A Book Review of Kirk Lambrecht's

Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada

Kaitlyn S. Harvey*

Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada[1] by Kirk N. Lambrecht is a valuable resource to those interested in learning about the topics in its title. Its purpose, however, is to describe and support Lambrecht's proposal for "how Aboriginal consultation can be *practically* integrated with environmental assessment and regulatory review processes of tribunals to foster relationships among Aboriginal peoples, project developers, tribunals, the Crown and the courts."[2] Although Lambrecht's intention of fostering relationships between parties is admirable, this review shows that the proposed integrated framework he puts forth should be approached with some caution; conflicting perspectives regarding issues such as how the duty to consult is to be carried out are notably absent from his analysis. Lambrecht may have considered these issues to be beyond the scope of his book. I argue, however, that any framework that is proposed to deal with Aboriginal law issues should explore both the "support for" and "opposition to" aspects upon which that framework is built.

As mentioned, Lambrecht's book offers readers a useful summary of environmental assessment [EA] and regulatory review [RR] processes, the development of Aboriginal and Treaty rights jurisprudence, and the law on Aboriginal consultation. He succinctly reviews these complex areas of law with enough depth to give readers a basic understanding of their relevant functions, processes, frameworks and limitations, and uses examples to demonstrate how these areas of law interact with one another and are applied in practice. Lambrecht also highlights several key issues within EA, RR and

* Kaitlyn Harvey is currently an LLM student at the University of Saskatchewan, from which she also holds a JD and BA. She is a Métis woman from Prince Albert, SK, who studied environmental assessment and regulatory review processes throughout her time at the U of S, and has also worked for Environment Canada as well as in private practice.

1 Kirk N. Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) at XXV [Lambrecht, "Aboriginal Consultation, EA, and RR"].

2 *Ibid* at XXV [emphasis in original].

consultation processes, which he argues may be addressed through the adoption of an integrated process by tribunals such as the National Energy Board of Canada (NEB). He argues that his integrated environmental assessment/regulatory review/Aboriginal consultation (EA/RR/Consultation) framework provides a "multi-faceted relationship-building dynamic [which] can advance reconciliation with Canada's Aboriginal peoples," and a means for developing a "consensus or doctrine for how the duty to consult may be applied in project development."[3] Finally, Lambrecht asserts that an integrated process is necessary because the common law approach promotes "adversarial perspectives,"[4] and he argues that tribunals provide the preferable forum for addressing the issues he highlights. His proposed framework, he suggests, offers "a practical signpost on the long path to reconciliation."[5]

Although Lambrecht presents his proposed integrated framework as providing an efficient and reconciliatory means of satisfying the requirements of EA/RR processes and the Crown's duty to consult, a thorough review of the book finds that his proposal focuses more on addressing the issues that EA/RR and consultation raise from the proponents' side of the debate. While the integrated EA/RR/Consultation framework he advocates may provide some of his anticipated benefits, Lambrecht neglects to address a number of key issues. He assumes that regulatory and industry-led processes are the best processes in which to fulfill the duty to consult and address the concerns of Indigenous peoples affected by natural resource developments. His reliance on tribunals like the NEB to apply his proposed EA/RR/Consultation process, coupled with his (arguably) insufficient attention to the concerns of Indigenous peoples, has the potential to increase conflict and disagreement between these interests. The danger in this approach seems, to me, a potential step backward on the path to reconciliation.

Despite the critical tone of these comments, however, they are not meant to take away from the role of the book as a valuable resource for anyone interested in these areas of law. Indeed, in this chapter-by-chapter review of the book, I highlight only some of the ways in which Lambrecht's book may be a valuable resource to people interested in these areas. Still, I also look at each chapter individually in order to provide specific examples of where complications with his integrated process should be recognized and addressed.

3 *Ibid* at XXV-VI.
4 *Ibid.*
5 *Ibid.*

In his first chapter, Lambrecht begins by stating that the "fundamental proposition" of his book "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."[6] He argues that consultation requirements with Indigenous peoples and EA/RR can and should be combined "because each is a *process* that informs decision making,"[7] and that such integration would increase efficiency by reducing duplication of efforts and associated costs.[8]

To demonstrate how integration can occur, Lambrecht provides a number of models to show readers how regulatory review and corporate business models might be aligned and integrated with the functions of a tribunal.

Lambrecht then explains that, through the integration of project development processes, "relationships with Aboriginal peoples can be positively developed" if the duty to consult is delegated to and discharged by tribunals.[9] Since tribunals can consider EA/RR processes and are often empowered to consider the potential impacts of natural resource development projects on Indigenous peoples, Lambrecht argues that not only is it "consistent with the honour of the Crown to rely on such regimes to fulfill this statutory mandate,"[10] but that such integration will ensure the duty to consult is fulfilled while providing Indigenous peoples who are affected by a project with "extensive procedural fairness and natural justice rights."[11]

While I accept tribunals may provide a forum for satisfying the requirements of EA/RR and ensuring the duty to consult is satisfied, I must raise a number of concerns regarding Lambrecht's integrated EA/RR/Consultation framework. One of the most significant of these concerns stems from Lambrecht's limited discussion of Indigenous opposition to, and concerns with, an integrated EA/RR/Consultation process that is carried out entirely by a tribunal. Such limited engagement with Indigenous perspectives regarding the issues of EA/RR and consultation, I suggest, unfortunately undermines the arguments Lambrecht makes in favour of his proposed approach.

For example, Lambrecht recognizes early on that Indigenous "engagement in

6 *Ibid* at 1.
7 *Ibid* [emphasis in original].
8 *Ibid* at 3.
9 *Ibid* at 9-10.
10 *Ibid* at 10.
11 *Ibid* at 14.

environmental assessment or regulatory review is not a certainty."[12] He notes that some Indigenous groups describe "tribunal proceedings to be adversarial and therefore unacceptable," while other groups "assert the *right* to be consulted by the Crown in a process separate from Aboriginal consultation by a proponent and preceding environmental assessment or regulatory review."[13] Lambrecht notes this reflects issues of "fundamental disagreement"[14] with respect to how Indigenous peoples want to engage in EA/RR processes or how they prefer consultation to occur. Yet instead of exploring why Indigenous peoples may not participate in these processes, why they may find tribunal proceedings as adversarial and unacceptable, or whether alternative means of engaging in consultation may exist that all parties find acceptable, Lambrecht downplays the issues and simply asks readers, "[i]f Aboriginal peoples do not engage in the tribunal process to express their outstanding concerns about a project, then who will communicate to the tribunal such concerns?"[15] He responds to his own question by urging Indigenous peoples to "engage in tribunal planning processes where these are intended to gather and assess project impacts on Aboriginal rights or Treaty rights."[16]

Lambrecht's question and response reveal a seemingly paternalistic, Eurocentric perspective upon which his integrated process is based: that pre-determined EA/RR processes created by non-Indigenous institutions are best-suited for making decisions concerning Indigenous peoples, despite "fundamental disagreement" and even open opposition. However, this opposition cannot be overlooked or undermined, and doing so will only undermine reconciliation efforts.

A prime example of how Lambrecht's proposed process is exceedingly one-sided is the fact that the question he poses assumes that a tribunal is the only appropriate decision-making authority. Lambrecht does not mention that, across Canada, many Indigenous communities, tribal councils, grand councils, and other representative agencies already have their own consultation and land use policies. Lambrecht also fails to discuss opposition by Indigenous peoples to policies currently proposed by the government *primarily because* the government did not consult Indigenous peoples in preparing them.[17] The failure of, *inter*

12 *Ibid* at 13.
13 *Ibid* at 10, 14 [emphasis in original].
14 *Ibid* at 11.
15 *Ibid* at 13.
16 *Ibid* at 13-14.
17 Chief Marvin Yellowbird, "Treaty 8 Alberta Chiefs' Position Paper on Consultation" *Confederacy of Treaty Six First Nations* (30 Sep 2010) online: <http://www.treaty8.ca/documents/T6%20Consultation%20%20

alia, governments, regulatory bodies, and legal academics alike to consider Indigenous peoples' perspectives when developing policies and processes that affect them is a central issue that lies at the heart of reconciliation.[18] Therefore, any solutions proposed regarding how best to navigate matters of EA, RR, and consultation with Indigenous peoples *must* explore opposing perspectives. While the integrated process Lambrecht puts forward may ultimately increase efficiency for proponents and project decision-makers, it is not the only way to do business, and opposing or alternative perspectives are noticeably absent from his book.

A final concern with the opening chapter is that it does not offer any practical suggestions regarding how EA/RR and consultation is to be integrated, undertaken, and assessed by a tribunal.[19] Instead, the chapter is focused on streamlining EA/RR/Consultation processes to increase efficiency.[20] While Lambrecht does suggest that Indigenous peoples can be accommodated through aspects of procedural fairness, he does not address issues such as: financial and human capacity to participate in EA/RR processes (i.e. who participates and who pays for participation); the extent to which the tribunal will (or is able to) incorporate traditional or community knowledge into their EAs; or whether, and to what extent, affected communities will be able to participate in EA/RR decision-making processes. Lambrecht essentially contends that it will be sufficient if the tribunal offers Indigenous groups a forum in which to raise their concerns. Despite his best intentions, Lambrecht's integrated framework thus offers yet another top-down, potentially-adversarial approach to project development and impact management that is not conducive to reconciliation — it is likely to lead to further disagreement and opposition instead.

The second chapter of Lambrecht's book provides a lot of relevant and useful information regarding Aboriginal law in Canada. Unfortunately, Lambrecht

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Position%20Paper.pdf> (this 30-page paper, which Lambrecht references, is supported by elders and chiefs from First Nations in Treaties 6, 7, and 8, who oppose Alberta's *First Nations Consultation Policy on Land Management and Resources Development* because the government failed to, *inter alia*, work *with* First Nations to develop an appropriate consultation process).

18 Although published after Lambrecht's text *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada*, Arthur Manuel and Grand Chief Ronald M. Derrickson discuss these and other issues in *Unsettling Canada: A National Wake-Up Call* (Toronto: Between the Lines, 2015).

19 Lambrecht does provide some guidance on this point in chapter 6; however, his suggestions do not go beyond a consideration of the legislation that establishes the tribunal and a contextual application of the *ratio decidendi* in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

20 Lambrecht, "Aboriginal Consultation, EA, and RR", *supra* note 1 at 3.

starts out on the wrong foot when he tells readers that "[u]nderstanding the basic distinction between Aboriginal rights and Treaty rights in Canada is the first step in understanding how project development can affect such rights and therefore the first step in building relationships with Aboriginal peoples whose rights are integral to their identities."[21] While I agree that a developer must understand the types of Aboriginal rights that may be affected by a project, I disagree that this should be the very "first step" a proponent takes "in the relationship-building exercise associated with project development."[22] As essential as this understanding is, we cannot assume that a proponent knows *why* Indigenous peoples in Canada possess Aboriginal and Treaty rights or that the proponent understands the *significance* of those rights to a community's culture, especially in a time of increasing international investment and development. Indeed, if the goal is actually to foster meaningful relationships, a proponent's first steps should involve learning about the communities that will be affected by a development. Instead of being primarily concerned with which Aboriginal rights may be infringed upon, the proponent should first learn about the community and its culture, history, and its members' connections to the land. Without these basic understandings, attempts at reconciliation are unlikely to be successful.

Despite starting off on the wrong foot, Lambrecht provides a concise, well-written summary of Aboriginal law and Treaty rights in Canada that contains all of the essential information, including maps, which readers need to understand the issues at hand. Lambrecht addresses basic principles that are applicable to Aboriginal, Treaty, and Métis rights, and gives an overview of important legal and factual considerations of, and distinctions between, modern and historic/numbered Treaties. Lambrecht also recognizes the chapter's general purpose and its limitations, yet he explores this complex area of law with appropriate depth to make it practical and understandable.[23]

Lambrecht's third chapter, like the one before it, provides a general yet thorough and practical introduction to its topic of environmental assessment and regulatory review processes in Canada. Lambrecht effectively examines the source jurisprudence, legislation, and provincial-federal agreements that have

21 *Ibid* at 15.

22 *Ibid.*

23 It is worth mentioning that since the time of publication, the Supreme Court of Canada has released a number of decisions that would be appropriate to add to this chapter, such as: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2013] SCCA No 215; and, *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623.

contributed to the development of EA/RR in Canada. He also uses case studies to illustrate the implementation of joint provincial-federal project reviews and to demonstrate how provincial EA authorities have coordinated with federal tribunals to "harmonize" their overlapping processes.[24]

Lambrecht states that the purpose of EA/RR is "to contribute to sustainable development," which he defines as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[25] Given the focus of sustainable development on the needs of future generations, and Indigenous peoples' concerns with protecting the land for future generations, Lambrecht reasons that "there is a natural relationship between Aboriginal consultation and the law of environmental assessment and regulatory review."[26]

Although this reasoning is sound in some respects, I would argue that the goal here is not to align legal processes for the sake of expediency. Although consultation is admittedly a "procedural obligation,"[27] it is also an obligation which stems, in essence, from the recognition by Canadian courts that Indigenous peoples have lived and relied on the land since time immemorial. Parliament has constitutionally protected the Aboriginal rights and interests of Indigenous peoples in Canada such that consultation is required when there are risks of adverse effects on those rights. Yet, much of the developments involved in typical EA/RR processes are based on the extraction of non-renewable natural resources, putting those constitutionally-protected rights and interests directly at risk; entire habitats are often lost or altered when a natural resource development project is built. Lakes are converted into tailings ponds, forests are cleared, mountaintops are leveled, and earth is moved so that minerals below can be extracted. Such developments can cause irreversible damage not only to the land, but also to the people and cultures that depend upon that land. Developments that are subject to EA/RR processes — and the tribunals that oversee these developments — are often inherently irreconcilable with the practice of Aboriginal rights in those affected lands. "Sustainable development" does not mean "sustainable practice of Aboriginal rights"; the parties involved in and affected by projects that have the potential to significantly undermine the practice of Aboriginal rights will continue to disagree with one another

24 Lambrecht, "Aboriginal Consultation, EA, and RR", *supra* note 1 at 45-46.

25 *Ibid* at 39.

26 *Ibid*.

27 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

unless concerns are addressed and decision-making is shared.

This situation is apparent when one looks at the increase in public opposition by Indigenous peoples regarding the development of natural resources in their territories, especially since the growth of the Idle No More movement. Indigenous groups from across Canada have recently been involved in large protests against proposed pipelines such as Northern Gateway[28] and Energy East.[29] With less national attention, Indigenous trappers have been blocking roads in La Loche, Saskatchewan, to prevent exploration by tar sands and uranium exploration companies.[30] These are just a few examples, and it seems like every month more and more headlines are made of another protest, blockade, or petition opposing developments that directly conflict with Aboriginal rights and the rights of future generations. Of course, not all Indigenous communities oppose all industrial development, and many of them do want to work with proponents to develop natural resources. However, the fact remains that people are increasingly opposing developments that are potentially irreconcilable with the practice of Aboriginal rights. As such, it seems that the "natural relationship" between sustainable development and Aboriginal consultation that Lambrecht refers to may not lead to the smoother, more expedient process he envisions.

Another concern with this chapter is that it fails to address concerns raised over the scope of a tribunal's EA/RR processes, its susceptibility to legislative changes, and how these issues may affect Lambrecht's EA/RR/Consultation process.

Lambrecht points out that "legislation may limit or define the scope of the inquiry delegated to a tribunal or to any particular branch of government during environmental assessment and regulatory review," [31] and he refers, as an example, to the environmental effects listed in the *Canadian Environmental*

28 Tiffany Crawford, "More than a thousand protesters rally against Northern Gateway pipeline in Vancouver", *The Vancouver Sun* (10 May 2014), online: <http://www.vancouversun.com/news/More+than+thousand+protesters+rally+against+Northern+Gateway+pipeline+Vancouver/9827485/story.html#ixzz3LZ7OK4X>. See also: Jonathan Hayward, "Thousands Protest Northern Gateway Pipeline", *The Canadian Press* (22 October 2012) online: CTV News <http://www.ctvnews.ca/canada/thousands-protest-northern-gateway-pipeline-1.1005815>.

29 "Energy East Pipeline Proposal Meets Opposition in Winnipeg", *Red Power Media* (8 December 2014) online: <https://redpowermedia.wordpress.com/2014/12/08/energy-east-pipeline-proposal-meets-opposition-in-winnipeg/>.

30 "Trappers block northern Sask. road, says industry must consult with them", *The Canadian Press* (25 November 2014) online: Global News <http://globalnews.ca/news/1690912/trappers-block-northern-sask-road-says-industry-must-consult-with-them/>.

31 Lambrecht, "Aboriginal Consultation, EA, and RR", *supra* note 1 at 43.

Assessment Act, 2012, (*CEAA 2012*)[32] that are subject to EA/RR.[33] Lambrecht seemingly recognizes that Parliament determines a tribunal's jurisdiction, including the information or effects a tribunal can consider, as well as a tribunal's capacity to make decisions regarding, for example, the adequacy of Aboriginal consultation. What he does not mention, however, is that a tribunal's powers may be narrowly construed and are subject to sudden — and significant — change.

In 2012, for example, the *CEAA 2012*, as part of the controversial omnibus Bill C-45, the *Jobs, Growth and Long-term Prosperity Act*,[34] repealed and replaced the previous *Canadian Environmental Assessment Act* (*CEAA*)[35] in its entirety. The changes in the *CEAA 2012* were not welcomed by many Canadians, and for some the *CEAA 2012* represented "the slicing and dicing of environmental protection and any remaining trust with aboriginal peoples."[36] It is unclear to what extent, if any, Indigenous peoples in Canada contributed to the creation of the *CEAA 2012*, but some argue that the regulations were created with "very limited [public] consultation" and only involved "feedback from proponents of projects and industry associations."[37] Furthermore, the changes between the *CEAA* and the *CEAA 2012* signified a shift from determining the need for an EA based on a "trigger" approach, to a "project-based" approach, with the result that "significantly fewer environmental assessments will be required" under the *CEAA 2012*.[38] Indeed, Bill C-38 has been referred to as being "as much about speeding up decision-making on resource projects like oil sands pipelines and new mines across the country, as it is about government finances."[39] This example shows just how quickly and significantly legislation can change; accordingly, Lambrecht's proposed EA/RR/Consultation process also might be affected by

32 *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*].

33 Regulations pursuant to the *CEAA 2012* identify physical activities that will be subject to an EA/RR. *Regulations Designating Physical Activities*, SOR/2012-147.

34 Canada, Bill C-45, the Jobs and Growth Act, 2012, 1st Sess, 41st Parl, 2012, Chapter 31 (assented to 14 December 2012).

35 *Canadian Environmental Assessment Act*, SC 1992, c 37.

36 Heather Scoffield, "Omnibus Budget: Bill C-45 To Deliver Profound Changes For Environment, Natives", *The Canadian Press* (21 October 2012) online: Huffington Post <http://www.huffingtonpost.ca/2012/10/21/omnibus-budget-bill-c-45_n_1997300.html>.

37 "Legal Backgrounder: Canadian Environmental Assessment Act (2012) — Regulations", Legislative Comment on *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, Ecojustice (August 2012) online: <http://www.ecojustice.ca/wp-content/uploads/2015/03/August-2012_FINAL_Ecojustice-CEAA-Regulations-Backgrounder.pdf>.

38 *Ibid.*

39 Shawn McCarthy, "Budget bill gives Harper cabinet free hand on environmental assessments", *The Globe and Mail* (9 May 2012) online: <http://www.theglobeandmail.com/news/politics/budget-bill-gives-harper-cabinet-free-hand-on-environmental-assessments/article4105864/>.

such changes, and the author could have more fully explored these possibilities.

In contrast to chapters one and three, Lambrecht's fourth chapter strikes me as much less contentious. In chapter four, Lambrecht provides a well-organized overview of the law of Aboriginal consultation that both Indigenous communities and proponents will find useful for assessing what level of consultation and accommodation may be appropriate for a given situation. Lambrecht provides succinct case summaries and draws from them key details, examples, and lessons that can be practically applied in the future. Although these well-delivered case summaries should benefit readers unfamiliar with the law on Aboriginal consultation, the relevance of these summaries to Lambrecht's overall proposition — that is, the need for an integrated EA/RR/Consultation method — is not made as clear as it could be.

In his fifth chapter, Lambrecht looks at several decisions by tribunals dealing with Aboriginal consultation issues, including the Mackenzie Gas Project (MGP) and the Alberta Clipper, Keystone, and Southern Lights Interprovincial Pipeline projects (the "Pipeline Cases"). Although the MGP case study seemingly provides a more positive example of a reconciliatory approach that could be aligned with his integrated EA/RR/Consultation process, Lambrecht focuses on the Pipeline Cases to support his proposal.

The MGP case study involves parties negotiating a modern land claim agreement and demonstrates shared decision-making between several territorial, federal, and Indigenous organizations with planning, approval, and regulatory capacities.[40] By working together, these organizations established a joint review panel (JRP) and collectively drafted the JRP's terms of reference "specifically to emphasize Aboriginal interests," while the NEB was designated as a separate regulatory review body.[41] The responsibilities, scope, and processes of the JRP were determined through organizational cooperation, and the JRP was empowered to investigate the concerns of government, regulatory, and Indigenous organizations. Indeed, Lambrecht himself notes that "[t]he National Energy Board Reasons for Decision point out how Aboriginal consultation by the proponent, and Aboriginal engagement in the JRP and NEB processes,

40 Lambrecht, "Aboriginal Consultation, EA, and RR", *supra* note 1 at 80. The organizations involved in the Mackenzie Gas Project were the: NEB; Mackenzie Valley Environmental Impact Review Board; Mackenzie Valley Land and Water Board; Northwest Territories Water Board; Government of the Northwest Territories; Environmental Impact Screening Committee and Environmental Impact Review Board for the Inuvialuit Settlement Region; Inuvialuit Settlement Region Land Administration; Inuvialuit Game Council; Sahtu Land and Water Board; and, Gwich'in Land and Water Board.

41 *Ibid* at 83.

demonstrably resulted in modifications to the project and contributed to the NEB conclusion regarding the issuance of a Certificate of Public Convenience and Necessity for the project."[42]

However, despite this seemingly positive example of reconciliation between Indigenous groups, government, and industry, Lambrecht focuses on the Pipeline Cases to support his argument that a forum like the NEB is best-suited for applying his proposed integrated EA/RR/Consultation process. According to Lambrecht, the NEB incorporates "post-*Haida*" practices regarding Aboriginal consultation into its EA/RR and decision-making processes,[43] thus enabling the NEB to assess "the significance of project impacts on Treaty rights having regard to the implementation of mitigation measures."[44] Additionally, since the Pipeline Cases demonstrate that the government may rely on the NEB processes to fulfill the duty to consult, he reasons that tribunals like the NEB are the appropriate forums in which to address EA, RR, and consultation issues.

The distinctions between the MGP case study and the Pipeline Cases demonstrate alternative approaches to consultation, accommodation, and reconciliation, yet it is unclear why Lambrecht focuses most closely on the processes in the Pipeline Cases. The NEB operates as a quasi-judicial federal agency in which Indigenous groups may submit evidence for the Board's consideration in public hearings,[45] while the MGP JRP approach brought numerous Indigenous and non-Indigenous organizations together to determine how project assessment and review would proceed — ostensibly providing a much bigger, brighter "signpost on the path to reconciliation." Additionally, the MGP approach helps parties avoid issues that may occur from legislative changes, and inherently provides for consultation with Indigenous peoples. It is also worth mentioning that, although litigation occurred in all four case studies, it did so for very different reasons. Litigation in the MGP case was the result of a First Nation's request to be included in the JRP process, while litigation in each of the three Pipeline Cases resulted from Indigenous groups' opposition to the tribunal's decisions. These distinguishing features in themselves demonstrate that the

42 *Ibid* at 91.

43 *Ibid* at 95, citing to Indian Affairs and Northern Development, Road to Improvement: The Review of the Regulatory Systems Across the North by Neil McCrank (Ottawa: Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, May 2008).

44 *Ibid*.

45 National Energy Board of Canada, "What is the National Energy Board?" (3 October 2014), online: National Energy Board Fact Sheet <https://www.neb-one.gc.ca/bts/whwr/nbfctsht-eng.html>.

MGP approach is more reconciliatory, yet Lambrecht does not make this connection.

In his concluding chapter, Lambrecht argues that his proposed process will allow tribunals to take a contextual approach to the duty to consult that is "embedded in universalism rather than formalism."[46] He contends that "[h]igh-level tribunals charged with responsibility for environmental assessment and regulatory review of projects are well placed to assess project impacts on Aboriginal rights and Treaty rights and respond to those concerns within the ambits of their jurisdiction,"[47] and thus are well-suited to taking a contextual approach to the duty to consult called for by the Supreme Court in *Rio Tinto*. Lambrecht's proposed framework, he argues, "recognizes that the Supreme Court itself attempts to foster reconciliation within an existing framework of democratic institutions,"[48] while enabling tribunals to engage in a "robust" process that allows them to "meaningfully gather and assess the impact of projects on Aboriginal rights and Treaty rights."[49]

While I understand Lambrecht's reasoning that his proposed framework would allow a tribunal to gather information and enable it to engage in a contextual analysis when considering questions of consultation, he ultimately relies on an institution that is fundamentally formalistic. Although he recognizes this fact when he aligns his proposed process with the Supreme Court's attempts at fostering reconciliation within existing frameworks, he does not engage with the topic as thoroughly as he could have. Tribunals, by their very nature, are creatures of legislation, dependent on rules, precedents and categories susceptible to change by outside forces not involved in a particular case. They also serve to streamline and simplify project development and approval processes. Relying on such institutions to apply an integrated EA/RR/Consultation process in an efficient and expedient manner, therefore, may inevitably lead to a formalistic approach that is ultimately unconducive to the end goal of reconciliation. A more in-depth analysis on this point would have been beneficial, especially given the different roles played by the NEB and other organizations in the MGP and Pipeline case studies.

In the final part of this chapter, Lambrecht recognizes that the EA/RR/Consultation process he proposes has limitations regarding types of issues

46 Lambrecht, "Aboriginal Consultation, EA, and RR", *supra* note 1 at 112.
47 *Ibid* at 114.
48 *Ibid* at 113.
49 *Ibid*.

that it can address. He notes that "[b]eyond traditional activities, Aboriginal peoples may have 'broader concerns' that, while raised during environmental assessment and regulatory review of a particular project, are best addressed by other processes."[50] Unfortunately, he does not describe what those "other processes" are, and his proposed process would have Indigenous peoples' concerns confined to "traditional activities." Instead of engaging on this point, however, he discusses the tribunal's ability to give effect to an Indigenous group's procedural fairness rights[51] and, although he recognizes that Indigenous peoples may not be satisfied with his EA/RR/Consultation process, he simply suggests that their broader concerns be dealt with elsewhere.

In conclusion, Lambrecht provides readers with a helpful resource for understanding the general development and application of the law on Aboriginal consultation, Aboriginal and Treaty rights, and environmental assessment and regulatory review processes in Canada. He explores complex topics and delivers them in a coherent, easy-to-digest manner. Throughout his discussions, Lambrecht offers examples and explanations that are practical and insightful, and his book will undoubtedly provide a useful guide to anyone interested in learning about these areas of law.

As I have made clear throughout this review, however, in proposing his integrated EA/RR/Consultation process, Lambrecht fails to adequately consider matters of "fundamental disagreement" which cannot be brushed aside. I have highlighted several issues with his approach, yet its fundamental problem is its assumption that Indigenous peoples ought to accept a pre-determined set of rules in which they have had no hand in drafting, rules which are susceptible to rapid and unilateral change. If Indigenous peoples have not helped create the tribunal that is to make decisions that affect them, how can the tribunal be said to truly represent a reconciliatory process? When one considers the alternative approaches to project-related decision-making that are available, especially in light of the growing opposition to natural resource developments by many Indigenous peoples across Canada, it becomes apparent that Lambrecht's integrated EA/RR/Consultation process would require exploring alternative opinions and suggestions in order for it to meaningfully advance notions of reconciliation.

50 *Ibid* at 109.
51 *Ibid* at 110.