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Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects, by Kinnari I Bhatt

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Book Review



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Abstract

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***Concessionaires, Financiers and Communities: Implementing Indigenous Peoples’ Rights to Land in Transnational Development Projects* by Kinnari I. Bhatt¹**
Ethan Guthro²

The publication of Doctor Kinnari I. Bhatt’s first book, *Concessionaires, Financiers and Communities: Implementing Indigenous Peoples’ Rights to Land in Transnational Development Projects* (“*Concessionaires*”), comes at a time of uncertainty for the field of Aboriginal law in Canada and across the globe. To contextualize the key themes found throughout *Concessionaires*, and to provide a basis upon which my critiques shall be built, it is important to briefly detail recent developments in Aboriginal law in Canada.³

In late 2007, the General Assembly of the United Nations voted to adopt the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁴ Comprised of forty-six articles, this comprehensive, non-binding text details the rights of Indigenous peoples “to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.”⁵ In Canada, Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* was introduced to the House of Commons on 3 December 2020.⁶ This bill—the first step in satisfying campaign promises made by Prime Minister Justin Trudeau and the Liberal Party of Canada in both the 2015 and 2019 election cycles⁷—elicited mixed reactions from Indigenous leaders, legal academics, and the greater public alike. However, the bill was ultimately adopted, receiving royal assent on 21 June 2021, and coming into force immediately thereafter.⁸

¹ (Cambridge University Press, 2020).

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³ Definitions of Indigenous and Aboriginal law may vary depending upon one’s jurisdiction. For the purposes of this review, I have chosen to adopt the well-established Canadian distinction wherein Indigenous law refers to the traditional legal practices of Indigenous nations, while Aboriginal law refers to the constitutionally-enshrined rights of Indigenous peoples.

⁴ GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/Res/61/295 [UNDRIP]. See also United Nations, “United Nations Declaration on the Rights of Indigenous Peoples” (n.d.), online: <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [perma.cc/NE7C-57U9]. Only four countries objected to the United Nations’ declaration at the time of adoption: Australia, Canada, New Zealand, and the United States. As of 2010, each of these countries have reversed their objector status.

⁵ UNDRIP, *supra* note 4 at 4.

⁶ Parliament of Canada, “An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples” (2021), online: <www.parl.ca/LegisInfo/en/bill/43-2/c-15> [perma.cc/UUZ2-QYCB]; Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2020 [Bill C-15].

⁷ Ferdouse Asefi & Erick Laming, “Indigenous Peoples Will Continue to Suffer Under Liberal Minority,” *The Star* (4 December 2019), online: <www.thestar.com/opinion/contributors/2019/12/04/indigenous-peoples-will-continue-to-suffer-under-liberal-minority.html> [perma.cc/34DZ-SKJT?type=image]; Jorge Barrera, “Trudeau: A Liberal Government Would Repeal, Amend All Federal Laws That Fail to Respect Indigenous Rights,” *Aboriginal Peoples Television News* (15 October 2015), online: <www.aptnnews.ca/national-news/trudeau-a-liberal-government-would-repeal-amend-all-federal-laws-that-fail-to-respect-indigenous-rights> [perma.cc/C9QK-ZYKY].

⁸ Government of Canada, “Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act” (last modified 10 December 2021), online: <www.justice.gc.ca/eng/declaration/about-apropos.html> [perma.cc/R5VC-LZLU].

Initial responses to Bill C-15 were highly critical; one prominent Indigenous policy analyst went so far as to characterize it as “an attack on Indigenous sovereignty and self-determination.”⁹ However, the overarching consensus seemed to be one of wary optimism.¹⁰ It is worthy of note that Bill C-15 does not render UNDRIP law in Canada; instead, it simply affirms the application of UNDRIP and provides an “action plan to achieve the objectives of the Declaration.”¹¹ As of March 2022, the only decision citing the Act notes that “[i]t remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title.”¹²

Five articles of UNDRIP, all detailing various ways in which nation states should implement the concept of free, prior, and informed consent (FPIC) into domestic law and their dealings with Indigenous communities, are of significance to this review.¹³ Canadian jurisprudence has long affirmed the existence of the Crown’s duty to consult with Indigenous nations. Beginning with *Haida Nation v. British Columbia (Minister of Forests)* (“*Haida*”), the Supreme Court of Canada has established a three-part test to determine whether the duty to consult has been triggered.¹⁴ However, the duty to consult is just that—a duty to *consult*. In her reasons in *Haida*, Chief Justice McLachlin (as she then was) concluded that “[t]his process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim.... Rather, what is required is a process of balancing interests, of give and take.”¹⁵ Juxtaposing the implicative language of Canada’s duty to consult framework with UNDRIP’s requisite need for *consent* explains why some were hesitant to embrace the implementation of UNDRIP into domestic law. In other words, by adopting the UNDRIP principle of FPIC in Canadian law, consultation under the *Haida* framework would seem to grant Indigenous nations the veto power that Chief Justice McLachlin explicitly failed to find.

In *Concessionaires*, Dr. Bhatt—a project finance lawyer with extensive experience in transnational development, international trade, and human rights law—attempts to reconcile the inner workings of transnational development projects with the notion of inherent (and, following the ratification and implementation of UNDRIP, proclaimed) Indigenous rights to land. Dr. Bhatt’s stated goal is to “map the legal terrain around the understudied universe of transnational development projects as they increasingly interface with [I]ndigenous peoples’ rights to land.”¹⁶ It is my position that the author’s goal has been accomplished.

⁹ Russ Diabo, “Federal UNDRIP Bill C-15 is An Attack on Indigenous Sovereignty and Self-Determination: Opinion,” *Aboriginal Peoples Television Network* (21 December 2020), online: <www.aptnnews.ca/national-news/undrip-bill-c-15-federal-government-soverignty-russ-diabo> [perma.cc/9Q5J-26VQ].

¹⁰ Kevin Hille, Roger Townshend & Jaclyn McNamara, “Bill C-15 (UNDRIP Act) Commentary” (2021), online (pdf): <i4b251yqxbh32mme4165ebzu-wpengine.netdna-ssl.com/wp-content/uploads/2021/01/OKT-Bill-C-15-UNDRIP-Commentary-2.pdf> [perma.cc/X7GD-7RKY].

¹¹ Bill C-15, *supra* note 6, s 6(1).

¹² *Thomas and Saik’uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at para 212. Justice Kent notes that, although the Act “supports a robust interpretation of Aboriginal rights...I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, UNDRIP legislation has on the common law” (*ibid*).

¹³ UNDRIP, *supra* note 4, arts 10, 11, 19, 28, 29.

¹⁴ 2004 SCC 73 [*Haida*]. See also *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.

¹⁵ *Haida*, *supra* note 14 at para 48.

¹⁶ Bhatt, *supra* note 1 at 9.

Concessionaires begins with an overview of the global mechanisms governing Indigenous peoples' rights to land and transnational project financing, providing the reader with the context needed to comprehend the components of complex project financing structures. Two concepts introduced in the overview—"Coping Strategies, Lacunas and Fragmentation in the Formal Legal Framework"¹⁷ and "Private Mechanisms and Behaviours for Implementing Indigenous Peoples' Rights to Land"¹⁸—are then examined through the critical analysis of global legislation and jurisprudence, academic papers, and NGO policies. The final chapters of the book situate the author's critique within case studies of transnational project financing successes and failures, resulting in several recommendations for systemic reform.

To contextualize the need for this contribution to academic legal literature, Dr. Bhatt aims to explain the notion of sociolegal conflict in oil, gas, mineral, and infrastructural development projects in developing nations.¹⁹ Such conflicts, described as "triangular tensions," between Indigenous peoples, nation states, and private actors, have increased in frequency commensurately with the intensification of industrialization in developed and developing nations.²⁰ Further, she underscores existing issues within the normative concept of due diligence by highlighting the power imbalances that arise in projects requiring mass global capital: "[D]ue diligence fails to interrogate crucial interfaces; specifically, between private mechanisms...and local or international legal norms on [I]ndigenous rights as well as the power dynamics and behaviours that drive decision-making at these hidden hotspots."²¹ These failures become readily apparent in the context of the Canadian duty to consult/FPIC dichotomy. One must wonder whether capital interests underpinned the political hesitancy to support Bill C-15.

As noted above, *Concessionaires* makes extensive use of case study analyses, including those of the Mongolian Oyu Tolgoi gold and copper mine,²² the Panamanian Barro Blanco dam,²³ and the Ugandan Bujagali Hydropower Project.²⁴ Such analyses provide insight into the technical components of project financing mechanisms and allow for a greater understanding of the ways in which private actors can legally exploit fragmented politico-legal regimes. However, I find that the author's reliance on these case studies is somewhat excessive—over the span of approximately 180 pages (excluding the preface and introductory chapter), more than 100 in-text references are made to other sections or chapters of the book.

While providing a thorough overview of the current state of affairs, supplemented by in-depth case studies of past successes and failures in transnational public-private partnership developments, Dr. Bhatt's analysis is invariably framed through the lens of late-stage capitalistic paternalism towards Indigeneity. In drawing attention to this, my goal is not to discredit Dr. Bhatt's research. Instead, it is my hope that, in recognizing the author's perspective, readers of this review may take it upon themselves to seek a critical perspective developed beyond the scope of project financing law.

¹⁷ Bhatt, *supra* note 1, 52.

¹⁸ Bhatt, *supra* note 1, 83.

¹⁹ I use the terms "developed" and "developing" subject to a lack of more succinct terminology. However, I remain cognizant that these terms are often used to convey subtextual neoliberal or colonial ideals not widely accepted beyond the praxis of contemporary hegemonies.

²⁰ Bhatt, *supra* note 1 at 1-4.

²¹ *Ibid* at 11.

²² *Ibid* at 124-36.

²³ *Ibid* at 136-44.

²⁴ *Ibid*, ch 6.

The author's perspective manifests clearly in her proposed "recommendations for an overall remedial agenda."²⁵ Prefacing her recommendations, Dr. Bhatt advances the following on the notion of a regulatory deficit existing within the realm of project financing in transnational development:

At various points it has been argued that the legal architecture around development projects fails to adequately recognise and regulate for [I]ndigenous peoples' rights – deprioritising them in favour of a larger political economy of land commodification that has, in turn, been supported by the rules that sustain global capital investment and the global financial architecture—contract and private property rights. At the moment, practice around the recognition and implementation of [I]ndigenous rights to land in these projects is, by and large, taking place within a shielded zone which prioritises the projects' creditors and shareholders, to the obvious benefit of concessionaires and financiers and the detriment of communities. The result for those communities: repetitive injustices and exclusion.²⁶

Fewer than ten pages later, Dr. Bhatt begins to inventory her proposed changes to the existing legal and regulatory oversight processes.²⁷ The first suggestion is to implement legislation that recognizes "the special vulnerability of land-connected people in the context of transnational development projects."²⁸ This opening recommendation, in conjunction with the author's overview of prevailing Indigenous views on land and water in chapter one,²⁹ encapsulates the notion of Indigenous peoples' deep connection to land as meriting more than a surface-level acknowledgement. This involves a careful and thorough overview of the complex, interdependent relationship between Indigenous peoples and their traditional land.

The sentiment underlying this recommendation, however, is subsequently undermined by the fifth and seventh recommendations. In these recommendations, the author details her suggestion for a potential mechanism whereby a concessionaire could set up a blind trust for the deposit of funds related to the resettlement of Indigenous peoples.³⁰ To first establish the unique significance of land to Indigenous identity, only to later provide a framework for the de facto expropriation of land by private actors, seems counterintuitive.

By seemingly assuming that each of the three groups—private actors, nation states, and Indigenous peoples—would approach the trust creation process from the same starting point, the proposed changes to resettlement processes mischaracterize the unequal bargaining power found throughout this unique, triadic relationship. In turn, the systemic inequities faced by Indigenous peoples become further removed from any such negotiatory mechanism. Further, they work to induce a shift in the responsibility of upholding Indigenous rights to land from local governance systems to transnational corporations. Given the track record of transnational corporations operating abroad, is this really the most efficacious step forward?

²⁵ *Ibid* at 184.

²⁶ *Ibid* at 184-85.

²⁷ This section of the book commences with the preface that "[i]t is important to keep in mind that given the level of fragmentation, powerful vested interests and regulatory deficit in the field, the quest for a perfect solution is, in practice, somewhat illusive" (*ibid* at 192-93).

²⁸ *Ibid* at 193.

²⁹ Dr. Bhatt explains:

For [I]ndigenous people, land and water are regarded as sacred, inextricably connected to their identity, culture, sense of meaning and survival. Unlike Western notions that view land and the resources within it as property rights, to be exclusively owned and enclosed for productive potential and value creation, [I]ndigenous worldviews may not differentiate between the earth and the resources it supports, seeing land in a wider concept that relates to the collective right to survival as a people, for the reproduction of their culture and for their own development and plans for life (*ibid* at 3).

³⁰ *Ibid* at 196-97.

Though not explicitly stated, it is possible that Dr. Bhatt intended for her recommendations to follow a hierarchical structure, wherein the earlier recommendations reign supreme over the later. Read in this way, recommendations five and seven could be interpreted to serve as a means of impact remediation rather than mitigation.³¹ Providing suggestions for the ways in which Indigenous peoples could be compensated for the expropriation of their traditional lands is a concrete response to this fragmented legal system. However, by accepting that Indigenous land rights will continue to be violated for corporate gain, the author is addressing the symptoms of the problem rather than the problem itself.

Consider, for instance, Rio Tinto's 2010 Oyu Tolgoi project, wherein two separate human rights complaints relating to the resettlement process were filed by Mongolian communities of nomadic herders.³² These complaints were based upon the premise that, per both national and international legislation, the herders' rights to access their land and water resources were being infringed. In 2015, following Rio Tinto's receipt of these complaints, construction of the second phase of underground development commenced, and in 2016, the final phase of construction began.³³

Dr. Bhatt notes that, as UNDRIP is a non-binding declaration, and as the project was subject only to the project financing organization's policies in place at the time, FPIC was not a prerequisite of project funding approval.³⁴ The Mongolian government, an original signatory of UNDRIP, allowed this project to continue despite multiple complaints that actions contrary to UNDRIP were being undertaken by Rio Tinto. This disregard for the articles of UNDRIP, specifically those detailing Indigenous peoples' rights to self-determination and FPIC, highlights the underlying issue: the transnational development process itself.

The eighth recommendation in this section, titled "Promoting State-Based Non-Judicial Mechanisms,"³⁵ is, in my view, one of the book's greatest strengths. Dr. Bhatt describes the ways in which informal grievance mechanisms operate, providing both praise and critique of such systems. Of note is that, while the Optional Protocol to the Covenant on Economic, Social and Cultural Rights ("Optional Protocol") may have been available to aid the Indigenous Mongolian herders in their complaints, the mechanism was inaccessible due to the herders' lack of knowledge that the Optional Protocol exists.³⁶ With the goal of fostering systemic reform, in which the implementation of Indigenous peoples' rights to land in transnational development projects can be successful, it is clear that systemic inaccessibility must be addressed. As the author astutely points out, "[s]tates and advocates need to do more to promote these mechanisms known as a potential advocacy tool for cases involving development projects, the state and private actors."³⁷

In sum, *Concessionaires* provides a novel contribution to the transnational development and project financing literature that is theoretical yet practicable. Though some of the author's

³¹ This interpretation is furthered by the subtitle prefacing Dr. Bhatt's recommendations: "Proposed Remedial Agenda." However, it is my position that the implementation of a remedial agenda for instances in which Indigenous land rights are violated—rather than a robust framework to ensure that Indigenous land rights are not violated—is a reactionary solution to a complex issue. *Ibid* at 192.

³² *Ibid* at 125. Mongolia voted in favour of the 2007 adoption of UNDRIP at the UN General Assembly.

³³ Bhatt, *supra* note 1 at 125.

³⁴ *Ibid* at 123-24. The Oyu Tolgoi project was subject to the 2006 International Finance Corporation's Performance Standards and the 2008 European Bank for Reconstruction and Development's Environmental and Social Policy (*ibid* at 124).

³⁵ *Ibid* at 197-98.

³⁶ *Ibid*. *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 8/2, UNHCR, 63rd Sess, UN Doc A/RES/63/117 (entered into force 5 May 2013).

³⁷ *Ibid* at 198.

recommendations are arguably contradictory, their grounding is strong. In just a few pages, Dr. Bhatt was able to construct a thorough overview of the intricate nature of Indigenous peoples' unique relationship to their traditional lands. Dr. Bhatt set out to reconcile this relationship with the complex, technocratic nature of project financing in transnational development projects. In my opinion, this objective was not only met but was achieved with delicacy and ease. With such a nuanced approach to analyzing the complex inner workings of the transnational project development process, academics and legal practitioners alike can benefit from the content of this book. Given the increasing frequency with which Indigenous peoples' rights to land intersect with international development, I am confident that Dr. Bhatt's work on project financing will emerge as an important piece of scholarship in its field.