the eyes of the Western legal system. Law, as an artefact of history, needs to be more closely examined for its lack of cultural equality.

For non-Aboriginal Canadians born in Canada the very concept of negotiating one's way into a country is conceptually challenging. These people take the socio-historical conditions of their citizenship for granted. Dominant norms and values, upheld by the rule of law, are the context into which non-Aboriginal Canadians are socialized. In British Columbia, many First Nations are currently negotiating their way into Canada. Christopher McKee, a political scientist at the University of British Columbia, analyzes treaty negotiations in British Columbia. This book is funded in part by a grant from the Treaty Commission of British Columbia, whose role in educating the public is partially fulfilled by it.

This book is the first to open up treaty-making in British Columbia. McKee does a credible job of pro-

viding information concerning the treaty-making process without trying to convince the reader of the correctness of any one approach. He tackles his subject in a straightforward manner, beginning with background and issues to be negotiated, and then going on to consider the process of treaty-making itself, speculate on its future, and to provide conclusions in a positive, albeit cautious, tone. The issues to be negotiated are represented by specific examples (e.g., with regard to the Sechelt and the Nuu'chah'nulth) of some of the main issues: forms of self-government, acknowledgment of alienated lands and resources, economic development initiatives, and greater role for Aboriginal participation in natural resource management. In his discussion of the treaty-making process McKee deals with such problems as secrecy, third-party representation, costs, and government protection of public interest as well as Mel Smith's position that there should be a 5 per cent limit on negotiated land and a blanket extinguishment of Aboriginal rights. He enables both Aboriginals and non-Aboriginals to have confidence that the process can produce treaties that are legitimate. McKee raises questions concerning how to address issues that emerge from the treaty process and the new institutions created by it: who will evaluate treaty outcomes? will the benefits be equally distributed within the Aboriginal community? how will the political climate help or hinder the process? will Aboriginal frustrations with the treaty process and outcomes be reduced enough to ward off protests? The conclusion provides a nice summary and could stand by itself. It is accessible enough for a

layperson to read while referring back to specific chapters for more detail. Most useful are the appendices, consisting of the 1991 recommendations of the British Columbia Task Force, a listing of First Nations organizations participating in treaty negotiations as of April 1996, and a chronology of events that have contributed to creating and pacing the treaty-making process in British Columbia.

McKee does not provide a framework that renders his evidence compelling in the face of constitutional experts who maintain that Aboriginal title does not exist. As he merely cites the "heavyweight" authors who write in support of First Nations treaty issues rather than the facts behind their positions, McKee cannot adequately challenge the assumptions that underpin legal judgments and common-sense knowledge.

Asch's and McKee's books provide timely and important discussions about historical treaties and modern treaty-making. The need to understand economic relationships in the context of legal contracts that are (re)-negotiated from time to time is a fact of capitalist society. Understanding social relations as contracts rather than as institutional structures is a relatively new phenomenon. Asch and McKee provide insight into why and how this is happening with respect to the relationship between Aboriginal peoples and the federal and provincial governments of Canada. These two books are recommended reading in an era in which legal relationships between Indigenous peoples and states are de/reconstructing at a rapid pace, both internationally and next door.