

# Economic Recovery in Response to Worldwide Crises: Fiduciary Responsibility and the Legislative Consultative Process with Respect to Bill 150 (Green Energy and Green Economy Act, 2009) and Bill 197 (COVID-19 Economic Recovery Act, 2020) in Ontario, Canada

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Résumé de l'article

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## Abstract

The Green Energy and Green Economy Act was quickly passed in 2009. Due to the breadth of the Act, it should have received a rigorous legislative review-and-consultation process, but did not due to green-labeling. Ontario did not meet their ethical fiduciary responsibility to consult with Indigenous peoples. With the COVID-19 Economic Recovery Act, 2020, there were no public hearings even though changes to the Environmental Assessment Act would allow for the exemption or streamlining of projects from the process. If a project was exempted, there would be no environmental assessment, and no legal fiduciary responsibility to consult with Indigenous peoples; the legal duty to consult would not be triggered even though Indigenous peoples would potentially be impacted. Rather than noting an improvement in the legislative consultative process since 2009, there has been a regression.

## Keywords

First Nations, Green Energy Act (2009), Ontario, Canada, green energy, consultation, hydroelectric

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## **Economic Recovery in Response to Worldwide Crises: Fiduciary Responsibility and the Legislative Consultative Process with Respect to Bill 150 (*Green Energy and Green Economy Act, 2009*) and Bill 197 (*COVID-19 Economic Recovery Act, 2020*) in Ontario, Canada**

In just over a decade, green energy has become internationally relevant. Green energy advocates believe that its methods are congruent with responsible energy production in line with surrounding environmental discourse. The rhetoric presented by green energy proponents emphasizes the low environmental impact of modes of production such as hydroelectric power and other forms of renewable energy. However, the research conducted to date has laid a strong foundation for the critique of such rhetoric. Critics cite the environmental impacts of green energy projects, especially in Indigenous communities, which are typically in close proximity of hydroelectric projects (e.g., Armstrong, 2000; MacFarlane & Kitay, 2016; MacFarlane et al., 2017).

The aim of this paper is not to address the environmental impacts further; I discuss the reason for these missteps. As previously stated, many Indigenous communities live in close proximity to green energy projects. As such, they are typically bear the brunt of detrimental impacts due to their profound interrelationship with the environment. Many parts of the world have policies that govern interactions with Indigenous Peoples to protect them in these circumstances. Yet, these precautions are not always effective in limiting threats because of flaws within the policies and governments' ability to navigate around them.

This article will explore Bill 150, the *Green Energy and Green Economy Act, 2009*, in Ontario, Canada, as a case study demonstrating the Canadian government maneuvering threats to the consultative process, in particular consultation during the legislative process whereby a bill becomes an act. To grant a broader perspective, Bills 173 and 191 will be used as markers for measurement due to their proximity to Bill 150 with respect to context. To provide additional context, Bill 197, the *COVID-19 Economic Recovery Act, 2020*, will also be examined, as well as other comparative acts. Through these analyses and comparisons, I will identify the pitfalls, missteps, and specific points that require additional caution. Through the identification of these points, I will draw inferences and lessons which can provide cautionary suggestions for future endeavours on the topics of both green energy and Indigenous peoples, on both a local and international scale.

### **Background**

Canada employs a centralized federal government and regional provincial governments, as detailed in the Canadian *Constitution Act, 1867*. At the federal and provincial levels, there are three separate parts of the government—the judicial, executive, and legislative branches. The judiciary branch is an independent system of courts whose role is to interpret and apply laws. The executive branch is composed of the Lieutenant Governor (the British Monarchy's representative), the Premier of Ontario, and the Executive Council (Members of Provincial Parliament, MPPs, appointed as Cabinet Ministers)—also known as the Government—sets priorities and policies (Legislative Assembly of

Ontario, 2020a). The Executive Council reviews and recommends Orders-in-Council<sup>1</sup> for formal approval by the Lieutenant Governor to bring into force laws or parts of laws (Legislature of Ontario [LO], 2020). Thus, the Crown holds supreme power but acts upon the formal advice of the Executive Council, and the Executive Council is responsible to the Legislative Assembly for its advice (LO, 2020).

In Ontario, the unicameral legislative branch<sup>2</sup> is composed of elected representatives, MPPs that make up the legislature. The Canadian Constitution granted the Legislative Assembly the power and fiduciary responsibility to debate bills, and to pass and amend acts (also known as statutes or laws) (LAO, 2020a). Fiduciary responsibility is both a legal and ethical concept implying that one party has a duty to another, to act in the other's best interests (Tsuji, 2020). Therefore, the legislature and constituent MPPs have an ethical fiduciary responsibility to act in the best interests and consult with the people that elected them—all Ontarians, including Indigenous Peoples—on matters that directly or indirectly impact them. For example, consultation should occur during the parliamentary process whereby a bill becomes an act (Hynes & Johnston, 2011; LAO, 2020b).

### **How a Bill Becomes an Act: The Parliamentary Consultative Process**

A bill is a proposed act that is before the legislature for consideration (Government of Ontario [GO], 2020a). There are three types of public bills: Government Bills are introduced to the legislature by Cabinet Ministers; Private Members' Public Bills are introduced by MPPs; and Committee Bills are introduced by Standing Committee Chairs (Hynes & Johnston, 2011). Government Bills will be the focus of the following discussion.

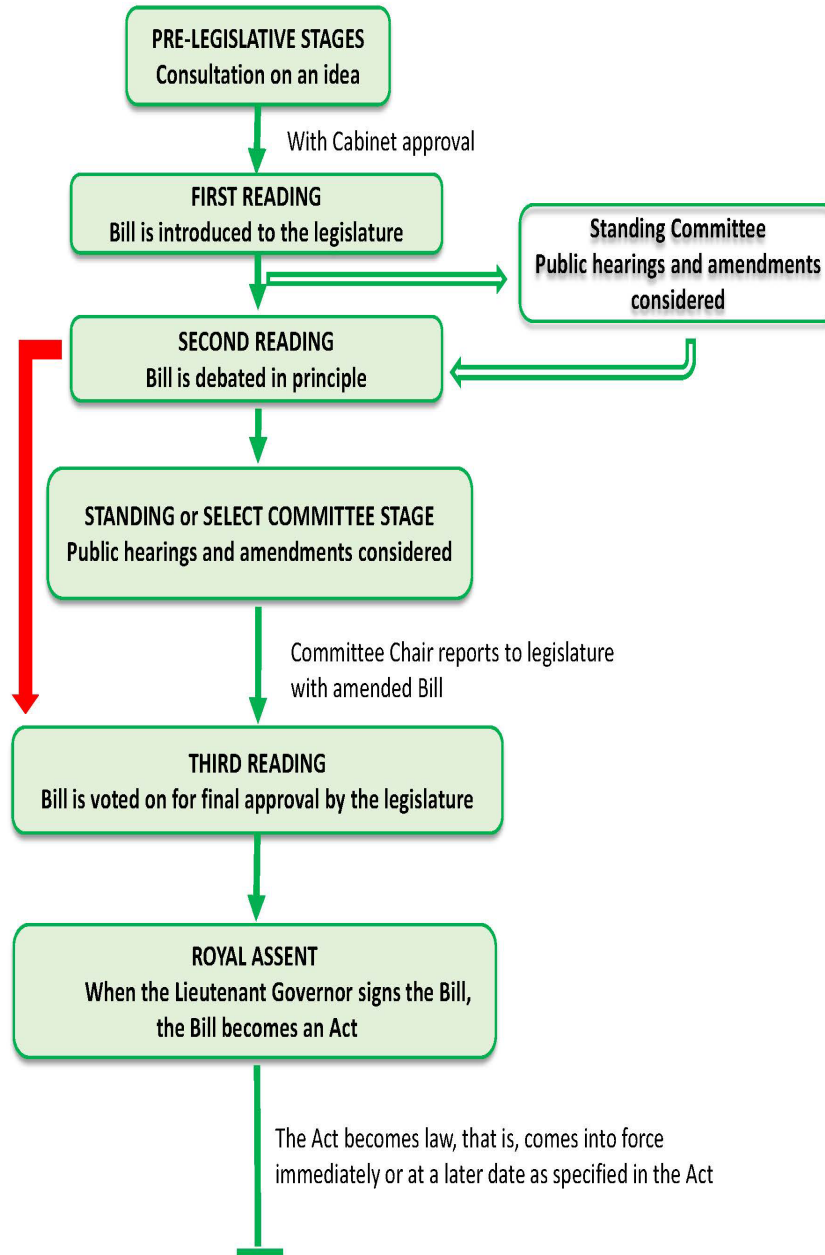
In Canada and Ontario, the stages of the process from Government Bill-to-Act are based on the Westminster model (Hynes & Johnston, 2010; Parliament of Canada, 2020; Figure 1). Standing Orders give a detailed account of the rules (House of Commons, 2020a, b; LAO, 2020b) throughout the various stages of the legislative process (House of Commons, 2020a, b; LAO, 2020b; Figure 1) whereby consultation with the public can be realized through public hearings. Additionally, during parliamentary debates, MPPs that have held consultation at the constituent level, can speak on behalf of their constituents. The pre-legislative stages are protected by conventions of confidentiality—thus, typically outside the public eye—and the complex processes change from government-to-government (Hynes & Johnston, 2011). Once a Bill has been approved by the Executive Council, the Government Bill can be

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<sup>1</sup> An Order-in-Council in Ontario “is a legal order made by the Lieutenant Governor, on the advice of the Premier or a Minister” (GO, 2020f). Similarly, a Canadian federal “Order-in-Council is a legal instrument made by the Governor in Council pursuant to a statutory authority . . . made on the recommendation of the responsible Minister of the Crown and take[s] legal effect only when signed by the Governor General” (Library and Archives Canada [LAC], 2020).

<sup>2</sup> The Government of Canada is a bicameral legislature: the elected House of Commons and the appointed Senate. Bills can originate from either assembly (Parliament of Canada, 2020). To be enacted, a bill must be passed by both chambers and receive Royal Assent from the Monarchy's representative, the Governor General of Canada (Parliament of Canada, 2020).

introduced to the legislature (Figure 1).



**Figure 1. The Legislative Process in Ontario Representing how a Bill becomes an Act (based on Hynes & Johnston, 2011).**

Green cells and solid green arrows represent the typical sequence of the process. The green-outlined-white cell and arrows represents a less typical sequence. Meanwhile, the red-solid arrow represents an atypical sequence for an important bill, because the Committee stage is bypassed altogether.

Typically, a Minister introduces the Bill to the legislature at First Reading (Hynes & Johnston, 2011). The Bill is not debated at this stage, but the Bill is posted on the legislature's website (Hynes & Johnston, 2011). Infrequently, at any time before Second Reading, the Bill is referred to a Standing Committee for public hearings, debate, and consideration of amendments to the Bill (Hynes & Johnston, 2011; Figure 1). Usually after First Reading, the Bill is referred to Second Reading where the Bill is debated in principle by the legislature, and then referred to a Standing (or Select) Committee for consideration<sup>3</sup> (Hynes & Johnston, 2011). At the Committee stage, public hearings take place at different locations across Ontario so that Committee members can hear first-hand from individuals, groups, organizations, and Ministry officials about various aspects of the Bill under consideration (Hynes & Johnston, 2011). A clause-by-clause examination of the Bill is conducted, and because the Committee proceedings are less formal than the legislature, more in-depth and meaningful discussion occurs (Hynes & Johnston, 2011). Thus, amendments to a Bill may be made; if amended, the amended Bill is reported back to the legislature by the Committee Chair, and if the Committee Report is adopted, the Bill is ordered for Third Reading (Hynes & Johnston, 2011). At Third Reading, debate on the Bill will conclude and a vote will be taken on whether to pass the Bill, and if the Bill passes, the Bill is presented to the Lieutenant Governor for Royal Assent (Hynes & Johnston, 2011). When assent is given, the bill becomes an act which comes into force immediately after assent or at a time specified in the act (Hynes & Johnston, 2011).

In the following sections, using the parliamentary-consultative framework presented in Figure 1, the *Green Energy Act* will be examined to identify both the presence and quality of the consultation process involving Indigenous and non-Indigenous people with respect to defining green energy in Ontario. The period of importance is identified as prior to the introduction of Bill 150 in the legislature, and during the Committee hearings. Through investigation of Hansard verbatim transcripts of the legislature debates and the Standing Committee hearings, the definition of green energy in Bill 150 will be detailed, and it will be shown how it impacted the consultative process with respect to the *Green Energy Act* and Indigenous people. My analysis of the debates identifies whether party affiliation of MPPs impacted the way green energy was defined and viewed, and through my reading of the Committee hearing transcripts, I assess how the public defined and viewed green energy and perceived the *Green Energy Act*. This section is followed by a comparison between the consultative processes for Bill 150 (the *Green Energy Act*), Bill 173 (*Mining Amendment Act, 2009*), and Bill 191 (*Far North Act, 2010*) using Hansard transcripts. To end this section, I discuss the ramifications of labelling hydroelectric-power generation green energy in the context of the *Green Energy Act*, with the purpose of providing cautionary insight into the challenges of its association with green energy.

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<sup>3</sup> It is atypical, but a bill can be referred to the Committee of the Whole House that has different rules of debate (Hynes & Johnston, 2011; LAO, 2020b). The Committee of the Whole House examines amendments to a bill after Second Reading or after the amended bill has been reported from a Committee or on a discharge order during the Third Reading stage (Hynes & Johnston, 2011; LAO, 2020b; not represented in Figure 1 for simplicity sake).

However, prior to proceeding, it should be emphasized that the “duty to consult” is never triggered during the process of Bill-to-Act. Because the Bill-to-Act process occurs in the legislative branch of the government (Supreme Court of Canada [SCC], 2018) and does not directly emphasize the duty to consult, there only exists an ethical fiduciary responsibility to consult with Indigenous people. The recent Supreme Court of Canada (SCC) decision (*Mikisew Cree First Nation v. Canada*) has indicated that the legislative branch does not need to consult with Indigenous people during the law-making process, as will be briefly discussed in the following section prior to the discussion of our cases. It is important to note that the legal fiduciary responsibility to consult (i.e. duty to consult) only applies after an act becomes law, which is outside the framework described in Figure 1.

## Duty to Consult

In Canada, Aboriginal<sup>4</sup> and Treaty Rights were entrenched in section 35(1) of the repatriated *Constitution Act, 1982*. Since this time, case law at the Canadian provincial and federal levels have started to clarify the extent of these rights, and the duty to consult doctrine has emerged (Gardner et al., 2015). Lawrence & Macklem (2000, p. 252) state, “the nature and scope of the duty of consultation will vary with the circumstances.” Further, the duty to consult doctrine continues to evolve and parameters continue to be set. As pointed out by Bankes (2016), the SCC declined to answer the important question of whether the duty to consult doctrine was applicable to legislative activities in citing the *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* (2010). Bankes noted that while the majority of Justices for the *Canada v. Mikisew Cree First Nation* (2016 FCA 311) case ruled that the duty to consult was not applicable to legislative action due to the separation of power<sup>5</sup> and parliamentary privilege,<sup>6</sup> Justice Pelletier suggested that in some cases, duty to consult would be appropriate. More clarity on the

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<sup>4</sup> The term Aboriginal refers to First Nations, Metis, and Inuit peoples as defined in *the Canadian Constitution Act, 1982*. Aboriginal and Treaty Rights were constitutionalized, while Crown Treaty Rights were not (Macklem, 1997).

<sup>5</sup> According to the Supreme Court of Canada, “Separation of powers means that different branches of the state have different roles in Canada’s democracy. The executive (which includes the Prime Minister and Cabinet) [or Premier and Ministers in Ontario] decides policy and implements laws (for example, by passing regulations). The legislature (Parliament) makes and passes laws. The judiciary (the courts) interprets and applies laws once they are passed. (2018, unnumbered). However, the separation of power is more of an ideology than a reality in Canada. For example, there is the dual role of the Minister of Justice and the Attorney General of Canada (*Department of Justice Act, 1985*; Department of Justice Canada, 2020c); this is in contrast to the separated roles of the Attorney General’s Office (2020) and the Ministry of Justice (2020) in the U.K. The dual role in Canada has led to some high-profile cases. For example, the SNC-Lavalin affair questioned the ethical behaviour of Prime Minister, Justin Trudeau with respect to his dealings with Jody Wilson-Raybould (at the time Attorney General of Canada and the Minister of Justice) (Center for the Advancement of Public Integrity, 2020).

<sup>6</sup> Parliamentary privilege (immunity) is “the set of powers and privileges possessed by the federal Houses of Parliament and provincial legislative assemblies that are necessary to their capacity to function as legislative bodies” (Abella & Martin, 2018, p. 813 [83], Judges SCC). Parliamentary privilege is “essential to allowing Parliament to perform its constitutional functions by giving it the right to exercise unfettered freedom in the formulation, tabling, amendment, and passage of legislation” (Brown, 2018, p. 772, Judge SCC) Meanwhile, parliamentary sovereignty “mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority” (Wagner et al., 2018, p. 794 [36], Judges SCC).



duty to consult and its application to the legislative process would be forthcoming in the recent SCC decision with respect to the *Mikisew Cree First Nation v. Canada* (2018).

In 2012, Canada passed two omnibus bills (Bills C-38 and C-45) that fundamentally changed environmental assessment at the federal level<sup>7</sup> (Doelle, 2012; Gibson, 2012). The *Canadian Environmental Assessment Act, 2012*, part of Bill C-38, and streamlined the environmental assessment process by exempting many projects, thus reducing or eliminating opportunities for consultation with Indigenous people (Kirchhoff et al., 2013). In this political context, the Mikisew Cree made an application for judicial review in the Federal Court asserting that the Crown had a duty to consult with the Mikisew during the development of the Bills and prior to Royal Assent (*Mikisew Cree First Nation v. Canada*, 2018). The reason put forward by Mikisew Cree First Nation was that there was the potential for the enacted legislation to adversely affect Mikisew's Treaty No. 8 rights to hunt, trap, and fish. Although the Federal Court ruled that the Crown should have consulted with the Mikisew when developing the Bill, the Federal Court of Appeal disagreed, stating that the Federal Court should not have heard the Mikisew's application in the first place because the Federal Court lacked the jurisdictional power (SCC, 2018). In addition, the Federal Court of Appeal asserted that the judiciary should only hear challenges to statutes, since "Parliament, not the Crown, develops and passes law, according to the 'separation of powers' in the Canadian Constitution" (SCC, 2018).

At the highest court, the SCC, the Mikisew appeal was dismissed (*Mikisew Cree First Nation v. Canada* 2018). All nine judges agreed that the Federal Court did not have jurisdictional authority to review the activities of the federal Ministers who developed Bill C-38 and Bill C-45 (*Mikisew Cree First Nation v. Canada*, 2018). However, the Judges were not in agreement with respect to the issues of the honour of the Crown and the duty to consult: "Five [of nine] judges said the honour of the Crown was involved at the lawmaking stage. But a total of seven said there was no binding duty to consult before a law was passed" (SCC, 2018).

In brief, Brown (2018, 832 [124], Judge SCC) takes a very reductionist view with respect to consultation during the legislative process:

And, as this Court said . . . "the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent."

Although it is true that the process Brown (2018) described is the very basic framework from Bill-to-Act, in reality, the sequence described above for the Bill-to-Act process is one of the least followed in practice, except for the most simplistic of bills (Figure 1). House of Commons Committees regularly invite and

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<sup>7</sup> Since the environment was not mentioned in the Canadian Constitution, the responsibility for the environment is shared between the federal and the provincial governments of Canada (Kirchhoff et al., 2013). Hence, there are federal and provincial environmental assessment processes.

host witnesses (e.g., experts, Indigenous organizations) that appear before the Committee to present evidence relevant to the bill under consideration (House of Commons, 2020c). While Canada does not have a legal duty to consult, utilizing consultation with committees in the Bill-to-Act process allows the government to fulfil its ethical fiduciary responsibility. As noted by SCC Judges Abella & Martin (2018, p. 818 [92]): “Commonly observed duties of consultation such as notice to affected parties and the opportunity to make submissions are hardly foreign to the law-making process.” SCC Judges Moldaver, Cote, and Rowe (2018, pp. 854–855 [166–168]) added:

As a matter of practice and in furtherance of good public administration, consultation on policy options in the preparation of legislation is very often undertaken. But, it is not constitutionally required . . . If Parliament or a provincial legislature wishes to bind itself to a manner and form requirement incorporating the duty to consult Indigenous peoples before the passing of legislation, it is free to do so . . . But the courts will not infringe.

Therefore, the Crown needs to act honourably with respect to dealings with Indigenous peoples, but there is no legal fiduciary responsibility to consult with them during the law-making procedure.

Lastly, on 3 December 2020, Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* was introduced to the House of Commons of Canada, and assented to on June 21, 2021. Bill C-15 was introduced to implement the United Nations Declaration and provide a way forward for Canada and its Indigenous Peoples by working together to bring the Declaration into force (Department of Justice Canada, 2020a). In particular, Bill C-15 would:

inform how the Government approaches the implementation of its legal duties [i.e., duty to consult] going forward . . . that provides greater clarity . . . for Indigenous groups and all Canadians. (Department of Justice Canada, 2020b, p. 5)

Thus, the legal dimensions of the fiduciary responsibility of duty to consult continue to evolve in Canada.

### *The Green Energy and Green Economy Act, 2009*

#### **Economic Context**

In 2008, the world experienced its largest financial crisis since the Great Depression (Barrell & Davis, 2008). In 2009, Ontario became a have-not province, qualifying for a federal-equalization payment from the Government of Canada (Roy-Cesar, 2013). Ontario was no longer the economic giant that drove Canadian prosperity. Equalization payments are issued by the Canadian-federal government to “poorer” provinces with the intent to “ensure that Canadians residing in provinces have access to a reasonably similar level of . . . services . . . taxation, regardless of which province they call home” (Roy-Cesar, 2013, p. 1). In this economic climate, Ontario introduced Bill 150–The *Green Energy and Green Economy Act* (also known as the *Green Energy Act*), Bill 173–The *Mining Amendment Act, 2009*, and Bill 191–

The *Far North Act, 2010* (Table 1). Ontario turned to green energy (McRobert et al., 2016), mining, and Ontario's Far North (Gardner et al., 2012) with the promise for economic salvation in the dire financial straits of the time.

**Table 1. Descriptive Information on the Legislative Consultative Process with Respect to the *Green Energy Act*,<sup>A</sup> the *Mining Amendment Act*,<sup>B</sup> the *Far North Act*,<sup>C</sup> and the *COVID-19 Economic Recovery Act*.<sup>D</sup>**

Consultative Activity	Bill 150 <i>Green Energy and Green Economy Act, 2009</i>	Bill 173 <i>Mining Amendment Act, 2009</i>	Bill 191 <i>Far North Act, 2010</i>	Bill 197 <i>COVID-19 Economic Recovery Act, 2020</i>
Time from First Reading to Royal Assent	23 February to 14 May 2009 ~3 months	30 April to 28 October 2009 ~6 months	2 June 2009 to 25 October 2010 ~16 months	8 July to 21 July 2020 ~14 days
Standing Committee <sup>E</sup> Hearings after First Reading	<b>NO</b>	<b>NO</b>	6--13 August 2009 Five hearings in the south and near-north	<b>NO</b>
Standing Committee Consideration of a Bill after First Reading	<b>NO</b>	<b>NO</b>	19-21 October 2009	<b>NO</b>
Bill reported as amended and ordered for Second Reading	<b>NO</b>	<b>NO</b>	22 October 2009	<b>NO</b>
Second Reading Debate	24 February to 11 March 2009	4-27 May 2009	18 May to 3 June 2010	15-21 July 2020
Standing Committee Hearings after Second Reading	6--22 April 2009 7 hearings	6--13 August 2009 5 hearings	Week of 14 June 2020 Five hearings cancelled in the Far North	<b>NO</b>
Standing Committee Consideration of a Bill after Second Reading	27--29 April 2009	14 September to 7 October 2009	13--15 September 2010	<b>NO</b>
Bill reported as amended and ordered for Third Reading	30 April 2009	8 October 2009	16 September 2010	<b>NO</b>
Third Reading Debate	5--13 May 2009	21 October 2009	22--23 September 2010	21 July 2020

<sup>A</sup> LAO. (2020j, k).

<sup>B</sup> LAO. (2020l, m)

<sup>C</sup> LAO. (2020n, o)

<sup>D</sup> LAO. (2020p, q).

<sup>E</sup> The Standing Committee on General Government exists for the duration of Parliament (LAO, 2020h). A person can present at public hearings of the Standing Committee as a "witness," "if you are chosen to present" (LAO, 2020i).

## Policy and Politics

Smitherman, the Liberal (LIB) Party<sup>8</sup> Minister of Energy and Infrastructure,<sup>9</sup> introduced the *Green Energy Act* to the legislature and stated that it would:

Make this province North America's green energy leader . . . making it easier to bring renewable energy projects to life [by streamlining the application and approval process] . . . help[ing to] create sustainable green employment for Ontarians . . . [and] an attractive price for renewable power, including wind . . . solar, hydro . . . Ontario would join the ranks of global green power leaders like Denmark, Germany and Spain. (Smitherman, 2009a, p. 4951–4952)

McGuinty, the LIB Premier,<sup>10</sup> added: “It’s fundamentally about new jobs, it’s about clean, green electricity and it’s about fighting climate change” (McGuinty, 2009a, p. 5027–5028). These statements consolidate the stance presented by the LIB Party on the topic of green energy; however, it should be recognized that this is only what was publicly presented.

It should also be noted that the Minister of Energy and Infrastructure was given sweeping powers to expedite green energy projects through the *Green Energy Act* at the expense of removing or modifying existing checks and balances in other pieces of legislation. Moreover, Bill 150 was an omnibus bill<sup>11</sup> that once enacted affected 20 acts.<sup>12</sup> Due to its purview and breadth, the pre-consultative process prior to Bill 150 being introduced to parliament should have been extensive. These consultations should have been an ongoing process during the hearings of the Standing Committee for the purpose of addressing the critiques raised during these discussions. Given the context of hydroelectric development in Ontario and how it has sordidly impacted Indigenous communities in the past, this is an important and necessary step.<sup>13</sup> Due to the scale and nature of Bill 150 and Ontario’s ethical fiduciary responsibility there should have been more meaningful consultation with Indigenous leadership. This is especially true when one

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<sup>8</sup> There are three major parties in Ontario: Liberal, Conservative, and New Democratic Party. Other political parties include the Green Party (GRN) and Bloc Quebecois. Each constituency elects a MPP.

<sup>9</sup> The Premier of Ontario recommends Ministers to lead ministries, such as Energy and Infrastructure; the Crown representative, in this case the Lieutenant General, approves the appointment. The Premier and Cabinet Ministers form an Executive (also known as the Cabinet).

<sup>10</sup> The Leader of the Government of Ontario is called the Premier. In the situation under discussion, the Premier was leading a LIB-majority government. That is, the LIB Party had the majority of the seats in the unicameral legislative chamber or house for the 39th Parliament and could ram any bill through the legislature even if opposition parties joined together (LAO, 2020f).

<sup>11</sup> An omnibus bill seeks to amend, repeal and/or enact several mostly unrelated acts (Bedard, 2012; Parliament of Canada, 2021).

<sup>12</sup> Acts affected included the *Ministry of Natural Resources Act*, and the *Ontario Water Resources Act* (LAO, 2020g).

<sup>13</sup> Flooding, methyl mercury contamination issues, desecration of cultural sites, relocation of communities, and impacts on subsistence activities have been reported (e.g. Armstrong, 2000).

considers that after Bill 150 received Royal Assent, Ontario would be bound by their legal fiduciary responsibility of duty to consult because of the potential infringement on Aboriginal and Treaty Rights being triggered by the environmental assessment process linked to green energy projects (Gardner et al., 2015).

### **Geographical and Cultural Scope**

With more than 1 million km<sup>2</sup> of land in its borders, Ontario is the second largest province in Canada (GO, 2019a). The economy is based on a mixture of sectors: natural resources (e.g. mining, forestry), energy production, agriculture, manufacturing, services, and high-tech innovation (GO, 2019a).

On a population count basis, there are more Indigenous people in Ontario than any other province in Canada (Spotton, 2006). There are 133 First Nations located in the province (Chiefs of Ontario, 2020), and the people belong to 13 distinct groups (Spotton, 2006). Located in northern Ontario (Figure 2), Nishnawbe Aski Nation (NAN) has a membership of 49 First Nations and has a traditional-land base of 543,898 km<sup>2</sup> (Beardy S., Grand Chief NAN, 2009).



Figure 2. Ontario, Canada, and the Far North of Ontario (stippled area)

## Defining Green Energy

In Part 1, Definitions 1(1), green energy was not defined; nor was it defined anywhere else in the *Green Energy Act*. The National Democratic Party (NDP) MPP, Tabuns (2009) put forward an amendment to Bill 150 defining green energy, but his motion was defeated. The Progressive Conservative (PC) and LIB Parties all voted against his green energy definition amendment but offered no other definition. This resulted in green energy remaining undefined in the *Green Energy Act* throughout its lifetime (Tsuji, 2020), and to its repeal in 2019 (GO, 2019b). It is possible that the LIB Government purposively left the term green energy undefined, so that they, and the general public, could define green energy flexibly to meet various needs.

While green energy was never defined in the *Green Energy Act*, renewable energy was defined:

“renewable energy source” means an energy source that is renewed by natural processes and includes wind, water, biomass, biogas, biofuel, solar energy, geothermal energy, tidal forces and such other energy sources (LAO, 2020k)

In the legislature deliberations, renewable energy was described as being equivalent and interchangeable with green energy: “renewable energy, so-called green energy.” (Moridi, 2009, p. 5338)

Importantly, nuclear power generation was never mentioned in the *Green Energy Act*; however, MPPs mentioned during their deliberations that nuclear power was part of the LIB’s green energy strategy:

It [nuclear power] is part of a green energy strategy going forward. (Brotten, 2009, p. 5072)

I’m very proud of the *Green Energy Act*. I’m very proud that nuclear is an important component of it (Mitchell, 2009, p. 6725).

These assertions were confirmed by LIB Minister Smitherman (2009b, p. 5831) when he stated:

75% of all of Ontario’s . . . needs last year were met by a combination of emission-free nuclear and emission-free hydroelectric power . . . tremendous opportunities to integrate a greater degree of renewable energy. That’s what the Green Energy Act is all about.

With no mention of the nuclear power agenda in the *Green Energy Act*, the LIB Party was able to avoid a difficult discussion with both the public and the legislature.

## Green Energy: Green Environment

In temperate climates, such as in Canada, the colour green has positive connotations. These associations include the greening of spring after the frigid winter, to growth of vegetation, and green being an



indicator of plant health. A green light means everything is okay, or to go. Green is a positive colour and has always been associated with a healthy environment. The connotations afforded to the colour green did not go unnoticed in the Committee hearings with the public. This relationship was mentioned:

If Bill 150 is to provide the impetus for green energy and . . . a green environment—and that’s the purpose for green energy, to ensure a green environment—the time to act is now. (Tenebaum, 2009, p. 644)

In the legislature deliberations over the *Green Energy Green Act*, the positive feelings associated with the colour green were discussed:

It alludes to the terms “innovation” and “creativity.” The word “green” is an optimistic colour. (O’Toole, 2009, p. 5171–5172)

The title is a really good one. It . . . makes me feel warm and fuzzy inside. (Bisson, 2009a, p. 6761)

I would submit that what we have is a feel-good act that sounds good. (Elliot, 2009, p. 5158)

However, the debates in the legislature were also critical of the title, and how it was deceptive with respect to the content of the Act; words such as “greenwashing” (Marchese, 2009, p. 5030; Miller, 2009, p. 5070) and “green rhetoric” (Marchese, 2009, p. 5030) were used to call attention to these concerns. MPPs asserted that:

The only thing that is green about the Green Energy Act is its title. (Shurman, 2009, p. 5066)

It is not what we expect. This is an act of camouflage . . . co-opting that green label. (Hillier, 2009a, p. 5438)

Wilson (2009, p. 6766) rightfully notes that:

A Green Energy Act sounds like it will score points, sounds like it will be popular [regardless] of what it says inside the bill. Other than scoring political points in the polls, they [LIB] can’t tell you what their real purpose is in doing this act.

Polls indicated “overwhelming” public support for the *Green Energy Act* in Ontario with 87% of respondents supporting it (Smitherman, 2009c, p. 6268).

It appears that the titling of Bill 150 as the *Green Energy Act* was a strategic move made by the LIB party. Whenever the opposition parties wanted to criticize the *Green Energy Act*, MPPs would have to first make a disclaimer that they were not against green energy and/or a green environment, before they could level any type of criticism against Bill 150. For example:

[the PC] Party are not against the concept of green energy. It's sort of a motherhood statement... so that any criticisms that we have should not be taken as criticisms of the premise of the act (Elliot, 2009, p. 5158).

I want to start off by making it very clear that I support green energy. Every member of this Legislature would acknowledge the importance of protecting our environment, and I agree that clean energy and green energy are an important part of that goal. However, we need to look at how we get there. (Hardeman, 2009, p. 5359)

First of all, we support green energy. We support green energy and conservation... Here's why I'm having difficulty with supporting it overtly: I want... thorough public hearings around the province. (O'Toole, 2009, p. 5174)

### **Consultation and the First Reading of Bill 150**

Normally there is a pre-consultative process prior to bills being written and presented in the legislature (Yakabuski, 2009a; Figure 1). With Bill 150, major stakeholders were not consulted prior to the hearings (Quinney, 2009). Moreover, there was no written record that Indigenous Peoples were pre-consulted about Bill 150, even though Ontario has an ethical fiduciary responsibility to consult with the Indigenous people due to the potential infringement on Aboriginal and Treaty Rights after Bill 150 would become law. Pre-consultation with stakeholders was inconsistent; there was some testimony that pre-consultation did occur with at least one stakeholder (Hope, 2009).

Similarly, the opposition MPPs noted that Bill 150 was introduced to the legislature without proper briefings (Shurman, 2009). They further stated that there was a departure from parliamentary tradition of introducing a bill, then allowing the opposition several days to consult with potentially impacted stakeholders and the general public (Arnott, 2009). The expediency with which Bill 150 was being processed caused concern:

Although I support green energy, I am concerned... [about] the haste to pass this bill... without extensive consultation with stakeholders and the public. (Witmer, 2009, p. 5330)

Bill 150 went from First Reading to Royal Assent in less than three months, while Bill 173 and Bill 191, introduced the same year as Bill 150, took approximately six and 16 months, respectively (Table 1). Also, both Bill 173 and Bill 191 had lengthy pre-consultation processes with First Nations community-elected governing leadership, while Bill 150 had none (see Table 2).

**Table 2. The Legislative-consultative Process with Respect to First Nations and the *Green Energy and Green Economy Act*, the *Mining Amendment Act*, the *Far North Act*, and the *COVID-19 Economic Recovery Act*.**

Consultative <sup>F</sup> Activity	Bill 150 <i>Green Energy and Green Economy Act, 2009</i>	Bill 173 <i>Mining Amendment Act, 2009</i>	Bill 191 <i>Far North Act, 2010</i>	Bill 197 <i>COVID-19 Economic Recovery Act, 2020</i>
Pre-consultation with First Nations community-elected governing leadership	NO	YES <sup>G</sup>	YES	NO <sup>H</sup>
Consultation with non-elected First Nations representative during Committee Hearings	YES	YES	YES	NO
Consultation with First Nations-elected governing designate during Committee Hearings	YES	YES	YES	NO
Consultation with First Nations community-elected governing leadership during Committee Hearings	NO	YES	YES	NO

<sup>F</sup> This is a checklist type of approach—yes or no response—typically used by government officials and development proponents to address duty-to-consult requirements. Here, the checklist is applied to the legislative process.

<sup>G</sup> This type of checklist approach makes no distinction of whether there was meaningful consultation from an Indigenous perspective or just contact.

<sup>H</sup> Although pre-consultation was reported by MPPs, specifics were never given (Yurek, 2020) to substantiate claims.

Nevertheless, LIB Minister Smitherman (2009d) reported that he visited >20 communities on his Green Energy Act tour (Levac, 2009). Although his tour could be considered disseminative in nature, it is not consultation. Moreover, he did not visit the Far North, which is noteworthy because the LIB Government would shortly after introduce the *Far North Act*. Since there was no real pre-consultation

with respect to Bill 150, the consultation for this bill would have to occur through the Committee hearings.

Any Ontarian can present at a Committee public hearing as a “witness.” To present, individuals or organizations must register with the Clerk of the Committee, hand in any material they wish to present, and, finally, be selected to present.<sup>14</sup> For Bill 150, presentation time was set at 10 minutes with five minutes for questions from the Committee (Oraziotti, 2009). At first glance, the procedure to present has the illusion of being democratic. However, because organizations are chosen to present based on the materials they provide, the government can pre-select presenters who strengthen their agenda (e.g., Green Energy Act Alliance; Eyamie, 2009; Yakabuski, 2009b), and refuse others who challenge the government’s position (Jones, 2009). Another barrier to the general public presenting before the Committee was the distance needed to be travelled to reach the locations of the hearings: “This effectively silences many who oppose aspects of the Green Energy Act” (Eyamie, 2009, p. 571). There were many barriers to stakeholders participating in the hearings.

### **Consultation with First Nations**

It should be emphasized that Indigenous people are much more than a stakeholder, but Ontario’s legal fiduciary responsibility of duty to consult is not triggered during the legislative process of Bill-to-Act. Ontario has a higher ethical fiduciary responsibility for consultation with First Nations during the legislative process than with the general public because once a bill becomes law, there is a legal duty to consult with Indigenous people when Indigenous and Treaty Rights are infringed upon. During a Committee hearing for Bill 173 and 191, Grand Chief Stan Beardy of NAN spoke about consultation more generally. His words are also relevant for Bill 150:

Just because I have appeared here today does not mean you have consulted with the First Nations in Nishnawbe Aski Nation. NAN, the organization I represent, a political organization, does not have any aboriginal and treaty rights. This hearing is not consultation . . . each First Nation should be consulted without artificial timelines . . . It’s the rights-holders, the people on the land, the First Nations level, the leadership at the community level who hold those aboriginal and treaty rights, and they are the ones who need to be consulted. NAN’s role, basically, is to facilitate that process to ensure that they are being heard, that the people who need to talk to them do consult with them. (Beardy S., 2009, p. 828–831)

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<sup>14</sup> The Standing Committee on the General Government exists for the duration of the parliamentary term (LAO, 2020h) and consists of a working group of MPPs (LAO, 2020i). Ontario citizens and organizations can participate in Standing Committees public hearings as witnesses (LAO, 2020i).

It is clear that consultation—whether the ethical fiduciary responsibility or the legal fiduciary responsibility of duty to consult—must be held with communities and their elected leadership (i.e. Chiefs & Councils).

During the *Green Energy Act* hearings (Table 2), no elected First Nations representatives was present. Only one designate appeared on behalf of an elected First Nations official (Kopperson, 2009). There was First Nations representation at the hearings (e.g., Director of Economic Development, Pic River Nation; LeClair, 2009), but no community-elected officials.<sup>15</sup> The First Nations organizations that were present at the hearings were there to influence economic opportunities. These opportunities were related to transmission lines (Five Nations Energy Inc.; Chilton, 2009) and allowing hydroelectric development in provincial parks to benefit First Nations (LeClair, 2009). Changes to existing policy, such as the waterpower site release policy limiting hydroelectric development to 25 megawatts and the Northern Rivers Commitment limiting hydro-electric development in northern Ontario (Brant, 2009), were sought to better exploit hydroelectric opportunities in the Far North.

While Premier McGuinty (2009b, p. 5944) purported that the *Green Energy Act* “is designed to stimulate construction of new renewable sources of electricity, everywhere from remote parts of northern Ontario to farms in the south-west,” not one of the Committee hearings was scheduled in the Far North (Table 1). Titling Bill 150 the *Green Energy Act* made it appear innocuous; thus, consultation was very limited and the time to Royal Assent expedited. The quick passage of the *Green Energy Act* sharply contrasts Bill 173 and Bill 191, which were also introduced in 2009 (Table 1). This demonstrates that titling of a bill is important to how it is perceived and received.

### **Comparing the Consultative Process: Bill 150 to Bill 173 and Bill 191**

The LIB Government described a lengthy pre-consultation process for Bill 173 to meet its ethical fiduciary responsibility to consult with Indigenous people. In February 2007, a discussion paper was released to initiate relationship building and consultation about *Mining Act* amendments (Brown, 2009). There were some successful pre-consultation efforts at the First Nations level:

I’m the elected chief of the Sagamok Anishnawbek . . . we’ve had opportunities to speak to government with respect to the discussions around the Mining Act. (Eshkakogan, 2009, p. 858).

However, the responses at the Tribal-Council level were all critical:

When the revisions of the Mining Act came about . . . We went in the tent, so to speak . . . Every time we came to a clause that we would like to see enacted as law, we were told, “We will deal with that at the policy level.” We did not enter into these discussions to influence policy. We

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<sup>15</sup> Chief Robert Corbiere was the president of the First Nations Energy Alliance at the time of their involvement with the *Green Energy Act*, but his role and stance was not explicitly described; nor was it stated whether Corbiere participated as an elected representative of Wikwemikong Unceded Indian Reserve (Canada Forum, 2009; Cooper, 2007).

went . . . to influence what the wording of the law should be. (Beardy, F. 2009, p. 960, NAN Envoy)

Matawa First Nations . . . participated in several Mining Amendment Act forums. They were very clear in what kinds of changes they would like to see in the legislation . . . Regrettably, most of those recommendations were not included . . . This is not a question of consultation but rather, were our people listened to? Consultation is only as good as the accommodation that arises. (Moore, 2009, p. 963)

We have been involved right from the outset not in our terms of what we desired to be consultation. Ontario has attempted to have discussions by bringing people together in urban centres and thereby calling it consultation . . . We've told the province from day one that it is the people in our home communities who need to have the discussion and need to have input into the process. That has fallen on deaf ears. (Louttit, 2009, p. 985)

In developing Bill 191 in 2007, Ontario put forward the Northern Table idea to create a new working relationship with the First Nations of northern Ontario (Solomon, 2009; Babin, 2009). For two years, First Nations worked with Ontario to establish a new relationship and create a land-use planning law that would be First Nation-led (Beardy, F. 2009, NAN Envoy). Unfortunately, the two years of pre-consultation in regard to the *Far North Act* was all for naught:

We started out with land use planning being First-Nations-led. By the time we got to the legislation, that had been watered down to “significant involvement” for First Nations, as determined by the minister at her unilateral discretion. (Beardy, F. NAN Envoy, 2009, p. 952)

Ontario . . . they've gone on the record as wanting to work with us, and then making arbitrary decisions like that without talking to us was very, very shocking. (Louttit, 2009, p. 985)

It is unusual that Bill 173 and Bill 191 were bundled together for Committee hearings, especially taking into account the significant impact each bill would have on First Nations (Slipperjack, 2009). First Nation leadership stated that, “The bills should be considered separately” (Beardy S., 2009, p. 828). A LIB MPP tried to placate First Nations' leadership by insisting “that this is first reading only” (Mauro, 2009, p. 830). However, as pointed out by Bisson (2009b, p. 831):

Let's be clear there are two bills here. There's Bill 191 and Bill 173 . . . For those who are interested . . . the Mining Act is at second reading and this is your only kick at the can as First Nations . . . to be able to have an effect on what this final bill will look like.

When the Committee hearings did occur for Bill 173 and Bill 191, they were located in Toronto in southern Ontario, and some mid-northern towns, but not on First Nations territories (Slipperjack, 2009). Even the Committee hearing scheduled for Chapleau, a mid-northern town, was controversial:

Today is election day for Nishnawbe Aski . . . The committee is here in Chapleau and expecting to hear from NAN First Nations on . . . Bills 191 and 173 . . . so why did you schedule this committee hearing today, of all days . . . it was a huge mistake on your part, and one that has set the relationship back . . . an opportunity lost, a promise broken. (Beardy, F. 2009, p. 952, NAN Envoy)

An additional round of hearings for the *Far North Act* were scheduled for June 2010 in several of the Far North communities (Table 1). These were cancelled by NAN resolution 10/36 (Levac, 2010, p. 99)<sup>16</sup> because Ontario arbitrarily set the day and time. First Nations were not given any latitude for accommodation of day or time of the hearings: “This was just a complete disregard for everybody . . . I guess there’s one thing that the Liberals have learned over the last seven years, that there are more votes in southern Ontario than there are in northern Ontario, with the way they’re ramming this bill [Bill 191] through” (Hillier, 2010b, p. 100).

## Overview

By not defining green energy in the *Green Energy Act*, green energy could be anything to anyone, although it was typically interpreted in a positive light. The labelling of Bill 150 as the *Green Energy Act* pressured any critics to carefully choose their words, lest they be accused of being an opponent of green energy and the environment. This helped Bill 150 to obtain Royal Assent in record time. However, Ontario did not meet their ethical fiduciary responsibility for meaningful consultation during the Bill-to-Act parliamentary process (Table 1 and 2). The process of Bill 150 is in sharp contrast to the consultative processes for both Bill 173 and Bill 191, which involved a relatively extensive pre-consultative and consultative phases; however, the quality of these consultative processes is questionable at best.

Bill 150 was also an omnibus bill, which is either accepted or rejected in its entirety through a single vote in the legislature (Kirchhoff & Tsuji, 2014). Omnibus bills are not viewed as being conducive to democratic participation because of the complexity of the changes to be made to a variety of laws (McRobert et al., 2016). In Canada, omnibus bills and the acts they become have been used to streamline environmental protection by limiting opportunities for both public and Indigenous participation in development projects throughout the environmental assessment process (Kirchhoff & Tsuji, 2014). The fact that no elected First Nations representatives were at the Committee meetings for

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<sup>16</sup> According to NAN, “This resolution was forwarded to the Standing Committee . . . requesting an amended date. No formal response was provided by the Committee and they did not hold public meetings in these First Nations during the week of June 14, 2010” (2011, p. 83).

Bill 150 was an anomaly, while numerous elected First Nations representatives attended the joint Bill 173 and 191 Committee hearings. If Bill 150 was named differently, perhaps there would have been more involvement from elected First Nations representatives.

Since renewable energy was prominent in the *Green Energy Act*, hydroelectric power-generation projects would be streamlined under this act and barriers to development would be removed. On the premise that most of the hydroelectric potential is located in northern Ontario, this should have been acknowledged as a potential concern for the First Nations and their political organizations. This point was raised in the legislature by O'Toole who noted: "I would say that hydroelectric—that's water dams—would be green energy, with the exception that often, to create a dam, you have to flood property . . . [Flooding] has been affecting First Nations for hundreds of years. It's a huge issue" (2009, p. 5171–5172). In addition, there would be impacts on fishing (Quinney, 2009). Further expansion of hydroelectric power in this manner also impacts wildlife and traditional activities, as has been reported in the Far North.

In closing this section, while it should be recognized that there were numerous factors at work that contributed to the misgivings with the act-creation process associated with Bill 150, one of the most identifiable components was the labeling of Bill 150 as the *Green Energy Act*. It is this sort of rhetoric that one must be wary of; the wording seeks to obfuscate the intent and meaning of the Act through relying on the positive connotations of the word "green." This is an example of the kind of deception that people should be vigilant against to protect against hidden agendas that can negatively affect Indigenous communities (Kirchhoff & Tsuji, 2014).

These concerns are not only relevant to Canada. Worldwide, there are other countries that have followed suit in the adoption of a green energy strategy, such as, but not limited to, The United Kingdom (*Green Energy Act, 2009*) and The United States of America (United States Environmental Protection Agency, 2020). As exemplified with the *Green Energy Act*, rhetoric can play a large role in policy discussion and development.

### ***COVID-19 Economic Recovery Act, 2020***

#### **Economic Context**

In 2020, the world was again plunged into a worldwide financial crisis as the result of the emergence of COVID-19 (Manjili et al., 2020; McKibbin & Fernando, 2020; WHO, 2020). In Canada, there has been unprecedented disruption in the social and economic lives of Canadians, and the economic impacts have disproportionately affected Indigenous peoples because of greater pre-existing vulnerabilities resulting from colonialism (Statistics Canada, 2020). During the COVID-19 pandemic, there have been historic declines in economic indicators in Canada, such as consumer spending, investment, and international trade (Statistics Canada, 2020). After the initial downturn of the economy with the first wave of COVID-19 (PHO, 2020a), there was an increase in economic outputs, but the economic recovery was



uneven across sectors (Statistics Canada, 2020). In Ontario, May 2020 signaled the start of Phase 1 of Ontario's Action Plan in response to COVID-19 (i.e., \$17 billion CAD in targeted support) (GO, 2020b). In June 2020, Phase 2 of the economic restart began, and Phase 3, the recovery phase, was initiated July 2020 (GO, 2020c). In July 2020, Bill 197 was introduced and enacted as the *COVID-19 Economic Recovery Act* (Table 1) months before the start of the second wave of the COVID-19 pandemic, which again, forced Ontario into "lockdown" (i.e., the closing of everything except for essential services; GO, 2020d; GO, 2021). The lockdown also severely impacted the economy (PHO, 2020b).

## Policy and Politics

In July 2020, Clark (2020a, p. 8491,) introduced Bill 197 to the legislature (Table 1) and stated that the *COVID-19 Economic Recovery Act*:

is part of our government's plan to get Ontario back on track . . . to get key infrastructure projects built faster, attract new jobs and investment, and adjust regulations<sup>17</sup> . . . to restart jobs and development.

Thompson (2020, p. 8799–8800), the PC Minister of Government and Consumer Services, added: "Bill 197 would . . . streamline processes for some infrastructure projects, create jobs, help boost our economy." These statements are in keeping with the PC-Majority Government's slogan "Open for Business" and their pronouncement that "we're cutting red tape" to create jobs (GO, 2020c).

With Bill 197, to help facilitate this agenda, the Lieutenant Governor in Council, which includes the Minister of Municipal Affairs and Housing, was given sweeping powers to designate which projects would require an environmental assessment and which would be exempt, removing "red tape." Opposition MPPs took exception to this removal of environmental oversight, calling the amendments "reckless" (Vanthof, 2020, p. 8770) and stating that they did not follow "due diligence" (Arthur, 2020, p. 8892) or the "precautionary approach" (Schreiner, 2020a, p. 8799). This is emphasized by Schreiner):

The minister has the power to decide which projects will receive an EA [environmental assessment] and which will not. That shouldn't be decided by the minister. That should be

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<sup>17</sup> As is explained in Archives of Ontario, "A regulation is law that is created under the authority of a statute or act . . . They make it possible for the government to act expeditiously in providing for additional rules or procedures without having to enact new statutes . . . Regulations are made by the Ontario government ministry that is responsible for administering a statute, and are passed by Order-in-Council. They do not need the approval of the legislature" (unnumbered).

decided by the threat of a project, the scale and scope of a project, and, most of all, by science. (2020, p. 8797)

As noted by Bell (2020) and Schreiner (2020b), when the majority of projects are exempt from the environmental assessment process, some exempted projects, such as forestry projects, will have devastating effects on waterways with respect to mercury contamination (Porvari et al. 2003; Kronberg et al. 2016). Further, by sidestepping the environmental assessment process, public consultation would be precluded and voices from the communities impacted by these projects would be silenced (Begum, 2020; Hunter, 2020; Karpoche, 2020)

### **Consultation and the First Reading of Bill 197**

Bill 197 was an omnibus bill that when enacted as the *COVID-19 Economic Recovery Act* affected 43 acts (LAO, 2020c). Due to its breadth in coverage, the consultative process for Bill 197 should have been extensive, but it was not (Fraser, 2020a; Sattler, 2020). The expediency with which Bill 197 was rushed “at the speed of light” (West, 2020, p. 8931) through the legislature concerned opposition MPPs (Fraser, 2020b; Karpoche, 2020).

With respect to stakeholders, although the PCs asserted that they “consulted extensively” (Clark, 2020b, p. 8492), including with Indigenous communities (Yurek, 2020, p. 8779), no specifics were given to validate their claim. Fife’s (2020, p. 8779–8780) comments on this topic were quite pointed:

I sit on . . . the finance and economic recovery special committee that has been set up by this government . . . I heard the minister . . . talk earlier at length about how they have been listening and taking action, and so I was wondering, who have they listened to? . . . They certainly did not listen to First Nations, Métis and Inuit folks in this province.

Bill 197 went from First Reading to Royal Assent in ~14 days (Table 1). Similar to Bill 150, Bill 197 had no documented pre-consultation with First Nations community-elected governing leadership (Table 2). The fast-tracking of Bill 197 is noteworthy; it did not go to Committee after First or Second Reading and followed an atypical sequence of Bill-to-Act (Table 1).

### **The Legislative Consultative Process for Bill 197**

The legislature deliberations revealed the frustration of opposition MPPs. Sattler (2020) refers to the MPPs democratic right to debate being ignored, and other MPPs specifically mentioned the use of time allocation to limit debate in the legislature (West, 2020). While the use of time allocation is not an unusual practice in parliamentary deliberations, time allocations were often used after the Committee phase, which is uncommon.

The lack of a Committee stage was atypical, as other pieces of legislation that went from Bills-to-Acts during the same time period were sent to Committee (e.g., Bill 175, Bill 184). The opposition MPPs

were critical of the lack of a Committee stage, as there would be no consultation with the public or Indigenous people, who would be the most impacted by the amended environmental assessment process (Bell, 2020; Schreiner, 2020b). Several MPPs commented that the lack of consultation during the Committee stage was an attack on the democratic process because of its “eradication” of any public input by concerned citizens, experts, and stakeholders. They stated that without this consultation, an opportunity to create better bills and better laws would be missed (Bisson, 2020; Fraser, 2020b; Vanthof, 2020). Arthur (2020) gave an example using Bill 66 of why the Committee stage is of utmost importance, especially when discussing Schedule 6 (*Environmental Assessment Act*) of Bill 197.

### **Bill 66, Restoring Ontario’s Competitiveness Act, 2019, the Context for Bill 197**

Bill 66 was an omnibus bill that, once enacted, affected 18 acts (LAO, 2020d). Bill 66 was referred to Committee in 2019 (LAO, 2020e). During the Committee stage, Schedule 10 of Bill 66 was discussed extensively, and a coordinated response to Bill 66 was mounted by Ontarians. Bill 66 was amended by removing the whole of Schedule 10. Schedule 10 was very controversial because it would allow municipalities to pass Open-for-Business planning bylaws that would be exempted from the *Greenbelt Act, 2005*, and *Clean Water Act, 2006*, allowing for development on environmentally sensitive land.

Although amendments to sections of Schedules in proposed bills are typical occurrences, the removal of a whole Schedule in a proposed bill is very rare, especially with a Majority Government. The removal of Schedule 10 was possible because the legislature followed the typical Bill-to-Act legislative process, fulfilling their ethical fiduciary responsibility to meaningfully consult with their fellow MPPs and Ontarians in general. In addition, outside of the legislative process proper (Figure 1), Ontario met their legal procedural obligations (Lindgren, 2011) under the *Environmental Bill of Rights, 1993* with respect to the Environmental Registry. The Environmental Registry gives the right to all Ontarians to participate in government decision making with respect to government proposals and the potential impacts on the biophysical environment (Environmental Registry of Ontario [ERO], 2020a, b). After First Reading of a bill, a notice will be posted on the Environmental Registry for a minimum 30-days-comment period. In the case of Bill 66, a total of 26,032 comments were received (ERO, 2020c). For comparison, Bill 150 received a total of 1,348 comments (ERO, 2020d), Bill 173 tallied 750 responses (ERO, 2020e) and 128 comments were made for Bill 191 (ERO, 2020f). Additionally, through the efforts of 24 organizations (Stop Bill 66, 2020a), a website was established entitled “Stop Bill 66” that provided resources, such as a citizen toolkit on how to interact with your MPP and organizing tools (Stop Bill 66, 2020b). Although the Environmental Registry and online action groups are external to the Bill-to-Act legislative process, they can serve as an important avenue of discussion and may impact government actions.

Ontario learnt their lessons from the failure of Bill 66 (Arthur, 2020). For Bill 197 there would therefore be no Committee stage, and, as discussed earlier, legislative debate would be limited through time allocation. There would also be no external legislative consultation through the Environmental Registry. To circumvent the Environmental Registry, Ontario amended the *Environmental Bill of Rights* in Bill 197 to exempt the *COVID-19 Economic Recovery Act*. Nevertheless, Ontario posted on the

Environmental Registry a Bulletin with the date of First Reading of Bill 197 (Table 1) which they stated was “for informational purposes only.” They included a summary of the changes to the *Environmental Assessment Act* pertaining to the *COVID-19 Economic Recovery Act* and detailed why consultation was not required (ERO, 2020g). However, the legality of the above-described section of Bill 197 was questioned (Ontario Superior Court of Justice, 2020); and, under judicial review, it was ruled “that the Minister [of the Environment] acted lawfully respecting the posting of Schedule 6 [Environmental Assessment Act]” (Greenpeace Canada v. Ontario, p. 12)

## Overview

Similar to the labelling of the *Green Energy Act*, the naming of the *COVID-19 Economic Recovery Act* put critics on the defensive. Proponents asserted, “I’d like to know why the Liberals are against creating jobs” (Hogarth, 2020, p. 8787). Meanwhile, critics contended, “It makes it hard for people to have confidence when you call it an economic recovery act when everything is not about economic recovery” (Fraser, 2020a, p. 8494). As evident in legislative debates for Bill 197, opposition MPPs asserted that the Bills had little to do with economic recovery (Fraser, 2020c) and did “not help First Nations communities” (Karpoché, 2020, p. 8919). Bill 197 was described as more of “a pre-pandemic wish list from the government” (Schreiner, 2020a, p. 8796).

Bill 197 was granted Royal Assent in ~14 days. This contracted time period was achieved by Ontario shirking their ethical fiduciary responsibility for meaningful consultation throughout the parliamentary process of Bill-to-Act, limiting parliamentary debate, and, more importantly, bypassing the Committee stage (Table 1). This process is in sharp contrast to other somewhat less complex Bills passed during the COVID-19 pandemic that had Committee stages..

In Ontario, the acts that originated with Bills 150 and 197 have been brought into force to exempt and streamline the environmental assessment process, thus eliminating or limiting the opportunities for both public and Indigenous participation with respect to consultation in development projects. Ontario did not meet their ethical fiduciary responsibility to consult with the public, and especially with the people potentially most impacted by development, Indigenous people. It is interesting to note that Minister Yurek (2020) tried to justify the lack of consultation during the Bill-to-Act process by reiterating that consultation will occur once Bill 197 becomes law at the regulatory phase. However, as development projects are exempt from environmental assessment, duty to consult would not be triggered. As such, Indigenous communities would not be consulted.

Similar to the recently repealed *Green Energy Act*, hydroelectric power-generation projects would be streamlined under the *COVID-19 Economic Recovery Act*, as detailed by Minister Yurek (2020, p. 8775–8776): “We . . . will speed up projects, such as . . . water power generators . . . to modernize Ontario’s environmental assessment program.” It should be again stressed that hydroelectric power generation has severe negative effects at the local environmental level, and this has been well documented for Indigenous communities (Tsuji et al., 2021).

Recently, there has been a trend in Canada to use the term “clean power” to refer to non-emitting and renewable energy sources, and hydroelectric power generation has been included in this category (Government of Canada, 2020; Tsuji et al., 2021). Further, Statistics Canada (2020) identified clean technology jobs and, in particular, clean energy production as important during the COVID-19 pandemic and as an important avenue for growth. Likewise, Ontario recently released a discussion paper detailing how clean technologies can help support a speedy economic recovery from COVID-19 while helping to reduce greenhouse gas emissions (GO, 2020e). Thus, terminology may have changed, and the crises may be fundamentally different, but green energy and clean energy are still being touted as a way to economic recovery, and the path forward for hydroelectric projects is being streamlined.

In closing, the issues with the Bill-to-Act consultative process for Bill 150 are also relevant for Bill 197 in the COVID-19 pandemic context. The green energy rhetoric has evolved into discussions about clean power; thus, one must be wary of this type of rhetoric, especially during economic crises that result in bills quickly becoming acts with little legislative and public consultation. Moreover, Bill 197 contained limited details, so Ontarians were left wondering what the new environmental assessment process would look like (Lindgren, 2020). Lastly, there has been a legislative call for a green economic recovery in Ontario:

there’s a growing global consensus that now is the time for a green economic recovery from COVID-19 . . . If you listen to the experts and the economists, they are saying that we need to align our COVID-19 recovery with climate action. This is a chance . . . to flatten the curve on climate pollution like we’re working so hard to flatten the curve on COVID-19. (Schreiner, 2020b, p. 8927)

### **Lessons Learned**

The *Green Energy Act* and the *COVID-19 Economic Recovery Act* were passed in the context of worldwide crises. Both acts were omnibus bills with economic recovery being touted as the primary driver, but they also included a focus on green/clean energy (“emission free”). Bill 150 explicitly mentioned green energy, and Bill 197 included it in a later discussion paper (GO, 2020e). Both acts streamlined the environmental assessment process for projects, including green energy and clean energy developments, thereby, eliminating or severely impacting the integrity of the environmental assessment and consultation processes. If a green/clean energy project is exempt from an environmental assessment, the legal fiduciary responsibility of duty to consult with Indigenous peoples will never be triggered in Ontario or Canada.

In Canada, more meaningful use of the Bill-to-Act parliamentary process needs to occur to hold governments accountable for meeting their ethical fiduciary responsibility to consult on legislative matters that can have far-reaching effects on the environment and Indigenous Peoples. In Ontario, there are four opportunities (not including pre-consultation) in the Bill-to-Act process where consultation can have an impact. Within the legislative process, consultation can occur in debates within the legislature

and public hearings and debates within committees. Outside of the legislature, the Environmental Registry and grassroots movements also offer opportunities for meaningful public influence on proposed bills. Bill 150 and especially Bill 197 exemplify Ontario's problematic acceleration of the Bill-to-Act process through eliminating opportunities for consultation and shirking ethical fiduciary responsibility to consult with Indigenous people on matters that potentially impact their constitutionally embedded Aboriginal and Treaty Rights. By contrast, Bill 66 is a positive example of how public consultation on a bill can significantly alter it before it becomes law.

There are several lessons that we—as analysts and stakeholders—can glean from the cases presented, especially considering that there will be more bills on the horizon related to economic recovery from the COVID-19 pandemic in Canada and worldwide. First and foremost, it must be established who has the authority to represent Indigenous communities in consultations. The impacts of colonialism have sometimes made this more difficult to ascertain than it may seem. For example, in some First Nations communities there are hereditary leaders and elected leaders (Clogg et al. 2016; Harper et al. 2018; Voyageur, 2011). This raises the question: Who speaks on the community's behalf in what instances? Ideally, this issue needs to be resolved prior to any consultation. Second, do not judge a bill by its title. The *Green Energy Act*, and the *COVID-19 Economic Recovery Act* sound positive, but the titles of both acts hid major issues including the streamlining (or exemption) of hydroelectric projects from the environmental assessment process. Third, always be vigilant of the introduction of bills during emergencies. As mentioned in relation to the COVID-19 pandemic, Indigenous people are often hit the hardest due to pre-existing vulnerabilities, and it is at these times that governments often put forward economic recovery acts to exploit untapped resources typically located in Indigenous homelands worldwide. Fourth, the COVID-19 pandemic has demonstrated that, even during contracted timelines, public consultation could occur through online-Committee meetings with relatively little cost. The *COVID-19 Economic Recovery Act* allowed for electronic participation of council or committees to meet quorum opens the possibility that during the Bill-to-Act process, public hearings can be held remotely in Ontario.<sup>18</sup> Although in-person deputations are best, electronic participation would allow Indigenous people the chance to participate without the costs of travel and accommodation and help to alleviate the time factor. Connectivity issues in remote regions of Canada could be a concern, but asynchronous meetings could also be planned. Virtual meetings have become a reality in the COVID-19 pandemic world, and there are many platforms that are known to work well. Fifth, develop a list of people and organizations (including MPPs) that have similar concerns and values as your community, and keep this information on hand in the event that a coalition of organizations is needed to combat a bill, as with Bill 66. Lastly, be aware that Majority Governments feel less responsible for public consultation, especially during crises; examples include the LIB-Majority Government passing the *Green Energy Act* and PC-Majority Government passing the *COVID-19 Economic Recovery Act*.

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<sup>18</sup> The House of Commons in Canada currently uses a video-conferencing platform for public virtual proceedings (Sahota, 2020). Other countries (e.g., New Zealand) around the world also use videoconferencing for some government committees to meet remotely (Sahota, 2020).

However, even with a Majority Government, significant amendments can be made to a bill before it becomes an act, such as the case of Bill 66 when Ontario met their ethical fiduciary responsibility for consultation. Thus, in Ontario, the legislative process from Bill-to-Act does allow for meaningful public input if, and only if, the government honours their ethical fiduciary responsibility for meaningful consultation.

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