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REDWASHING EXTRACTION

Indigenous Relations at Canada's Big Five Banks

BY ROBERT HOULE



AUTHOR

Robert Houle

CONTRIBUTORS

Eugene Kung
Jackie DaSilva

EDITOR

Hayden King

COPY EDITOR

Jasmyn Galley

DESIGNER

Yumi Numata

RESEARCH ASSISTANT

Kelsi-Leigh Balaban

This report features commissioned
illustrations by [Bailey Macabre](#)
(nêhiyaw ayâhkwêw + michif/ukrainian)

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ABSTRACT

Emerging from an explosion of resource development in the 1990s and corresponding conflicts in the courts, Indigenous people have pushed for the development of minimum legal standards such as the Duty to Consult and Accommodate to protect their lands and resources. While approaches to consultation and accommodation have been ad hoc, failing to honour these new legal principles has given rise to a fear or culpability among industry. Departing from this context, the research here turns towards those most implicated: banks. How are banks responding to the rise of Indigenous rights?

The “Redwashing Extraction” research team analyzed the role that the Royal Bank of Canada, Toronto Dominion, Scotiabank, Bank of Montreal, and the Canadian Imperial Bank of Commerce have played financing resource extraction against the backdrop of their approaches to Indigenous relations more generally. By taking a snapshot of available data between 2019–2021, we were able to understand how each of Canada’s Big Five Banks has approached Indigenous relations and their interpretation of Indigenous rights. We found that while there are modest examples of progress, bank efforts are typically performative and superficial. Moreover, they tend to mask their inaction behind self-reporting certification processes that validate their limited engagement with communities. Ultimately, we argue that recent legal tools might be the only short-term opportunities to continue holding the financial industry accountable for infringements on rights and title.



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TABLE OF CONTENTS

07

Introduction

08

PART I: The Emergence of
Reconciliation Finance

09 Methodology

12

PART II: Redwashing at the Big Five

12 Royal Bank of Canada
(RBC)

13 Toronto Dominion Bank
(TD)

14 Bank of Nova Scotia
(Scotiabank)

14 Bank of Montreal
(BMO)

15 Canadian Bank of Imperial Commerce
(CIBC)

17

PART III: PAR for the Course? How The
Canadian Council for Aboriginal Business and
Equator Principles Maintain the Status Quo

17 Progressive Aboriginal Relations

18 Equator Principles (EP4)

21

PART IV: New Tools for Consultation and Consent

21 Cumulative Impacts

21 Potential Liability of Third Parties

23

Conclusion

26

Endnotes



SELECT KEY TERMS

Duty to Consult and Accommodate

The duty to consult and accommodate is a constitutional principle under Section 35 (Aboriginal and treaty rights) of the Constitution Act, 1982. It establishes that when the Crown (federally or provincially) is contemplating conduct that may interfere with Aboriginal rights or title, they must consult and, if there are infringements on aboriginal rights, accommodate the relevant Indigenous communities.

“Redwashing”

Similar to “greenwashing” this is a generally corporate response to an urgent social and or legal issue that merely co-opts language and symbols but offers little transformative or meaningful change. Redwashing is an attempt to craft an appearance of reconciliation, or being generous – reconciliation in a purely superficial conceptualization.

Thomas and Saik’uz First Nation v. Rio Tinto Alcan Inc

The construction of the Kenney Dam and subsequent Rio Tinto Alcan Mining Company’s management of the Nachako river prompted Saik’uz and Stellat’en to seek an injunction against the resultant harm to the watershed, which prevented the exercise of their rights. While ultimately ruling against the First Nations, this case is significant because the court affirmed that Aboriginal rights could form the basis of a claim of private nuisance (a disturbance of one’s property) against a third party, in this case, Rio Tinto Alcan.

Yahey v. British Columbia, 2021

Due to a variety of industrial developments on their territory, Blueberry River First Nation had experienced harmful cumulative impacts (impacts that compound over time and disrupt the health of the lands, waters, and wildlife within a territory). In *Yahey v. British Columbia*, the community filed a claim against the province and the Court found that cumulative impacts — and not simply a single specific project — can result in rights infringements and must be addressed. This decision may apply to other First Nations that have experienced years of harmful development activities.

Equator Principles

The Equator Principles are a risk management framework that financial institutions utilize to help identify, assess, and manage environmental and social risks when financing projects.

Certified Aboriginal Business (CAB) Program

Certification program which enables businesses to promote themselves as certified Aboriginal Businesses and be easily identified by industry and government.

Progressive Aboriginal Relations (PAR)

The Canadian Council for Aboriginal Business’ certification program that signifies effective corporate responsibility regarding Indigenous relations. Companies that enroll in the program submit evidence of their Indigenous relations and may receive a certification of Bronze, Silver, or Gold, depending on specific criteria and verification.

Free Prior and Informed Consent (FPIC)

Free Prior and Informed Consent is a concept most notably described in the *United Nations Declaration on the Rights of Indigenous Peoples*. FPIC requires governments to obtain Indigenous peoples’ free and informed consent, prior to making any decisions that may impact those peoples’ lands, resources, or communities generally.

UNDRIP

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) establishes a universal framework of minimum standards for Indigenous peoples survival, dignity, and well-being. Canada formally removed objections to UNDRIP in 2016 and passed the UNDRIP Act in 2021 to begin the process of implementation domestically.



The time has come for **governments, industry, and financiers** to stop continually pass the **proverbial buck** when it comes to respecting, acknowledging, and **upholding Indigenous rights**.

How many projects, mired in delay or **escalating costs**, would not have occurred if the Big Five Banks had not handed out **\$558 billion** in funding since 2016?"



BIG 5 BANKS | 2016-2020

Investment in Resource Extraction in \$US Billions*

Royal Bank of Canada (RBC)

\$160+

RBC, along with TD, is a leader, in oil sands investment. They have also partnered with the National Centre for Truth and Reconciliation (NCTR) and have chosen to focus on Call to Action #92, adopting UNDRIP as a reconciliation framework.

Toronto Dominion Bank (TD)

\$121+

TD is the only bank among the Big Five that explicitly outlines a mechanism for evaluating FPIC within their Environmental and Social Credit Risk assessments. They are, however, the least transparent publicly, about their Indigenous initiatives.

Scotiabank

\$113+

Scotiabank's investments include partnerships with Enbridge Ink and the Transmountain Expansion Project. They have also committed over \$100 billion to meet the Paris Climate Accord's goals.

Bank of Montreal (BMO)

\$97+

BMO invested \$22 billion in TC Energy Ltd. between 2016 to 2020, the most out of Big Five Banks. This funding connects BMO to the Coastal Gas Link natural gas project in Wet'suwet'en territory, one the most aggressive regarding Indigenous rights violations and conflicts.

Canadian Imperial Bank of Commerce (CIBC)

\$66+

The major recipients of CIBC funding between 2016 to 2020 were Enbridge Inc. and Suncor Energy Ltd. The bank has the largest Indigenous workforce out of the Big Five: just under 2%.

From 2016 to 2020, the total amount the Big Five Banks – RBC, TD, Scotiabank, BMO, and CIBC – invested into the resource extraction industry was

\$558 billion.

* Source | Banking on Climate Chaos: Fossil Fuel Finance Report 2021, published March 24, 2021 by Rainforest Action Network, BankTrack, Indigenous Environmental Network, Oil Change International, Reclaim Finance, and Sierra Club.



INTRODUCTION

Over the past four years, the Big Five Banks in Canada have invested a staggering \$558 billion into the resource extraction industry.

This is an industry — and an investment — that has a tremendous impact on Indigenous territories and people. While there are some positive impacts, such as employment opportunities and industry participation, the negative long-term consequences severely outweigh them. With new considerations and awareness being raised around cumulative impacts, it must be argued that every proponent throughout the lifespan of a project carries political, economic, and environmental liability.

The time has come for governments, industry, and financiers to stop continually passing the proverbial buck when it comes to respecting, acknowledging, and upholding Indigenous rights.

Indigenous leaders and community members should no longer be appeased with performative gestures, like pledging to fight climate change with the right hand while handing out cash for pipelines with the left, but demand meaningful changes to how projects are proposed, planned, and ultimately funded.

How many projects, mired in delay or escalating costs, would not have occurred if the Big Five Banks had not handed out \$558 billion in funding since 2016?

Have the Big Five done enough to mitigate the negative impacts experienced by Indigenous people?

The Emergence of Reconciliation Finance

In recent years, advocates and activists¹ have outlined the dire state of our planet and the need for immediate action to mitigate the climate change disaster.

The consequences of climate change are not merely written in reports — we can see and feel them everywhere, including in North America. While the role of the fossil fuel industry in this crisis has been made clear, only recently have decades-old defund movements gained momentum in the mainstream, and organizations like Indigenous Climate Action (ICA) drawn attention to the banks, insurance companies, and investors supporting the “business as usual” status quo, seemingly ignorant to the calls from around the world to transition away from burning fossil fuels immediately.

The stakes are tremendously high, given how intrinsically connected Indigenous communities are to resource development.

Major transportation routes for natural resources, access to remote leases, and the leases themselves, all have tangible connections to Indigenous reserves or traditional territories. Almost every First Nation community has a railway, pipeline, or highway in their territory, and the existence of these infrastructures can be traced to discriminatory or coercive land and resource laws or policies. Hardly any industrial project exists that does not have an impact on Indigenous ways of life, and this has been reflected in the courts to date.

Emerging from an explosion of resource development in the 1990s, and corresponding conflicts in the courts, Indigenous people have pushed courts to uphold minimum legal standards such as the Duty to Consult and Accommodate. This Duty demands Crown consultation on resource development on Indigenous lands but more broadly the courts are emphasizing the responsibilities of all parties to ensure impacts are accommodated and mitigated. There should remain little doubt in contemporary Canada that ongoing resource development impacts Indigenous communities, and should be done with the highest regard for Constitutionally protected Aboriginal rights and title. Of course, this is not always the case. The various jurisdictional approaches to consultation and accommodation have, it seems, been relegated to another transactional process in Canada, a formality resulting from a failure on the part of all parties to forge a new approach.

From the initial exploration of resources to the project proposals and the extraction itself, each party along the way bears some of the duties owed to Indigenous people. This argument has been most recently crystallized in the *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*² decision. Although ultimately ruling on behalf of Rio Tinto Alcan, the decision opens the door to finding third parties liable for Treaty rights infringements and creates another opportunity for Indigenous communities to seek compensation for violations of rights and title. If industry and governments consider

increased third-party liability, one would expect more fulsome engagement and partnership processes throughout an extraction project's lifespan.

Given the shifting ground of responsibility for Aboriginal rights and title infringements and the culpability of industry, this research turns towards those most implicated: banks. The research team analyzed the role that the Royal Bank of Canada (RBC), Toronto Dominion (TD), Scotiabank, Bank of Montreal (BMO), and the Canadian Imperial Bank of Commerce (CIBC) have played in financing resource extraction against the backdrop of their approaches to Indigenous relations more generally. By taking a snapshot of available data between 2019–2021, we were able to understand how each of Canada's Big Five Banks has approached Indigenous relations, their interpretation of Indigenous rights, and how their actions don't necessarily match their words.

Mirroring many other industries in Canada, namely the resource industry, financial institutions have fallen into a zero-sum approach to Indigenous issues.

Performative actions and rhetoric, such as seeking certification from entities like the Canadian Council for Aboriginal Business (CCAB), have become confused for meaningful change. A significant gap exists between the Big Five Banks' Indigenous friendly-rhetoric and the negative impacts that their core business has on Indigenous communities.

Methodology

To draw this conclusion, we have examined annual reports, policy statements, Indigenous reports, and management documents.

Additional information was gleaned from the United Nations Sustainable Development publications. To place the issue in a Canadian context, we localized data from the Rainforest Action Network report, “Banking on Climate

Chaos.” We included legal considerations by analyzing recent and existing jurisprudence, namely *Yabey v. British Columbia, 2021*. And, lastly, we explored the role initiatives like the Equator Principles play in allowing the banks to take incremental steps toward reconciliation that are still mostly superficial, and how ambiguity in the law remains a large loophole for meaningful change.

10 Strategies for Indigenous Relations Employed by the Big Five Banks

Here, we have summarized each of the Big Five Banks’ approaches to Indigenous Relations, and how that conflicts with their ongoing and deep support of resource extraction industries — particularly those whose further growth and expansion doom efforts to limit global warming to safe temperature levels. These piecemeal approaches to reconciliation and inclusion, which serve little purpose beyond window dressing, typically include these ten processes:



01. Establishing an Indigenous Advisory (Individual or Group)

02. Highlighting or increasing Indigenous Awareness Training

03. Reporting “investments” in Indigenous Communities

04. Showcasing their Indigenous Workforce

05. Counting the Indigenous account holders

06. Partnering with an Indigenous Organization

07. Engaging in Certification Processes

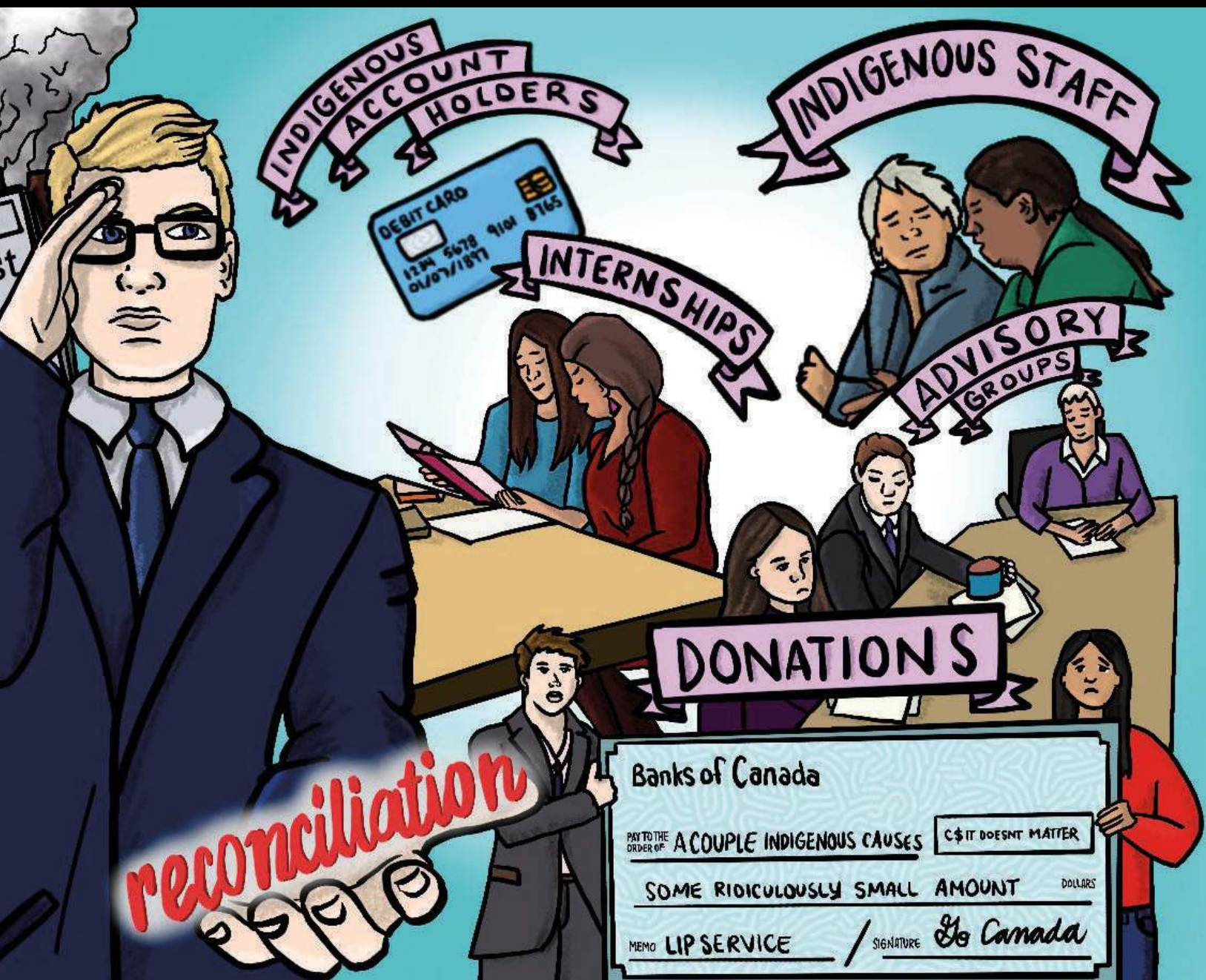
08. Referencing the Truth and Reconciliation Commission’s (TRC) Calls to Action

09. Committing to International Regulation (e.g. Equator Principles)

10. Publicly supporting Indigenous issues in the news



ILLUSTRATION BY BAILEY MACABRE (NĒHIYAW AYĀHKWĒW + MICHIF/UKRAINIAN)



Redwashing at the Big Five

The following represents a survey of the Big Five Banks and their approaches to reconciliation on the one hand, with an overview of how they actively support industry exploitation of Indigenous land and infringements on Indigenous rights.

There is little to distinguish between the banks; their approaches are similar and result in what has been coined as “redwashing.” Similar to “greenwashing” this is a generally corporate response to an urgent social and or legal issue that merely co-opts language and symbols but offers little transformative or meaningful change. Redwashing is an attempt to craft an appearance of reconciliation, or being generous — reconciliation in a purely superficial conceptualization. Given 1) the big banks’ ongoing attacks on Indigenous rights via resource extraction investments, and 2) the absolute unwillingness to incorporate Indigenous self-determination or ideas of free, prior, and informed consent, into bank operations; the conclusion here is that when it comes to big banks and Indigenous people, reconciliation is dead.

Royal Bank of Canada (RBC)

RBC highlights much of their work with Indigenous communities in an annual report titled *The Chosen Journey*,⁵ which details case studies and personal stories of Indigenous partners, employees, and project participants. The Indigenous-focused report includes inspirational images, quotes from leaders such as Phil Fontaine,

and aspects of Indigenous culture and ceremony that RBC supports.

Case studies highlighted in the 2020 report include “Lii Michif Otipemisiwak Family and Community Services” and their job training program, showcasing RBC’s participation in the Pow Wow Pitch competition, and various Indigenous art-focused investments around Missing and Murdered Indigenous Women and Girls, and the Truth and Reconciliation Commission.

In areas of employee development, RBC has established an online course called “4 Seasons of Reconciliation,” which runs parallel to their Indigenous-focused recruitment process, the “Indigenous Peoples Development Program.”

Additionally, many of Canada’s financial institutions have taken to establishing internal bodies which guide their approach to Indigenous relations. At RBC, this internal employee group is called the Royal Eagles.⁶ Tasked with ensuring the bank participates in important and national events, the Royal Eagles encourage branches in their region to engage with holidays like the National Day for Truth and Reconciliation. Additional initiatives include the Future Launch grant program which provides participants with peer-to-peer work skills training. (However, not being an Indigenous-focused program raises questions on why it is highlighted in annual reports and Indigenous reports with such emphasis).

RBC has also announced a partnership with the National Centre for Truth and Reconciliation (NCTR). In terms of the Truth and Reconciliation Commission’s Calls to Action, RBC has chosen to focus explicitly on #92:

We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources.⁷

While this commitment to training and education is laudable, it does little to address issues of financial commitments and loans to resource companies, or, importantly given the emphasis on UNDRIP, whether the bank will consider Free, Prior, and Informed Consent (FPIC) when funding extraction projects. Since 2011, RBC has committed to incorporating some sort of FPIC evaluation when considering projects. This is outlined in their Policy Guidelines for Sensitive Sectors and Activities,⁸ but remarkably they do not mention Indigenous people, their rights, or the impact that these projects have on their territories.

More, when examining their Human Rights Position Statement⁹ released in 2020, RBC committed to upholding numerous United Nations declarations; however, noticeably absent is the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP). Instead, they

include a vague, “We also respect the inherent right of Indigenous peoples to self-determination in accordance with international and domestic law.”¹⁰ RBC, it seems, is doing similar contortions as Canadian federal governments, who, for nearly ten years, selectively engaged with the UNDRIP.

This approach is problematic for several reasons, most notably due to the focus on domestic law, which is an apparent attempt to limit the applicability of the international declaration in a Canadian context. An institution such as RBC should be aware of Indigenous legal traditions and how the conflict between them and the Canadian state lies at the core of conflicts on the land. Given that the bank has dedicated an entire

annual report to all things Indigenous, this seems like a serious oversight.



But, perhaps there is a reason for this trepidation. Between 2016 and 2020, RBC continued to invest over \$160 billion into the resource extraction industries.¹¹ RBC is actually a leader, alongside TD, in oil sands investment. And since these investments in resource extraction have impacted, directly or indirectly, Indigenous communities in Canada, it is difficult to take RBC’s commitments to Indigenous people seriously.

Lastly, when comparing commitments outlined by RBC to resource extraction (\$38 billion in 2021) to their Indigenous Relations commitments, the difference is stark. While no definitive numbers are offered in their annual reports, piecing together from a variety of sources, it appears Indigenous-focused investments totalled approximately \$58 million in 2021.¹² The disparity in funding is problematic when

Indigenous peoples’ history and culture remain intrinsically connected to the environment. In order to ensure this connection is maintained, it would be reasonable for corporations to invest in relationship building and environmental stewardship to a comparable degree. At present, “greenwashing” takes priority over “redwashing”.

Toronto Dominion Bank (TD)

Unlike RBC, TD is not transparent about its Indigenous initiatives. There is no specific webpage or avenue to explore the bank’s efforts. In our research, we could find materials that reference Indigenous investments in the Arts and Culture sector, commitments to working with Indigenous communities and other general statements and positive imagery. The most recent TD Indigenous Communities Report examined is from 2019.¹³

In that 2019 report, TD champions its initiation of several employee-focused initiatives, including establishing an Indigenous Resource Centre (IRC). A strictly online resource designed in a portal format, the IRC seeks to educate TD Staff on Indigenous culture and celebrate Indigenous contributions.¹⁴ Who can access the IRC, and whether it is available to partners, is unclear. Equally lacking is any information on an evaluation of the IRC and whether the information contained therein is accurate or updated regularly. At TD, the number of Indigenous employees accounts for a dismal 1.5 percent of their workforce; is it this group tasked with the additional labour of the IRC?

Alongside the IRC is an increased focus on Indigenous Cultural Awareness training and another

online resource, the Indigenous Circle, which reports a booming membership number. In 2019, the Indigenous Circle retained 2,300 members, a 450 per cent growth. As a space for discussion, the Circle provides opportunities for non-Indigenous staff at TD to connect with their Indigenous peers, share stories of working at TD, and build a stronger sense of community. Finally, there is the establishment of an Indigenous Peoples Committee. The Indigenous Peoples Committee is an executive-level leadership group tasked with building partnerships and relationships with Indigenous communities. Chaired by Senior Vice President, National Real Estate Group, Jim Coccimiglio, information on the exact role of the Indigenous Peoples Committee or responsibility remains scant aside from the motions toward high-level commitments and discussions.

In addition to these initiatives that seem largely about employee support and learning, TD does have a corporate social responsibility portfolio.

TD bank is the only among the Big Five that explicitly outlines a mechanism for evaluating FPIC within their Environmental and Social Credit Risk assessments.¹⁵ While a step in the right direction, the inclusion of FPIC in TD’s Environment Social Governance (ESG) assessments remains heavily reliant on the Equator Principles and their impact reports.

Although this provides additional opportunities for considering funding a project or not, there are still shortcomings for tools like the Equator Principles. Explored later in the report, banks use the Equator

refrain, “FPIC currently does not have a universal definition, nor has its interpretation and application been settled” to avoid action.

According to the Banking on Climate Chaos report, TD bank is the second highest contributor to climate change by investing \$121 billion in fossil fuel extraction from 2016–2020.¹⁵ This staggering number makes them the second-worst investor in Canada and as mentioned earlier, a leader in oil sands funding. With attention being drawn in recent years to the debilitating effects of oil sands extraction, its effects on land, and cumulative impacts on water resources, TD has a lot of explaining to do to Indigenous communities.

Bank of Nova Scotia (Scotiabank)

Scotiabank’s commitments to reconciliation, or at least the only contributions cited in their annual reports, are partnerships on three Downie-Wenjack Legacy Spaces. In their reporting, there is little information regarding the cost of updating the Downie-Wenjack Spaces; however, most spaces exist within Scotiabank branches. Additionally, the intended focus of these Legacy Spaces is educating Canadians on the horrors of the Indian residential School System and the story of the late Gord Downie and Chanie Wenjack.

While noble in intent, it is unclear how these investments further tangible reconciliation or encourage the bank to change anything fundamental about its approach to Indigenous issues.

Further activities that mirror the other banks include establishing a Cultural Competency course for staff members, designed with the intention of, like

many others outlined, educating non-Indigenous employees on Indigenous culture, history, and present-day experiences. There is also an effort to obtain PAR certification. Again, this seems superficial and performative, a simple way to argue that actions are being taken. Whether an evaluation metric exists, how often content is reviewed, or whether members play some role in approving the course content remains unclear. There is also an Indigenous Employee Resource Group (ERG).¹⁶ This group, like the other 14 groups within Scotiabank’s portfolio, appears to be targeted towards participation in events that have some sort of Indigenous content.

All of that being said, Scotiabank, like RBC and TD, is heavily invested in the resource economy; between 2016–2020, they invested \$113 billion, in fact, including partnering with Enbridge Inc. and the much-maligned Transmountain Expansion Project headed by Kinder Morgan. But the interesting element of these investments is a parallel commitment to engaging in substantive discussions of Indigenous rights. In a 2020 Management Proxy Circular, an update document sent to shareholders, leadership was presented with a proposal by Harrington Investments Inc. for consideration. It was proposed that the following actions be taken:

- > *Prohibit all financing for all fossil fuel expansion projects and for companies expanding fossil fuel extraction and infrastructure;*
- > *Fully respect all Human Rights, particularly the rights of Indigenous Peoples, including rights to water and lands and the right to Free, Prior and Informed Consent, as articulated in the United Nations Declaration on the Rights of Indigenous Peoples;*
- > *Prohibit all financing for projects and companies that abuse Human and Indigenous Rights.*¹⁸

In a lengthy response to the proposal, the bank highlights its ongoing commitment to protecting human rights and balancing Indigenous and environmental concerns with its day-to-day operations. Leadership at Scotiabank stated that to meet the actions outlined in the proposal, impacts would be felt at the loan underwriting and credit level. However, this is precisely the intended effect the proposal championed, and what is needed to move beyond perfunctory actions. Interestingly, and perhaps signalling a shift in the position of the leadership, in May 2022, the bank left CAPP, which ended a long-standing relationship with the advocacy body. It remains to be seen whether this reflects a shift in priority, or simply a streamlining of support to other initiatives.

Finally, it is also worth noting that the bank has committed over \$100 billion to meet the Paris Climate Accords’s goals.

Bank of Montreal (BMO)

Formed in January 2020, an Indigenous Advisory Council (IAC) provides BMO with guidance regarding the TRC’s Calls to Action #92.¹⁹ Composed of high-profile leaders from First Nations, Métis, and Inuit communities from across Canada, the IAC seems focused on education and economic outcomes. It is unclear if the IAC has any powers to make or enforce recommendations regarding the bank’s approach to the UNDRIP. However, this seems



somewhat contradictory, given the lack of understanding around hereditary leadership and authority, which lies at the heart of the Wet'suwet'en conflict.

Additionally, a delicate balance is required to navigate economic outcomes and environmental impacts. Whether the IAC is equipped to tackle these fundamental issues remains to be seen, and if they are not empowered to make recommendations on existing projects, the IAC may appear somewhat hamstrung.

In conjunction with the creation of the IAC, BMO has begun Indigenous Awareness training for staff based on the TRC's work and placed an emphasis on Indigenous recruitment. Although these are positive initiatives in terms of increasing understanding and image, these approaches have little impact on the lending and partnerships in resource extraction. Any positive effect from increased Indigenous Awareness would most readily be seen in the day-to-day banking activities. Unfortunately, this awareness training has not reached all staff, as demonstrated in the horrific treatment of a Heiltsuk family at a Vancouver branch later that year.²⁰ Maxwell Johnson and his granddaughter were racially profiled, handcuffed by police, and detained; all without any justifiable cause.

The incident raises the question: How impactful are bodies like the IAC, Royal Eagles, Indigenous Peoples Committee, and others within financial institutions?

That being said, BMO does make hiring of Black, Indigenous, and racialized individuals generally, a priority. They take pride in a workforce that is 1.2 percent Indigenous and has financial relationships with over 250 Indigenous communities. To support its Indigenous staff members, the bank has established an enterprise resource

group titled, "The Sharing Circle," which serves as an internal meeting place or resource depository with the goal of allowing Indigenous and non-Indigenous staff to connect and share their experiences. Based upon self-identification (which has its own inherent problems (i.e. no verification of community connections), The Sharing Circle may be limited in its impact by being a strictly internal resource. However, a partnership has been formed with the First Nations University of Canada²¹ to share an e-learning suite, called *Nisitohtamowin*, focusing on Indigenous history and culture.

One aspect in their reporting that sets BMO apart from others is their transparency around Indigenous business investment. Championing over \$6.5 billion in Indigenous banking services, BMO is the only financial institution we found to disclose its investment in Indigenous communities. Other institutions shared high-level projections and commitments²² but BMO is the only one to quantify Indigenous business investments in a transparent fashion. However, their Indigenous investments amount to just 6.7 percent of BMO's overall business. As these investments reflect a proverbial drop in the bucket given how much wealth and resources are extracted from Indigenous territories, with some of the most contentious projects being supported by BMO, there appears to be a huge discrepancy in reconciliation.

Between 2016 and 2020, BMO invested just over \$97 billion in resource extraction, notably, TC Energy Ltd. and Enbridge Inc. (\$22 billion and \$10 billion, respectively).²³ These funds connect BMO to projects that rank among the most aggressive regarding Indigenous rights violations and conflicts. Namely, the Coastal Gas Link natural gas project in Wet'suwet'en territory and the Line 3

expansion into Northern Minnesota Anishinaabeg lands. These conflicts captured international headlines and drew attention to policing practices and how readily government and corporations take action to quell Indigenous opposition. So, naturally, one should question where the financier stands on some of these high-profile incidents and Indigenous relations in general.

Canadian Bank of Imperial Commerce (CIBC)

Rounding out the Big Five Banks in Canada is CIBC. Like their peers, the bank has also developed an internal Indigenous network. Similar to RBC's Royal Eagles, Scotiabank's Indigenous ERG, and BMO's Sharing Circle, CIBC has established an Indigenous Employee Circle. Existing amongst nine other employee networks, ranging from Black to Latino to NextGen, the Indigenous group serves as a "mentoring, education and career development"²⁴ table in which Indigenous employees connect with their peers. While encouraging a more inclusive²⁵ work culture, there is little to demonstrate how this attempt at inclusivity is included in decision-making processes and where recommendations from so-called "listening exercises" — virtual conversations with executives with BIPOC staff — impact the day-to-day operations of the bank.

Moreover, CIBC came under fire in the Winter of 2022 when news broke of their offensive recruitment process.²⁶ As part of the online submission process, CIBC provided the option for candidates to wear traditional regalia to showcase their Indigeneity. When pressed about the origins of this process, CIBC cited their work with Our Children's Medicine (OCM), a non-profit organization dedicated to working with Indigenous communities.

However, like many other performative organizations, OCM does not claim to be Indigenous-owned, controlled, or partnered in any meaningful way, which becomes even more evident when you consider their advice to CIBC and apparent lack of understanding around regalia and Indigeneity. Did the Indigenous Employee Circle vet the group?

Also like all of the other Big Five — except for RBC — CIBC proudly advertises their participation in the Progressive Aboriginal Relations (PAR) program offered by the CCAB. Although not Gold status, CIBC is a proud Patron contributor to PAR. The impacts, process, and benefit of the PAR program will be explored later in this report; however, on the surface it appears to be another mechanism for corporations to talk about their commitment to reconciliation but not really show it. In addition to attaining their Patron status, CIBC has entered partnerships with the National

Aboriginal Trust Officers Association (NATOA), the Council for the Advancement of Native Development Officers (CANDO), and Indspire.

As we have seen in other Big Five Banks reports, with the exception of TD Bank, CIBC is also void of reference or commitment to FPIC. In tandem with its performative actions, CIBC includes a high-level statement on its response to the TRC Calls to Action.²⁷ Without addressing any specific Call to Action, CIBC instead points to its contributions to Indspire and partnerships with previously mentioned organizations as evidence of its commitment to reconciliation.

Although a commitment to funding grants and educational organizations is positive, a better reflection of reconciliation by CIBC and other banks would be reconsidering the projects they finance that infringe on Indigenous rights.

CIBC has reportedly contributed over \$66 billion in financing to resource extraction companies.²⁸ The largest recipients of CIBC funding were Enbridge Inc. and Suncor Energy Ltd. This places CIBC in step with the actions of the other Big Five, and raises serious questions about the impact of these projects in Indigenous territories like Secwepemcúl'ecw²⁹ and Wet'suwet'en. As we have seen with the other banks, CIBC's approach to alleviate legitimate concerns around Indigenous rights has been limited. At this point, the measures will sound very much like a broken record, and reflect an industry-wide lack of understanding of Indigenous relations beyond supporting joint ventures and over piecemeal projects.

PAR for the Course?³⁰ How The Canadian Council for Aboriginal Business and Equator Principles Maintain the Status Quo

While examining annual reports, sustainability disclosures and Indigenous focused reports, a common example from each of the Big Five Banks is their participation with the CCAB's certification program.

CCAB Certification ranges from Patron status to Gold membership. There are actually 11 classifications of membership with the Canadian Council for Aboriginal Business (CCAB), each with different requirements. Membership in the CCAB, and their PAR Certification process is directly correlated to annual fees and employee numbers. For example, for a fee of \$25,000 a year, your company can gain Patron status with CCAB, given the required surveys and forms are completed. Following the attainment of membership, a partner is then eligible for participation in the Certified Aboriginal Business (CAB) and Progressive Aboriginal Relations (PAR) programs.

Progressive Aboriginal Relations

One of the recurring public relations tools championed by the Big Five Banks in their numerous publications is the Progressive Aboriginal Relations (PAR) certification program offered by the CCAB. According to their website, PAR is an online program that “signals to communities that they are good business partners, great places to work, and are committed to prosperity in Aboriginal communities.”³¹ Proponents are provided with templates and tools

through which they inform the CCAB of their efforts to build relationships with Indigenous communities in the areas of 1) Leadership Actions, 2) Employment, 3) Business Development, and 4) Community Relationships.

Interestingly, when considering the criteria for “progressive aboriginal relations”; they align with striking similarity to banks reporting on reconciliation efforts more generally. And more, since those criteria are by and large performative against the backdrop of ongoing resource extraction funding and infringements on Aboriginal rights, PAR certification can be read as performative as well. What role, then, does the CCAB play in providing an alibi for the continued theft of Indigenous lands and resources? Nowhere in the PAR reporting is there space for “bad news” stories. We know that list is extremely long; the history of Canada is one of industry exploitation. Yet examples of mistreatment, areas of improvement, challenges, and so on, are absent.

Either the PAR certification process is so successful that Aboriginal rights and title are respected 100 percent of the time by participating companies, or the PAR certification process is a scam.

Members of the CCAB include the likes of Enbridge, Imperial, LNG Canada, Rio Tinto, and Syncrude. These members are classified by the

CCAB relative to their participation within the PAR program and along a scale of bronze, silver, or gold. How do you earn these medals of reconciliation? Following a virtual submission process and acceptance into the program, companies are committed for the first three years of the PAR program as “patron” members.

For \$2000 per year, companies have CCAB's support, including logos and recognition at galas, etc. After year three, proponents that intend to move forward are required to pay additional application and verification fees in an attempt to attain Bronze, Silver, or Gold certification status.

This process requires additional documentation, interviews with employee resource groups, elements such as Indigenous relations strategies or plans and activity reports on their implementation — all of which are reviewed by an independent verifier that assigns companies a score. To obtain Gold status, an organization must have “Indigenous relations policies, strategy, and PAR criteria intent are fully ingrained within the company, at all levels.”³²

Though, importantly, it matters little to CCAB — at least in their literature or in requirements to progress through the program — that these activities are effective, collaborative, or lead to tangible outcomes. Further, nowhere in the PAR program does the CCAB take into account members of Indigenous communities who must engage

in land defence activities against the very same companies. In other words, the CCAB does not consider examples external to the companies' self-reporting. There also appears to be little substance around meaningful relationship building, understanding Indigenous rights, respect for territory, adherence to Treaty, and reference to UNDRIP. Reviews of the application documentation, checklists, and other tools used to evaluate a proponent's commitment to Indigenous relations makes zero reference to Indigenous rights.³³

It is also curious that there is no communication process with communities about these companies' work. Presumably, these certifications are for communities to know if they should work with companies that have "progressive" Aboriginal relations. Yet, there appears limited community involvement except in the case of already partnering First Nations. This raises the question: Who is CCAB's PAR program really for?

It is worth noting that the costs for the final three years of the PAR program range between \$1000 to \$5500, with an ongoing cost of \$5500 to recertify the company's achievement. In total, to become certified in PAR (and effectively heralded by the organization as a progressive partner to communities), a proponent should be expected to pay just under \$20,000 over seven years.

While PAR could be an incredibly useful tool for encouraging and reporting on industry's progressive approach to working with Indigenous communities, the lack of any rigorous criteria — at least when it comes to Indigenous rights — means the program should be considered with deep skepticism.

Equator Principles (EP4)

Another illusionary tool relied upon by the Big Five Banks is the international benchmark for evaluating environmental and social risks, The Equator Principles. The latest iteration, EP4, was released in July 2020 with some notable updates. In particular, and of importance for this report, EP4 provided special consideration of Indigenous people, their rights, and how organizations should consider Free, Prior and Informed Consent (FPIC). Although a step in the right direction, EP4 makes similar missteps seen in previous assessment processes. The hesitancy to establish a fixed standard of definition and application provides loop-holes for proponents to navigate through. For example, EP4's non-definition of FPIC states,

12. There is no universally accepted definition of FPIC. For the purposes of Performance Standards 1, 7 and 8, "FPIC" has the meaning described in this paragraph. FPIC builds on and expands the process of ICP described in Performance Standard 1 and will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree. (emphasis added)³⁴

Of course it is important to be flexible regarding FPIC application to specific communities; but to suggest there are no clear definitions of frameworks is not entirely correct. Various groups have and continue to

define and clarify FPIC. From their letter to the United States Securities and Exchange Commission (SEC) in June 2021, Amazon Watch and other advocates, for example, describe specific approaches for how FPIC should be operationalized and used to mitigate tangible risks. These recommendations and considerations clearly outline a positive approach to FPIC and how the government and industry can learn from incidents like *Standing Rock*. In fact, an important lesson from *Standing Rock* was that clear understandings of FPIC and UNDRIP as minimum standards, not the ultimate end point for consideration of Indigenous rights and consent, are urgently needed. Position statements like those outlined by Amazon Watch et al. would not be necessary if tools like EP4 were clear and could be effectively enforced.

Another perceived shortcoming of EP4 is their lack of application, or invalidity, when in conflict with national laws and regulations.³⁶ This creates the reality that although sound in process and justification, if EP4 does not coincide with our Canadian regulatory scheme, or the established industry norm for consultation, then proponents are not necessarily required to follow EP4.

This creates situations in which proponents like the Big Five Banks include EP4 reports in their annual reporting without having to take further steps. It is a backdoor out of the Principles.

These high-level disclosures include information required by EP4 regarding project impact levels, however lack insight on which regulatory standards are being followed. Hence, projects that are ongoing, regardless of huge flaws and issues, like Transmountain,³⁷

can continue moving forward while reporting to EP4 and following their regulatory approvals. This reflects not only a shortcoming of government regulation and monitoring, but also a failure of proponent leadership and governance based upon the belief that they have met industry-established minimums. Once again, the performative aspect of Indigenous relations is a smokescreen to misdirect mainstream society from considering the true impacts of projects and how it is a community responsibility to change the status quo.





Misdirection and misinformation continue to be the main tools for resource extraction companies and their funders to **distract** from how their projects may negatively impact Indigenous traditional territories. Adding to these tactics is the **sheer volume** of resources and money at their disposal, those which far **outweigh** Indigenous land protectors and communities.

So, **what tools exist** to aid those on the front lines?



New Tools for Consultation and Consent

There is little doubt that the status quo has been worked for Indigenous communities heavily partnered and invested in extraction.

Some communities have begun partnering, and even carving out specialized roles on projects in their territories. For example, in 2017, the Mikisew Cree and Fort McKay First Nation partnered with Suncor for an oil sands storage facility, and more recently, ATCO Energy has been contracting to the Simpcw First Nation and TMX, despite a number of troubling questions.³⁸ These piecemeal contracting or partnership approaches follow the usual government and industry approach to court communities that are interested in economic development of this nature, pitting community against community with the hopes that window dressing reconciliation will keep mainstream Canada busy.

Misdirection and misinformation continue to be the main tools for resource extraction companies and their funders to distract from how their projects may negatively impact Indigenous traditional territories. Adding to these tactics is the sheer volume of resources and money at their disposal, those which far outweigh Indigenous land protectors and communities. So what tools exist to aid those on the front lines? Even though the jurisprudence is still catching up to present day circumstances, the Court has provided a sliver of hope. Taking into consideration previous landmark rulings mentioned earlier, the decisions in the last two years in British Columbia have provided an opportunity for Indigenous

communities to hold not only government, but also industry, responsible and encourage a better path forward.

Cumulative Impacts

In June 2021, the Supreme Court of British Columbia ruled in favour of the Blueberry River First Nation (BRFN) regarding legal action that began in 2015.³⁹ The community argued that the approval of developments in their traditional territory had negative cumulative effects, which not only infringed on their Constitutionally protected Treaty Rights, but also limited to an extreme degree where they could exercise those rights. By regulating, permitting and causing unfettered industrial development in the Northern portion of the province covered under Treaty No. 8, the Court found the BC Government had breached its obligations under Treaty No. 8. Further to that, by allowing industrial development and taking up of lands, including those that lie in the BRFN claim area, the Court found additional breaches of duty.

As a result of this decision, the BC Government was ordered to pause authorizations in territories that could negatively impact the BRFN's Treaty Rights, as well as establish a new mechanism for assessing and managing cumulative impacts from industrial development. Recognizing that the existing regulatory framework and consultation process was flawed, a new approach was overdue. This decision opens the door for Indigenous communities to demand a reexamination of current established norms, and undertake evaluations on

whether they are adequate. While it may not lead to a full adoption of FPIC, it is definitely a step in the right direction. The Court has sent a message to not only the government, but also industry that the cumulative impacts of development can longer go unchecked and that the protection of Indigenous rights is paramount in an age of reconciliation.

Potential Liability of Third Parties

Another recent decision of importance is the *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*,⁴⁰ from January 2022. Stemming from a longstanding dispute regarding the erection of the Kenney Dam in the 1950s. This dam obstructed the flow of the Nechako River and its path to traditional territories used by the Applicant First Nations. Although the Court recognized the impact of the project on the watershed, and the potential infringement of rights, they ultimately ruled in favour of the third-party proponent Rio Tinto Alcan Inc. The Court recognized that by infringing on the Applicant's Indigenous rights, Rio Tinto Alcan Inc. would have been liable for the tort of nuisance (a disturbance of one's use of property) however they were ultimately saved by the defence of statutory authority.

This means that, as long as companies can meet the minimum standards put in place by governments and receive the required permits, the Court's hands are tied when considering penalties.

So, even when the Court recognizes that a proponent's consultation or engagement was flawed, negligent or inadequate, as long as they received government sign off, they may be immune to further action.

In its lengthy decision, the Court highlighted the progress of the jurisprudence surrounding Indigenous issues, and the ultimate failing of the regulatory regime in which the dam was approved. Signaling to the government and industry, that more due diligence is required moving forward, and that a project like the Kenney Dam may not be approved in the future. It also means that First Nations may have another legal argument to claim damages against not only the Crown, but third-party proponents. For too long, the duty to

consult has sat with the Crown, with proponents being required to carry out the process on behalf of the Crown, with the Crown ultimately liable. With this ruling, communities have been given an opportunity to ensure and encourage all parties of a project to take adequate consultation seriously.

For the Big Five Banks, it should signal to them that their past practices of relying on corporations who receive loans and governments who don't adequately consult are potentially liability for engagement failures; and this liability is carried by all project proponents.

More due diligence, at the least, must be shared throughout a project, from inception to completion.

In order to fully adhere to FPIC and UNDRIP, banks must move beyond simply recognizing them as existing, and incorporate them throughout their organizations. This would require progressive steps to divesting from projects that have a history of rights violations, questionable engagement, and lack of adequate partnership. They would encourage proponents to fully engage communities, with the end goal being consensus in approval or acceptance. Lastly, when questions arise on the path and direction of a project, funds attached should be leveraged to encourage changing that path, whether it be literal or figurative, to ensure all parties, especially Indigenous, have outcomes that push them beyond the status quo.

CONCLUSION

The proposal put forward to Scotiabank shareholders by Harrington Investments outlines one of the clearest examples of new avenues to evaluate projects, assessing risk, and safeguards to mitigate risk, for the Big Five Banks.

The Big Five are not being asked to recreate the wheel, but rather adapt existing mechanisms to Indigenous relationships. Their apparent lack of action then must flow from a lack of will. Until the piecemeal approaches to reconciliation and consultation are replaced by meaningful engagement that breathes life into Free, Prior and Informed Consent, as recognized in UNDRIP, organizations like the Big Five will continue to convince mainstream Canadians that they are doing enough in regards to Indigenous relations. These illusions — reinforced by self-serving certification processes and vague Corporate Social Responsibility (CSR) principles — might continue to quell concerns, and Canadians will take no issue with where their money is invested. In reality, the Big Five Banks' problematic lending practices and the lack of realistic re-examination of loans supports the ongoing violations of Indigenous peoples rights at places like Standing Rock, Wet'suwet'en yintah, and along the Transmountain Expansion.

Given the current state of Indigenous Relations in Canada and reconciliation, we appear to be on the precipice of a new relationship.

Canadians have been awoken to the true history of this country, and how each of us is obligated to commit to a new future. It should be clear to Indigenous leaders and members that the current financial and regulatory regimes only serve to benefit energy producers.

Indigenous people should take a careful examination the processes they endorse but which are purely performative in nature. It is well past time that communities take stock of the role they play in resource extraction, and whether they are true partners, or simply participants in their own demise.



ILLUSTRATION BY BAILEY MACABRE (NĒHIYAW AYÂHKWĒW + MICHIF/UKRAINIAN)



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