KIRK N. LAMBRECHT, *ABORIGINAL CONSULTATION, ENVIRONMENTAL ASSESSMENT, AND REGULATORY REVIEW IN CANADA* (Regina: University of Regina Press, 2013)

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This book grapples with one of the intricate legal questions of our time: how to address the overlap of Aboriginal¹ rights, Treaty rights and Aboriginal consultation on one hand, and the work of environmental tribunals on the other. Kirk Lambrecht's bold proposition is that environmental assessment and regulatory review tribunal processes can be integrated to both operate efficiently and to serve the goal of Aboriginal reconciliation. Lambrecht, a lawyer with over 30 years of experience, has skillfully crafted a treatise with the practitioner's perspective in mind and sets out an argument that simply and meaningfully achieves this purpose. However, the book falls short of integrating existing scholarship and Aboriginal perspectives as to why the proposed approach would serve the aspirational promise of reconciliation.

The book locates its argument in a pragmatic landscape, suggesting that, like environmental assessment and regulatory review, Aboriginal consultation is best understood as a "process," albeit one that is constitutionally protected. The author rightly observes that environmental assessment and regulatory review cannot achieve reconciliation on all Aboriginal matters. He sets out a model for integrating Aboriginal consultation into the tribunal process, suggesting that it is a "logical extension of Supreme Court jurisprudence involving the capacity of higher-level tribunals to consider constitutional issues."² He argues that the function of Aboriginal consultation is not limited to conducting or assessing the adequacy of Crown consultation. Instead, he proposes that information-gathering on the significance of project impacts on Aboriginal peoples should occur at the planning stages of a robust environmental assessment and regulatory review process, rather than having Crown consultation at the early project planning stage, which he suggests may be premature, duplicative or result in delays.³

Practitioners, educators and scholars will appreciate the comprehensive summary of the basic principles of Aboriginal and treaty rights included in Chapter 2, which includes a systematic history of constitutional developments, Métis rights and treaty rights under historical numbered treaties, including the legal implications of *Natural Resource Transfer Agreements*. Likewise, the book provides a compact description of the fundamental principles of environmental assessment and regulatory review in Chapter 3, including the essential functions of regulatory review processes where major projects are undertaken by business or government. It locates environmental assessment and regulatory review as part of the planning function that is mandated in legislation as a precondition to approval in many jurisdictions.

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¹ I use the terms "Aboriginal" and "Indigenous" interchangeably to refer to contemporary persons whose ancestors first lived on the land now known as Canada prior to the occupation of European settlers. I use the term "Indian" in reference to lands identified as "bands" under the *Indian Act*, RSC 1985, c I-5.

² Kirk N Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) at 113.

³ *Ibid* at 119-120.

The book capably details two multifarious case studies involving the National Energy Board (NEB), an independent tribunal exercising quasi-judicial function and serving an advisory role only, with final decision-making authority resting with the Governor in Council. Lambrecht selects the NEB as a case study based on its engagement in significant project development, its comparative transparency, and the generous judicial consideration of its role and function. Chapter 5 first sets out the legal review processes conducted by the NEB and other tribunals in relation to the Mackenzie Gas Project, resulting in a set of “regulatory roadmaps,” which “have produced a complex array of assessment and regulatory bodies.”⁴ The NEB ultimately recommended that the project proceed, despite claims from some Aboriginal groups that the environmental assessment and regulatory processes were inadequate. Lambrecht’s second case study involved the Alberta Clipper Keystone and Southern Lights Interprovincial Pipelines. The Federal Court of Appeal concluded that the NEB did not have to conduct or consider the adequacy of Aboriginal consultation. Instead, a challenge to the adequacy of Aboriginal consultation could be brought before a court.⁵ These case studies illustrate the tangled and overlapping terrain within which Aboriginal rights, Treaty rights and Aboriginal consultation, environmental assessment and regulatory review processes operate, and the need for a more cogent and effectual approach.

Lambrecht posits that “many hands serve the purposes of reconciliation” at multiple stages of the development planning process, but ultimately offers pragmatic justification for its thesis, most notably the advantage of multilateral dialogue.⁶ The arguments are rooted in relevant Supreme Court of Canada jurisprudence, focusing on consultation and accommodation in regard to numbered treaty lands in both historical (*Mikisew Cree First Nation*) and modern (*Little Salmon/Carmacks First Nation*) treaty cases, and the role of statutorily mandated commissions in assessing project impacts on Aboriginal rights (*Rio Tinto v. Carrier Sekani Tribal Council*). Practitioners of regulatory and environmental law can reliably use this book to understand current Aboriginal case law from the highest court on the nuances relating to consultation and accommodation.

Aboriginal law and other scholars may find wanting the lack of academic consideration in regard to honour of the Crown and administrative law in the context of tribunals. Other than reference to Brian Slattry’s work related to the duty to consult and accommodate as embodying a “generative” constitutional order,⁷ the book does not consider previously published scholarship on the same themes.⁸ The book acknowledges the arguments asserted by many Aboriginal groups that the duty to consult should not simply be woven into the fabric of regulatory bodies and tribunals, but should instead exist as a separate process to be worked out on a case-by-case basis.⁹ However, Lambrecht does not make reference to the significant concerns related to administrative consideration of Aboriginal claims. For example, in regard to the Enbridge Northern Gateway Project, an Enbridge proposal that would involve

⁴ *Ibid* at 80.

⁵ *Ibid* at 105.

⁶ *Ibid* at 11.

⁷ *Ibid* at 71.

⁸ See eg Lorne Sossin, “The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights” (2010) 23 Can J Admin L & Prac 93; Janna Promislow, “Irreconcilable?: The Duty to Consult and Administrative Decision Makers” (2013) 26 Can J Admin L & Prac 251; and Michael McClurg, “A Pragmatic Approach: The Nunavut Wildlife Management Board and the Duty to Operationalize Consultation” (2010) 9 Indigenous LJ 77.

⁹ *Supra* note 2 at 10.

the construction of two 1,170 kilometre-long pipelines carrying bitumen over Indian reserves and Aboriginal traditional territory, Tyler McCreary states that, “Indigenous considerations continue to be selectively included, considered, and accommodated within administrative review processes. [R]ather than empowering Indigenous people and respecting their traditional knowledge, the limited politics of inclusion within formal review proceedings forecloses on real possibilities of addressing power relations in the colonial present.”¹⁰

Moreover, many readers may be uneasy with the suggestion that there is a “natural relationship”¹¹ between Aboriginal communities and environmental assessment/regulatory review processes as each considers impacts on future generations, and would appreciate further elaboration on the claim that industry “has developed expertise in liaison with Aboriginal communities.”¹²

Lambrecht sidesteps the opportunity to place this debate within a larger context of Aboriginal reconciliation, asking how regulatory processes can be rethought to fully engage Aboriginal perspectives. For example, Glen Coulthard, a political scientist, remarks that Canadian politics of reconciliation and recognition may ultimately undermine Indigenous worldviews and their original claims.¹³ Coulthard writes, “over the last forty years Indigenous peoples have become incredibly skilled at participating in the Canadian legal and political practices... [O]ur efforts to engage these discursive and institutional spaces to secure recognition of our rights have not only failed, but have instead served to subtly reproduce the forms of racist, sexist, economic, and political configurations of power that we initially sought, through our engagements and negotiations with the state, to challenge.”¹⁴ While I appreciate that Lambrecht’s book focuses on a discrete thesis - which he capably delivers - reference should have been made to the important contextual environment within which the book’s subject lies.

This aptly named book is a meaningful contribution to regulatory, environmental and administrative law in the Canadian context. It would be a beneficial inclusion in any course syllabus concerned with Aboriginal, administrative or financing law, or land use planning, and will be an indispensable resource for practitioners engaged in these areas of law. Lambrecht’s work will hopefully inspire a broader discussion amongst members of the Aboriginal community, regulatory bodies, legal practitioners and academia on the assorted implications of his proposed model.

¹⁰ Tyler McCreary, “Beyond Token Recognition: The Growing Movement Against the Enbridge Northern Gateway Project” in Toban Black et al, eds, *A Line in the Tar Sands* (Toronto: Between the Lines Press, 2014) 146 at 153.

¹¹ *Supra* note 2 at 39.

¹² *Ibid* at 47.

¹³ Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 78.

¹⁴ *Ibid* at 179.