Book Review
*Compte rendu*

*Aboriginal Consultation, Environmental Assessment and Regulatory Review*

By Kirk N Lambrecht QC
University of Regina Press, 2013, 208 pages

Reviewed by Brian McLeod*

In his 2013 book *Aboriginal Consultation, Environmental Assessment and Regulatory Review in Canada,* Kirk Lambrecht states the book's simple premise in its opening paragraph:

> The fundamental proposition here is that Aboriginal consultation and environmental assessment/regulatory review of projects by tribunals can be integrated so as to operate effectively and serve the goal of reconciliation … I propose that they can be integrated because each is a *process* that informs decision making. I offer proof through a survey, or observation, of the constitutional law of Aboriginal and Treaty rights in Canada, the law of Aboriginal consultation, and the function of tribunals in environmental assessment and regulatory review. I then explore integration via case studies involving the National Energy Aboriginal Consultation. In the conclusion, I discuss observations of general application and some outstanding questions.[1]

The book provides an excellent technical summary of these three processes – Aboriginal consultation, environmental assessment and regulatory review – from the point of view of someone who has spent a long time within government who would like these processes to work better and in a considerably more integrated way. The book also includes a very complete table (up to 2013) of the relevant Supreme Court and provincial cases, statutes, constitutional provisions and tribunal decisions associated with the three processes and to Aboriginal law in general. He illustrates his main thesis with some well-chosen case studies of National Energy Board tribunals.

While a number of major Supreme Court of Canada judgments decided since 2013[2] might affect Lambrecht's argument to some extent, the book nonetheless does a good job of establishing the landscape of Aboriginal law in which the processes of Aboriginal consultation, environmental assessment and regulatory review operate.

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1 (Regina: University of Regina Press, 2013) [emphasis in the original].

2 See e.g. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 or *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 257.

Those who are intrigued by the premise Lambrecht lays out in the first paragraph of Chapter One should appreciate the book. His main concern is that from an administrative point of view Aboriginal consultation, environmental assessment and regulatory review are mutually out of step to an unnecessary degree and, within a narrowly limited framework, he lays out a set of potential technical solutions to mitigate some of the confusion and redundancy in the existing system.

Other people (like me), who may have been led by the title to hope the book might give us some deeper insight into potential solutions to the deep historical and structural problems in Indigenous/non-Indigenous relationships in Canada, will be less satisfied.

While it may be a bit unfair to critique a book for what it does not say, I think it is nonetheless useful to underline its deficiencies. Stated briefly, while Lambrecht's book makes frequent reference to relationship and reconciliation, it does not address these issues broadly enough to really help advance relations between Indigenous groups and government or business.

For a number of years I worked with Inuit organizations negotiating various aspects of implementation of the Nunavut Land Claims Agreement with government or business. A colleague and veteran negotiator with whom I worked closely often posed the following question in our internal deliberations: "Is the Claim a floor or is it a ceiling?" The possible answers to this deceptively simple question encapsulate the chasm between Indigenous and non-Indigenous approaches to relationship and reconciliation.

As a broad generalization, Indigenous groups see treaties as a floor – the foundation on which to build an ongoing collaborative relationship. They have therefore been continually hurt and angered by government's risk-averse approach in its interactions with them. As a second broad generalization, governments see the same treaties as a ceiling; generally speaking they will look for ways to limit government actions, obligations (and of course expenditures) to the minimum that each department thinks it can offer under the treaty or agreement in question. In nearly twenty years of experience with Inuit and First Nations organizations, and with governments at the territorial, provincial and federal levels I have seen only a few instances in policy, program delivery or in individual civil servants' performance that contradict these generalizations.

From this point of view Lambrecht's book is pretty much all ceiling – his perspective is almost entirely that of Euro-Canadian law and

administrative practice. He conveys a strong sense that the mechanisms of environmental assessment/regulatory review tribunals are sufficient for relationship building and reconciliation. Further, he seems to indicate that Indigenous groups should have faith in the tribunal system, backed up by the courts, as courts can "ensure that planning and approval functions in any given context operate according to law and reasonably in the circumstances."[3,4] I submit that for a large number of Indigenous groups in Canada such faith has not been established.

On the topic of relationship he does make some effort to delineate a comprehensive approach to relationship building, stating, "relationships with Aboriginal peoples can be positively developed throughout the development process for projects."[5] He also understands that creating relationships is a long-term process, that "integration of Aboriginal consultation into project planning, approval, and control is … not a one-time activity, but a distributed and ongoing dynamic."[6] He describes well and intricately the obligations of government in conducting Aboriginal consultation, environmental assessment and regulatory review, and he praises the undeniable virtues of common law as a means developed by the dominant culture to address complex disputes. But he does not reflect to any significant degree on whether or not these administrative and judicial processes are sufficient to serve Indigenous/non-Indigenous relationship(s) fully, or if any supplementary institutional and interpersonal processes might be needed to help address the deep historical challenges of relationship and reconciliation. If we accept the premise that native groups are generally more interested in developing long term respectful working relationships than fighting their way to reconciliation through the courts, it should be obvious that the often unilateral and adversarial aspects of the environmental assessment/regulatory review tribunal process and of the court process can be extremely corrosive to the establishment of productive living relationships.

With respect to the idea of reconciliation, the book has none of the emotional and rhetorical scope of the current national project of

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3 Lambrecht, *supra* note 1 at 13: "Tribunal proceedings are often described as adversarial and therefore unacceptable by some Aboriginal groups. However, the law provides that administrative law principles are material to the duty to consult. Tribunal process may confer extensive procedural fairness and natural justice rights on Aboriginal parties to a tribunal proceeding, including the right to obtain information from the proponent, present witnesses, make motions, cross-examine other witnesses, present arguments, receive reasons for a decision, and appeal any ultimate determination. These are powerful tools. All are evident in the case studies."

4 *Ibid* at 14.

5 *Ibid* at 9.

6 *Ibid*.

reconciliation, prompted by the work and findings of the Truth and Reconciliation Commission. Instead, it approaches reconciliation from a narrower viewpoint, occasionally verging on mere compromise. For example:

> Reconciliation with Aboriginal peoples can be advanced by project proponents themselves in the environmental assessment and regulatory review process, just as proponents themselves can reconcile environmental protection with project development in these processes.[7]

I will dwell no longer on Lambrecht's failure to meet my expectations. On its own terms, his book provides many useful insights into the workings of the processes of Aboriginal consultation, environmental assessment and regulatory review. And, with respect to his basic plaint "Why can't we just simply work together to integrate and simplify these processes?" I, along with anyone who has had extensive dealings with any level of Canadian government, feel his pain.

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7 *Ibid* at 11.