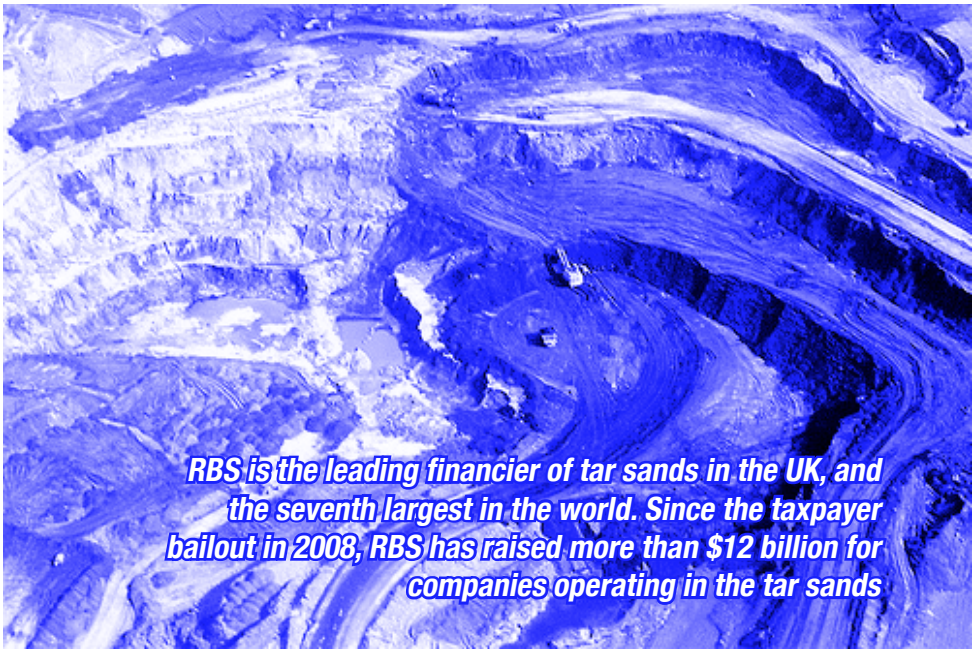
A Risky Business:
Tar Sands, Indigenous Rights and RBS



The relationship between the United Kingdom (UK) and Indigenous peoples in Canada spans centuries and has been characterized by both cooperation and conflict. Today, the relationship has changed, yet the decisions made by UK political and financial institutions still have a serious impact Indigenous peoples (called First Nations). Currently, First Nations communities throughout North America are battling to protect their lands, cultures and heritage against the largest industrial development on earth, the tar sands gigaproject.

In the UK, financing of tar sands companies by banks - including the Royal Bank of Scotland (RBS) - undermines First Nations' rights to sovereignty, healthy bodies, healthy lands, clean water and culture. First Nations have launched several lawsuits against tar sands projects based on Treaty violations. UK banks and politicians provide economic and political support to the governments and companies named in these suits. As such, the colonial relationship between the UK and Canada's Indigenous peoples continues.

However, alongside Indigenous peoples from Canada, civil society in the UK are now also demanding accountability from UK decision makers and an end to tar sands investments.

Top 15 banks in tar sands

Rank	Bank	Loans (Million USD)*
1	RBC	$16,903
2	JP Morgan Chase	$13,895
3	Citi	$12,775
4	TD Securities	$12,043
5	CIBC	$10,467
6	Bank of America	$10,101
7	**RBS**	**$7,544**
8	Scotia Bank	$4,685
9	BMO	$4,467
10	Wells Fargo	$2,176
11	Barclays	$1,450
12	Société Générale	$936
13	HSBC	$667
14	BNP Paribas	$261
15	Intesa Sanpaolo	$250

*The table above was compiled by the Rainforest Action Network. It is based on credit underwritten by each bank to companies operating in the tar sands since 2007 according to Bloomberg. *To find out how this data was collated visit:* http://understory.ran.org/2010/01/31/banks-ranked-and-spanked-on-tar-sands/

Financing of tar sands companies by banks - including the Royal Bank of Scotland (RBS) - undermines First Nations' rights to sovereignty, healthy bodies, healthy lands, clean water and culture

RESPECT ABORIGINAL and TREATY RIGHTS
Canadian Indigenous Tar Sands Campaign
Indigenous Environmental Network — www.ienearth.org/

UK TAR SANDS NETWORK

Photo: David Dodge, oilsandswatch.org

Just a few short years ago, people in Canada, US and the European Union had heard little to nothing about tar sands projects. Today, oil production from tar sands has become a topic of international discussion as stories of cancer epidemics in the community of Fort Chipewyan, massive wildlife losses related to toxic contamination and increased vocal resistance from impacted communities have shattered the 'everything is fine' myth propagated by the Canadian and Alberta governments. Indeed, a poll conducted in 2010 found that 50% of Canadian citizens believed the risks involved with tar sands projects outweighed the benefits.[1] Yet tar sands expansion continues. Already the Athabasca delta has been completely altered from pristine boreal forest, clean rivers and lakes to a deforested and mined land where fish regularly exhibit tumors and migrating birds landing on tailings ponds die instantly.

In northern Alberta, the tar sands or bitumen (a mixture of sand, clay and heavy crude oil) underlie 140,000 km^2 of boreal forest, an area larger than 140 countries, including Greece, Nicaragua and North Korea. These deposits are the second largest source of oil in the world, eclipsed only by Saudi Arabia. Currently, tar sands operations produce about 1.5 million barrels/day, the majority (97%) is exported to the US. In the next decade, production is expected to double and reach 5 million barrels/day by 2030.[2]

Impacts:

- **Loss of fresh water**
  Currently, tar sands operations are licensed to divert 652 million cubic meters of fresh water each year, 80% from the Athabasca River. This amounts to 7 times the annual water needs of Edmonton. About 1.8 million cubic metres of this water becomes highly toxic tailings waste each day.[3]

- **Increase of greenhouse gases**
  In 2008, tar sands operations produced 37.2 megatonnes of greenhouse gas emissions, an increase of 121% between 1990 and 2008. Planned growth indicates a near tripling of emissions between 2008 and 2020, to a projected 108 megatonnes.[4]

- **Problems with land 'reclamation'**
  As of 2009, 686 km^2 of land had been lost to surface mining (up from 470 km^2 in 2007). Both industry and government claim these lands can be returned to natural landscapes through 'reclamation'. After 50 years of operations, only 0.16% of land has been certified as reclaimed. Moreover, the Alberta government does not have sufficient funds to reclaim lands. In 2010, the treasury held approximately $12,000/hectare for reclamation, though the anticipated cost is $220,000 to $320,000/hectare.[5]

- **Increase in cancer rates**
  In 2006, unexpectedly high rate of rare cancers were reported in the community of Fort Chipewyan. In 2008, Alberta Health confirmed a 30% rise in the number of cancers between 1995 and 2006. However, the study lacks appropriate data and is considered a conservative estimate by many residents.[6]

- **Threatening caribou populations**
  Caribou populations have been severely impacted by tar sands extraction. The Beaver Lake Cree First Nation has experienced a 74% decline in the Cold Lake Herd since 1998 and a 71% decline of the Athabasca River herd since 1996. Today, just 175 – 275 animals remain. By 2025, the total population is expected to be under 50 and locally extinct by 2040.[7]

RBS and the Tar Sands

RBS is the leading financier of tar sands in the UK, and the seventh largest in the world. Since the taxpayer bailout in 2008, RBS has raised more than $12 billion for companies operating in the tar sands.[8] Taxpayers have handed over $53.2 billion to RBS since the bailout and the UK public is now the largest shareholder of the bank, with an 83% majority stake.[9] Yet the public has had little input into financial decisions made by the bank. Indeed, there has been vocal opposition from politicians, civil society groups and the business community regarding the banks lending practices following reports of human rights and environmental abuses linked to RBS financing.
The bank has signed the Equator Principles (detailed below) in an effort to deflect criticism from its lending policies. However, RBS has been on the defensive as these principles have proved ineffective at mitigating the bank's exposure to environmental and human rights abuses.

The Equator Principles seek to ensure projects are funded in a 'socially responsible' manner that 'reflect sound environmental management practices.' Under the principles, projects over $10 million dollars are 'assessed' for negative social or environmental impacts.[10] However, there has been widespread criticism of these principles, which are voluntary not mandatory, and have little follow-up after initial assessment. Indeed, tar sands financing is in direct violation of the declared intent of the Equator Principles given its ecological and social impacts.

In the first six months following the 2008 bailout, RBS raised over $16.2 billion for the fossil fuel industry including companies operating in the Alberta tar sands. Specifically, RBS underwrote $8 billion in loans to ConocoPhillips between 2007-2009.[11] ConocoPhillips is heavily invested in the tar sands through a tar sands refinery and both sub-surface 'in situ' mining and surface mining projects. In 2008, ConocoPhillips was named in a lawsuit launched by the Beaver Lake Cree Nation in Alberta for developing on the Indigenous community's traditional lands without proper consultation.[12]

In 2007, RBS also raised $192 million for Shell, which operates the open-pit Muskeg River mine project in Alberta. The mine produces 155,000 barrels/day of tar sands crude and is the largest tar sands mining project constructed to date.[13] In December, 2010, Shell reported a 'mystery' leak at the mine when an underground aquifer erupted and became mixed with highly toxic tailings. Clean-up to date has been minimal.[14]

Tar sands financing not only presents ethical concerns, it also poses financial risk. In 2009, insurance company Swiss Re predicted a sharp rise in litigation resulting from climate change and environmental degradation. The report predicts, '...climate change-related litigation could become a significant issue within the next couple of years.'[15] Indeed, First Nations in Canada have mounted four lawsuits related to tar sands projects. If successful, the cases will radically reform operations in the tar sands, potentially shutting entire operations down until environmental and human rights concerns have been effectively addressed.

Photo: David Dodge, oilsandswatch.org

Mining site and upgrader in Alberta.

Canada's legal relationship with Indigenous Peoples

Today, the legal basis for Canada's development policies rests on shaky foundations. The Government of Canada holds a unique legal relationship with Aboriginal (another word for the First Nation, Metis and Inuit) peoples. In the past, aboriginal rights were largely ignored in development projects. However, over the past 30 years Canadian courts have recognized a 'nation to nation' relationship between Aboriginal peoples and the Canadian state. Moreover, they have ruled against the state several times in cases where aboriginal rights were undermined or ignored.

In 1973, the Supreme Court of Canada ruled in Calder vs. British Columbia, that Aboriginal peoples in Canada held title to the lands of North America prior to the colonization period. The case had huge ramifications for Canada as any lands not clearly ceded through Treaties could be legally considered Aboriginal and not Crown land, representing huge areas in the North, Ontario, Quebec, East Coast and almost all of British Columbia. The precedent set an important context for Aboriginal peoples: that the Crown would have to negotiate and settle outstanding land claims.

First Nations children and youth march with the Unistoten Clan of the Wet'suwet'en Nation during a protest against the proposed Enbridge Northern Gateway Pipeline in Smithers, British Colombia July, 2010.

In 1763, King George III issued a 'Royal Proclamation' stating the Aboriginal peoples held rights to land in North America and that any encroachments on these lands required negotiation, which subsequently became the basis for Treaty making in Canada. During the late 19th and early 20th century, Canada negotiated a series of Treaties with Aboriginal peoples, which became the legal basis for development projects in Canada on Aboriginal lands.

In 1982, following the Calder case, the Canadian government ratified Section 35 of the Canadian Charter of Rights and Freedoms, which states, 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.' Legally applied, Section 35 has meant that there is a duty for government to both consult Aboriginal peoples on development projects and accommodate their concerns.

Subsequent cases have demonstrated that Aboriginal peoples have two types of rights substantive rights (to hunt, fish or harvest) and procedural rights (the right to be honorably consulted). Today, consultation remains a grey area in law as the courts have failed to clearly define what consultation means.

First Nations in Canada have mounted four lawsuits related to tar sands projects. If successful, the cases will radically reform operations in the tar sands, potentially shutting entire operations down

Jurisdictional issues between the provincial and federal governments further complicate consultation processes. In 1930, the Federal government transferred responsibilities for natural resource management to provinces under the Natural Resources Transfer Agreements. Essentially, the provinces would be responsible for setting environmental and development policies. However, with respect to Aboriginal peoples, the Federal Government holds fiduciary duty, which means any consultation or accommodation of Aboriginal concerns rests solely with the Federal government. In practice, provincial governments and even industry have been 'designated' as representatives of the Federal government.

The government of Alberta has traditionally held little regard for consulting Aboriginal peoples on development projects. Currently, there are two ongoing lawsuits launched by First Nations that could substantively impact the ability of the Alberta government to grant approvals for tar sands projects.

In 2008, the Beaver Lake Cree First Nation filed a lawsuit against Federal and Provincial governments, citing over 17,000 violations of their treaty rights. Central to the case is the question of consultation. The Beaver Lake Cree hold that given the immense cumulative effect of tar sands extraction on the land, water and wildlife, they were never properly consulted about what the real impacts of development would be. If the case is successful, it will have huge ramifications for Alberta's tar sands. Essentially, ongoing developments and future projects will not be able to take place until the concerns of the Beaver Lake Cree are accommodated – including the impact on caribou herds, which are expected to be locally extinct by 2040 at current rates of decline. Accommodating concerns would include substantive reclamation of lands and management plans that would ensure future projects would not impact the Beaver Lake Cree's traditional ways of life.

In 2008, the Prairie Chipewyan First Nation also launched a lawsuit against the Government of Alberta for lack of consultation related to a mining project that was approved for development on their territory. In 2006, the Athabasca Chipewyan First Nation (ACFN) filed a similar suit against the government of Alberta, however the case was dismissed over a small technical issue. Had the case succeeded, it would have radically altered the ability of the Alberta Government to grant tar sands leases. It is anticipated that the lawsuit by Prairie Chipewyan would have the same effect if successful.

Additionally, the Duncan's and Horse Lake First Nations have been granted intervener status in an ongoing Supreme Court case, which could have broad impacts on how approvals are granted by the National Energy Board and Alberta's Energy Resources Conservation Board. The case will determine if these tribunals are required to ensure consultation and accommodation of First Nations before declaring a project 'in the public interest'.

International agreements and tar sands

Canada exports the majority of tar sands oil to the US (97%). Through proportionality clauses in Chapter 11 and Article 315/605 of the North American Free Trade Agreement (NAFTA), Canada is required to maintain the same proportion of energy exports to the US from year to year, regardless of national need or other international agreements. If there is an increase in the percentage of exports in a given year to the US, this becomes the new standard to be met in subsequent years. As well, the 'investor-state dispute process' under Chapter 11 of NAFTA gives private companies the ability to sue provincial or federal governments if legislation is enacted which could limit profit opportunities. This translates as the ability to challenge government regulations that protect human and environmental health.

Canada and the European Union are currently negotiating the Comprehensive Economic and Trade Agreement (CETA). Under CETA, it is proposed that European companies would be granted the same ability to sue Canadian governments (and visa versa) if legislation impeded profit opportunities. Moreover, the deal could undermine the proposed 'Fuel Quality Directive' legislation aimed at encouraging low carbon fuel sources in Europe. In North America, CETA would undermine Indigenous Rights by protecting company investments on Indigenous lands.[16]

Yet Canada has signed several international agreements that inherently contradict NAFTA and CETA. Indeed, Canada is a signatory to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Prevention and Punishment of the Crime of Genocide. Most importantly, Canada recently ratified the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Groups protest outside the CETA talks to voice concerns about tar sands, the privatisation of public services, water, agriculture, corporate power and democracy.

Under the UNDRIP, Indigenous peoples have the right to Free, Prior and Informed Consent. For development projects, this means that Indigenous peoples have the right to say no to a development if it will negatively impact their lands or culture. Canada has attempted to minimize the impact of the UNDRIP on development projects. However, the UNDRIP has yet to be tested in Canadian courts. Given the strong legal support of Aboriginal peoples in the courts, the UNDRIP could result in sweeping changes to how projects are approved.

Risky Investment:
Enbridge and the Northern Gateway Pipeline

The impacts of tar sands extend beyond 'ground zero' in Alberta. Pipeline infrastructure and refineries threaten landscapes throughout North America, primarily in Indigenous and poor communities. The Enbridge Northern Gateway pipeline would transport 525,000 barrels of oil from the tar sands in Alberta to tanker ports in Kitimat, British Columbia (BC) using two parallel 1,200 kilometre pipelines.[17]

August of 2010, the hereditary chiefs of the Wet'suwet'en First Nation issued a final notice of trespassing to RBS-financed Enbridge, stating the company was no longer welcome on their territory.

Impacts:

- **Disrupting habitat**

  The project would cross 785 water courses, fragment wildlife habitat and impact fragile salmon fisheries.[18]

- **Increase of greenhouse gases**

  The project would produce greenhouse gas pollution equivalent to the annual emissions of 1.6 million cars and consume the amount of natural gas used by 1.3 million households in Canada each year.[19]

- **Risk of further spills**

  In 2010, Enbridge was responsible for a 1 million gallon spill of tar sands crude into the Kalamazoo River in Michigan, the second largest spill in US history. Enbridge has a long history of spills. Between 1999 and 2008, Enbridge operations were responsible for 610 spills that released close to 21 million litres of hydrocarbons into the environment. That's approximately half the volume of the Exxon Valdez spill in Alaska in 1988.[20]

In 2008, RBS underwrote a loan to Enbridge worth $166.67 million.[21] This has proven to be a risky venture. In 2001, 61 First Nations in BC signed a resolution to oppose the Enbridge Northern Gateway pipeline.[22] Building on this resolution, in February 2011, the Yinka Dene Alliance rejected an offer from Enbridge for 'revenue sharing' benefits representing more than $1.5 billion in cash, jobs and business opportunities during the next 30 years, as well as a 10% stake in the project, stating that water, land and cultural heritage were more important than short-term financial gain.[23] Similarly, in August of 2010, the hereditary chiefs of the Wet'suwet'en First Nation issued a final notice of trespassing to Enbridge, stating the company was no longer welcome on their territory. Since then, community members have constructed a traditional long house directly in the path of the proposed pipeline and are resolute that pipelines will not cross their territory.

Two First Nations women from British Columbia – Jasmine Thomas and Riannon Ball – travelled to Edinburgh in August 2010 to protest against RBS's dirty investments with the Camp for Climate Action. RBS finances Enbridge, which wants to build the Northern Gateway pipeline through their traditional territories.

Banks taking note of tar sands:
financing impacts and risks

To date, four banks have developed policies specific to tar sands financing. In 2008, the Belgian bank Dexia developed policies to include better information from tar sands developers on carbon intensity and local environmental and social impacts.[24] In 2010, both the Royal Bank of Canada (RBC) and Rabobank in the Netherlands similarly applied criteria to companies for tar sands financing.[25] In 2011, HSBC followed this trend, developing policy for tar sands and coal financing to better measure impacts and risk.[26]

To date, four banks have developed policies specific to tar sands financing.

Additionally, both the Toronto Dominion Bank and RBC have policies in place that affirm the right of First Nations to free, prior, informed consent over the use of their traditional lands and resources. While the policies have yet to be tested, the trend towards better assessment of tar sands impacts, specifically addressing Indigenous concerns, is an important factor in addressing shareholder concerns and sound risk management.

Recommendations

Shareholder input and resolutions are key to creating change in financial institutions. We recommend the following:

- Create a moratorium on providing finance of any kind to companies that are actively engaged in extracting tar sands or any other form of 'unconventional' oil.
- Develop revised investment mandates drawing on expertise and guidance from independent sources and best practices in the financial sector to identify which activities, such as tar sands extraction, should not be funded in future.
- Make the right and principles of Free, Prior and Informed Consent of Aboriginal peoples a condition of all forms of project finance.

The World Development Movement join Clayton Thomas-Muller and George Poitras outside the Royal Bank of Scotland to oppose investments in tar sands, 2009

Get involved!

Join the campaign to hold RBS to account:

Indigenous Environmental Network:
www.ienearth.org/tarsands.html

UK Tar Sands Network:
www.no-tar-sands.org

We are working in partnership with these amazing organisations to clean up RBS:

PLATFORM:
blog.platformlondon.org/rbstarsands

People & Planet:
peopleandplanet.org/tarsands

WDM Scotland:
www.wdm.org.uk/global-financial-crisis

Friends of the Earth Scotland:
www.foe-scotland.org.uk

Activists protesting RBS's sponsorship of Climate Week

---

1 CBC, September 27, 2010 'Oilsands poll shows Canadians evenly split' http://www.cbc.ca/news/canada/edmonton/story/2010/09/27/oil-sands-poll027.html

2 Pembina Institute (2010) 'Mining vs. In Situ' http://www.pembina.org/pub/2017

3 Pembina Institute (2010) 'Oilsands and Water' http://www.pembina.org/pub/1830

4 Pembina Institute (2010) 'Canadian Oilsands and Greenhouse Gas Emissions' http://www.pembina.org/pub/2057

5 Pembina Institute (2010) 'Toxic Liability' http://www.pembina.org/pub/2076

6 Alberta Cancer Board (2009). Cancer Incidence in Fort Chipewyan, Alberta,

1995-2006. Government of Alberta.

7 The Co-operative and Beaver Lake Cree First Nation (2010) 'Save the Caribou – Stop the Tar Sands' http://www.co-operative.coop/savethecaribou

8 Evans and Smith (2011) 'Dirty Money: Corporate Greenwash and RBS Coal Financing. www.platformlondon.org/dm.pdf

9 Evans et al. (2010) 'Cashing in on Tar Sands: RBS, UK Banks and Canada's "blood oil" ' www.platformlondon.org/rbstarsands

10 http://www.equator-principles.com/

11 See note 9.

12 The Co-operative (2009). 'The Beaver Lake Cree Nation's legal challenge' http://www.co-operativecampaigns.co.uk/toxicfuels/stopTarSandsExpansion-legalCase.php

13 See note 9.

14 Calgary Herald (December, 2010) 'Shell working to plug water leak at Muskeg River mine' http://www.calgaryherald.com/Shell+working+plug+water+leak+Muskeg+River+mine/3956355/story.html#ixzz1I70jSTE7

15 Swiss Re (2009) http://www.swissre.com/resources/7249eb804e42012db8a8bcb8626ab849-Publ09_FR_Globalisation_en.pdf

16 Council of Canadians, Indigenous Environmental Network, UK Tar Sands Network (2011) 'Keep Europe out of the Tar Sands', http://www.no-tar-sands.org/campaigns/ceta/

17 Pembina Institute (2010) 'Pipeline to Nowhere' http://www.pembina.org/pub/2143

18 ibid

19 Pembina Institute (2009) 'Opening the Door to Oilsands Expansion: Fact Sheet' http://www.pembina.org/pub/1940

20 Environmental Defence (2010) http://environmentaldefence.ca/campaigns/exposing-tar-sands

21 See note 9.

22 Marketwire (December, 2010). 'Oil Sands: First Nations Reject Enbridge's Pipeline Equity Offer, CEO & Board of Directors Served With Legal Declaration Banning Company' http://www.marketwire.com/press-release/Oil-Sands-First-Nations-Reject-Enbridges-Pipeline-Equity-Offer-CEO-Board-Directors-Served-1370413.htm

23 ibid.

24 Dexia (2009) 'Dexia Asset Management 2009 Engagement Report' www.dexia-am.com

25 RBC (2010) http://www.rbc.com/environment/research.html; Rabobank (2010) 'Rabobank's position on Oil & Gas activities' www.rabobank.com

26 Banktrack (2011) 'HSBC takes a step away from tar sands' http://www.banktrack.org/show/news/hsbc_takes_a_step_away_from_tar_sands

Author: Dave Vasey

Printed on 100% post-consumer recycled paper with VOC-free ink & renewable energy