



The Pipeline vs. Rail Team

Karen Grey (Geoscience)

Hossein Ahmadi (Engineering)

Jade McLean (Policy)

Volodymyr Vragov (Geoscience, *Project Manager*)

Policy Paper



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Indigenous participation in Canada's oil industry: Attaining economic growth through strengthened fiscal relationships

Jade McLean¹, Karen Grey², Volodymyr Vragov³, Hossein Ahmadi⁴

[1] The School of Public Policy, University of Calgary, Calgary, Alberta, Canada T2N 1N4; Tel.: +1 403-700-5883; jade.mclean@ucalgary.ca

[2] Department of Earth Sciences, University of Western Ontario, Ontario, Canada N6A 5B7; Tel.: +1 519-661-3187; kgrey2@uwo.ca

[3] Geoscience Department, University of Calgary, Calgary, Alberta, Canada T2N 1N4; Tel.: +1 403-700-5883; volodymyr.vragov1@ucalgary.ca

[4] Schulich School of Engineering, University of Calgary, Calgary, Alberta, Canada T2N 1N4; Tel.: +1 403-700-5883; hosseinahmadi13@ucalgary.ca

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Abstract:

Many Canadians have a vested interest in the development and sustainability of a strong energy sector. As such, closing the gap between the financial interests of Indigenous groups and the economic objectives of industry and government regarding oil sands development, has reached a critical point. Canada's petroleum sector is challenged by limited export capacity, resulting in transportation bottlenecks and decreased investor confidence. Delays in pipeline development have been in part due to legal challenges related to the Crown's duty to consult and accommodate Indigenous peoples. While some Indigenous groups remain in opposition to petroleum development, others are taking advantage of the economic opportunity and pursuing wider involvement by seeking equity partnerships in major projects. Despite the willingness of Indigenous communities to participate in the energy sector, many experience significant financial

and educational barriers to achieving economic prosperity. This paper explores how the Government of Canada can better reconcile the economic and environmental interests of Indigenous groups regarding resource development in Canada. Establishing federal loan guarantees for large-scale projects can ensure that Indigenous groups receive equitable opportunity to participate in pipeline and rail development projects that impact their land, and secure long-term economic benefits. Secondly, strengthening the fiscal capacity of Aboriginal Financial Institutions will increase support to Indigenous businesses that serve the industry. Finally, supplying training and employment opportunities through an environmental and monitoring program can allow for Indigenous peoples to play a larger role in environmental protection.

1. Introduction

The capacity constraints of Alberta's oil transportation, particularly by pipeline and rail, have remained a prominent headline in many political, economic, and environmental debates shaping Canada today. Delayed pipeline construction and congestion in the province's crude-by-rail shipments¹ contribute to the discounted value of Western Canadian crude relative to U.S. and global benchmarks. This is estimated to cost the Canadian economy roughly \$15.6 billion per year, or equivalently, 0.75 percent of GDP [1]. As a result, Canadian oil producers face transportation bottlenecks and decreased investor confidence.

Delays in pipeline development have been in part due to legal challenges related to the Crown's duty to consult and accommodate Indigenous peoples. This has led to Canadian regulatory bodies struggling to reconcile Indigenous concerns, such as environmental protection, while keeping pace with the country's economic interests for developing the oil industry. This has marked the most recent string of political conflicts in Canada's oil development, evident among various pipeline projects in Western Canada including the Trans Mountain, Northern Gateway, and Keystone XL pipelines.

Meanwhile, Indigenous peoples wanting to participate in resource development experience significant barriers to achieving economic prosperity. These include inadequate access to capital funding to support and sustain small-scale business development [2], and equity financing for large-scale investments [3]. This has inhibited many Indigenous peoples from achieving own-source incomes outside of limited federal support programs. Furthermore, Indigenous peoples

¹ Capacity fluctuates and is dependent on infrastructure constraints and the supply and demand of competing commodities shipped by rail [4]. Western Canadian rail terminals have available loading capacity, but there is shortage of railcars, crews, and track space to transport oil. Furthermore, Canadian railway operators have had to cut back on crude-by-rail shipments to alleviate a massive backlog of grain shipments [5].

tend to have lower education levels compared to non-Indigenous Canadians, and therefore lack the technical skills required to have equitable access to industry-related jobs [6].

The existing relationship between the federal government, Indigenous communities, and industry is not working. Canada's petroleum industry holds tremendous potential for Indigenous peoples to recognize a path towards self-determination, self-governance, and economic prosperity. There must be a new approach to governance and accountability that helps to make government transfers to Indigenous communities effective, while supporting the growth of Canada's petroleum industry. The purpose of this paper is to explore how the Government of Canada can better reconcile the economic and environmental interests of Indigenous groups regarding resource development in Canada.

2. Background and Current Status

The Crown has a legal duty to consult and accommodate Indigenous peoples “when [it] has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it” [7]. Prior to the *Haida Nation v British Columbia* (2004) case, the obligation of the Crown to consult Indigenous peoples was limited to a narrow scope of occasions where it “sought to justify demonstrated infringements of Aboriginal or treaty rights” [8]. Following *Haida*, the Court broadened the scope of the Crown's obligations in recognizing that the reconciliation of Indigenous peoples is the ultimate objective of the duty to consult, which provides for “meaningful” (*Haida Nation v. British Columbia* [9]) consultation where Aboriginal peoples have credibly asserted their right to the land [8]. The result of *Haida*, among a series of other Supreme Court rulings², has considerably increased the

² Including *Calder v British Columbia* (1973), *Guerin v The Queen* (1984), *R. v Sparrow* (1990), *R. v Van der Peet* (1996), *Delgamuukw v British Columbia* (1997), *Taku River Tlingit First Nation v British Columbia* (2004), *Haida v. British Columbia* (2004), *Mikisew Cree First Nation v Canada* (2005), and *Rio Tinto Alcan Inc. v Carrier Sekani*

volume and depth of consultation measures undertaken prior to project approvals and proceedings, and intensified the importance of Indigenous concerns and environmental protection regarding resource development in Canada.

In practice, achieving effective consultation and accommodation thresholds have been deterred by diverging cultural understandings and interpretations of consultation practices between Indigenous groups and government, lack of Indigenous input and decision-making power in resource development projects, as well as a perceived lack of economic and cultural accommodation considerations for Indigenous groups [10]. Furthermore, Section 89 of the Indian Act prohibits the use of reserve lands for collateral purposes [11], which creates a significant barrier for entrepreneurs attempting to access financing. This heightens the fiscal challenges faced by Indigenous peoples in Canada due to their generally low socioeconomic status⁷ and high levels of unemployment.

As a result, Indigenous peoples have traditionally played a minimal role in Western Canadian energy development. They have received minimal economic income supports, usually in the form of contribution agreements, land settlement claims, and legal claims [6], which has hindered their ability towards achieving self-determination and self-governance objectives. Since 1982, First Nations peoples have continuously challenged governments for a broader interpretation of their rights, including demands for greater control over resource development on their traditional lands, and have fought for greater responsibility on behalf of the Crown in their duty to consult.

3. Key Considerations

Tribal Council (2010), and Tsilhqot'in Nation v. British Columbia (2014), Tsilhqot'in Nation v. British Columbia (2014), among others.

The participation of Indigenous peoples in Canada's energy and resource sectors has increased significantly over the past two decades (Fig. 1) [12]. This participation has been encouraged by numerous collaboration agreements with industry, typically in the form of impact benefit agreements (IBAs). While some Indigenous groups remain in opposition to petroleum development, others are taking advantage of the economic opportunity and pursuing wider involvement by negotiating ownership stakes in proposed pipeline, rail, and bitumen storage projects [13]. Unlike most traditional IBAs that focused more on short-term resource projects, ownership interests serve to ensure productive, long-term partnerships in support of project development [14]. Perhaps the best example of such partnering is the agreement between Suncor and the Fort McKay and Mikisew Cree First Nations in Alberta. The two First Nations acquired 49% ownership in Suncor's East Tank Farm with shares valued at about \$500 million making it the largest business investment to date by a First Nation entity in Canada [15].

Support for resource development and desire for direct involvement is further illustrated by the First Nations' led \$17-billion Eagle Spirit Energy pipeline and energy corridor between Alberta and the northern British Columbia coast. The project has support from 35 First Nations along the proposed route; the bands are entitled to at least 35% ownership in exchange for the land use [13]. Alternatively, a private investor group, Generating for Seven Generations (G7G), has proposed a rail project to help move Alberta's land-locked oil, as well as other commodities, to tidewater [16]. The railway has extensive First Nation support because of adequate consultation and accommodation by G7G, whereby directly affected First Nations will hold a 50% equity stake in the project. To accommodate environmental concerns, G7G is proposing a "green" railway by going electric [17].

Despite the willingness of Indigenous communities to participate in petroleum development, they often lack the necessary capital to do so. A small business that serves the oil and gas industry, such as an environmental service or construction company, must borrow funds to start and maintain operations. The primary service providers specializing in Indigenous business finance belong to the National Aboriginal Capital Corporations Association (NACCA) and consist of 58 Aboriginal Financial Institutions (AFIs) across Canada [18]. These institutions are largely funded by the federal government, although some institutions (i.e., Aboriginal Developmental Lenders) receive funding from the provincial governments or private sector as well [2]. The AFIs provide various streams of funding geared toward mostly small-size business development³. A key aspect of AFIs is their ability to obtain a band council resolution that enables them to repossess on-reserve assets if the borrower defaults [19]. The opportunities available to Indigenous entrepreneurs have changed since the AFI programs began in the 1980s; the size and sophistication of the Indigenous business market has grown and diversified, and as a result, so has the size and volume of loan applications [20]. As of 2017, NACCA reported 22 AFIs lacking access to sufficient loan capital.

Indigenous communities wanting to make large-scale investments into infrastructure projects that impact their lands will require much more funding than an AFI can offer. The First Nations Finance Authority (FNFA) - an organization that provides its borrowing members with investment options and access to long-term loans with preferable interest rates - has aimed to provide such means. According to Moody's Investors Service (2017), however, the number of large infrastructure projects with Indigenous involvement is set to increase over the next several years. It is expected that organizations like the FNFA will face bottlenecks and have limited

³ AFIs have the authority to approve funding up to a maximum of \$99,999 for Aboriginal individuals and incorporated businesses and up to \$250,000 for community-owned businesses [21].

ability to finance equity loans for the duration and amount that would be required for some of the proposed megaprojects [3].

4. Policy Recommendations

4.1 Financial support to Indigenous businesses or communities participating in resource development (Table 1)

4.1.1 Federal loan guarantees for large-scale infrastructure projects

We recommended that the Government of Canada provide loan guarantees to Indigenous communities to facilitate equity participation in resource and transportation projects impacting their territories. A government guarantee is attractive to lenders because it provides assurance that the government, which is expected to have the most stability/lowest risk, can assume the debt obligation if the borrower defaults. This would enable Indigenous groups to approach lenders for financing and obtain much lower interest rates and higher returns than they could otherwise achieve.

Large-scale projects like tank farms and pipelines are very costly - on the scale of hundreds of millions to billions of dollars [3]. Despite the high cost, it is ideal for Indigenous corporations to acquire sufficiently large equity shares to ensure long-term partnerships with industry, have more control over environmental aspects, and generate substantial revenue streams that can be repurposed back into their communities. Additionally, Indigenous corporations that have an equity stake in these projects will be more likely to support further oil and gas development.

The Ontario government has successfully implemented a loan guarantee program to support Indigenous participation in renewable energy projects within their traditional territories. The Aboriginal Loan Guarantee Program (ALGP) provides a provincial loan guarantee to wholly owned Aboriginal corporations to purchase up to 75% of its equity interest in an eligible project,

to a maximum of \$50 million [22]. Aboriginal groups from other provinces/territories may serve to benefit from this financing mechanism, which could be expanded to projects beyond the renewable energy sector. The equity financing requirements for interprovincial pipeline projects, however, would require much more than a provincial loan guarantee like this can currently offer.

Federal loan guarantees could help to advance proposed infrastructure projects and attract global investment. Furthermore, the guarantees would help reconcile the fiscal relationship with Indigenous peoples by providing certainty to lenders, which better enables Indigenous peoples to capitalize on the opportunities provided by the energy sector.

4.1.2 Strengthen the capacity of Aboriginal Financial Institutions to support small-scale businesses

The number of Indigenous businesses have been on the rise in Canada throughout recent decades [23]. However, Indigenous businesses and entrepreneurs still face several barriers, the most prominent being access to capital and methods of financing. A 2016 study by the Canadian Council for Aboriginal Business found that 31% of Aboriginal business owners anticipate that their growth will be adversely affected by access to equity or capital and government policy, and 51% reported the biggest hindrance to this access is locating potential sources of funding.

Although there are a variety of government-funded programs currently available, many Indigenous business owners report a lack of perceived value for the programs available and experience difficulty locating actual programs. Among those who did seek government-assisted funding, 27 different programs or sources were cited as being used, indicating an inefficient patchwork nature of funding [23].

We recommend that the Government of Canada expand its investments toward AFIs by bringing awareness to the funding opportunities they provide. The government should establish a

centralized information tool to assist Indigenous communities in accessing government programs and fostering awareness for relevant AFI services. The information tool could help identify sources of federal and provincial funding or grant opportunities (as well as understanding the necessary qualifications) and direct them to the appropriate AFI. It is crucial that the centralized information tool be linked to staff that can communicate this information in a way that is culturally relevant to Indigenous peoples with varying degrees of financial literacy.

In accordance with an increase in AFI awareness, we recommend that the government continues to increase funding to the national network of AFIs. As a primary source of Indigenous financing and advisory services, increased funding would help not only to support the early stages of a business, but to support long-term, sustainable growth for these businesses. Additionally, between 2006 and 2016, the Indigenous population increased by 42.5% in Canada [24]. It is critical that the government consider funding expansions that account for Indigenous population growth and increasing demand for loan applications.

4.2 Educational support for environmental monitoring and management training (Table 1)

Expected growth in oil sands production⁴ may increase the level of environmental risk to the regions surrounding its development. There is willingness on the part of Indigenous communities to participate in the environmental issues that strongly affect them. Many communities, however, lack the capacity to provide environmental services or qualified Indigenous environmental technicians [25].

We recommend that the federal government, in collaboration with the provinces/territories, provide additional funding to implement certified environmental management, monitoring, and remediation programs for Indigenous peoples impacted by resource development. This would

⁴ The production and subsequent transportation of crude oil in Western Canada, particularly from the oil sands, is forecast to grow by 1.5 million barrels per day by 2030 [26].

aim to provide members of Indigenous communities with the technical skills required for equal employment and business opportunities in industry. Furthermore, research indicates there is growing demand for employees in the environmental services sector [25].

Environmental programs currently exist, for example, the Reserve Lands and Environment Management Program (RLEMP)⁵, which provides Indigenous peoples with comprehensive training to manage natural resources and the environment on reserve. The drawback to this program, however, is that the government only provides enough funding to certify one land manager per community. Alberta has been testing two Indigenous pilot training programs: the Pipeline Monitoring Project (begins in 2018) and the Environmental Monitoring Technician Training (EMTT) program (finishes in 2018), the latter of which is only available to First Nations in the oil sands region. The training is delivered in a series of short modules (total of 3 to 5 in-class weeks) that build up to a certificate, preventing the need for trainees to relocate full-time for the duration of the program. Feedback from the EMTT program was positive, but indicates that although the program costs were covered, travel expenses were problematic. Participants also mentioned needing more course time in order to practice what they learned and to internalize new information [27].

Following the Alberta models, we recommend fully implementing a certified modular based program for Indigenous peoples that would offer environmental monitoring (including pipeline leak detection), management, and remediation expertise. Additional funding will be required to provide a lengthier time frame for module completion, allow more participants to enroll, and offset travel costs.

5. Conclusion

⁵ The RLEMP program was created in partnership between Indigenous and Northern Affairs Canada, the University of Saskatchewan, and the Aboriginal Lands Managers Association.

Closing the gap between the financial interests of Indigenous groups and the economic objectives of Canada's oil industry and government has reached a critical point. The establishment of a coordinated and collaborative approach between the government and Indigenous groups can allow for both sides to realize mutual gains within the industry (Fig. 2). Reducing financial barriers by providing loan guarantees, investments in small businesses, and skills training, can provide opportunities for Indigenous peoples to become informed and active participants within the industry. In turn, this can allow Canada to advance its reconciliation efforts and support shared economic interests. As project developers continue to face increasing legal and regulatory challenges, the timing is right for the Government of Canada to capitalize on every opportunity available. The enthusiastic support of Indigenous communities would be a positive step forward for the Canadian petroleum industry.

6. Figures and Tables

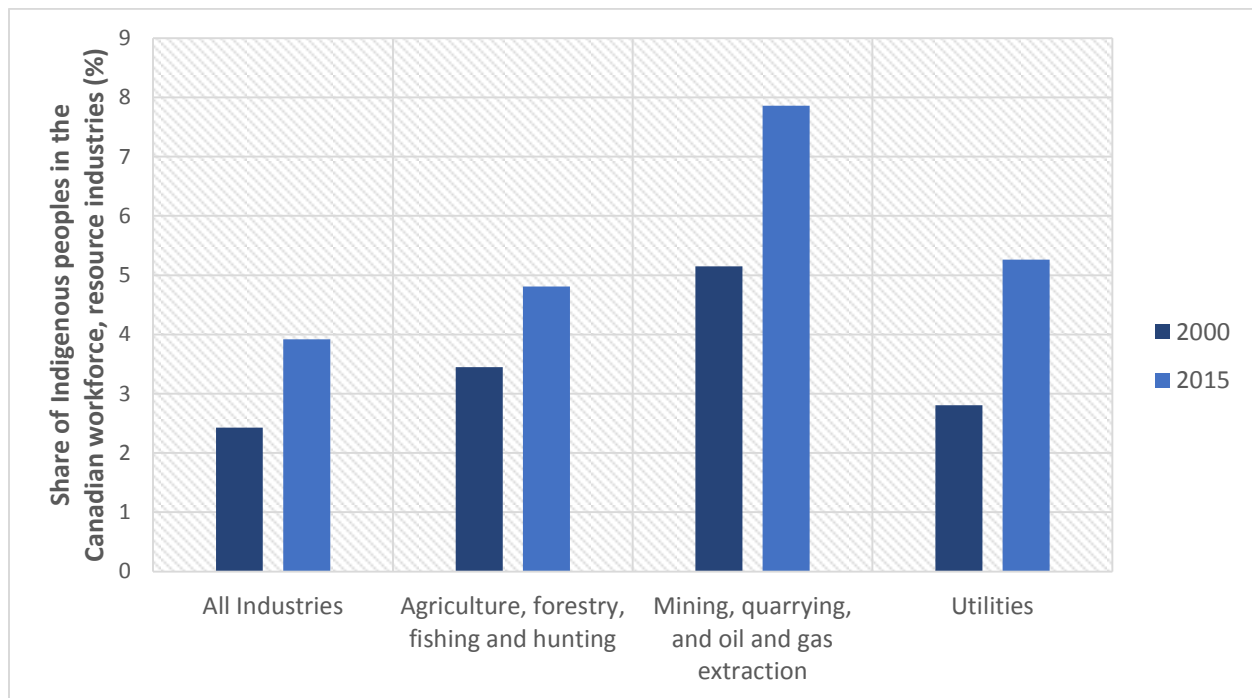


Figure 1. Share of Indigenous peoples working in the Canadian resource industries in 2000 (dark blue) and 2015 (lighter blue). *Source of data: Statistics Canada, Census of Population Programs 2001 and 2016 [28,29].*

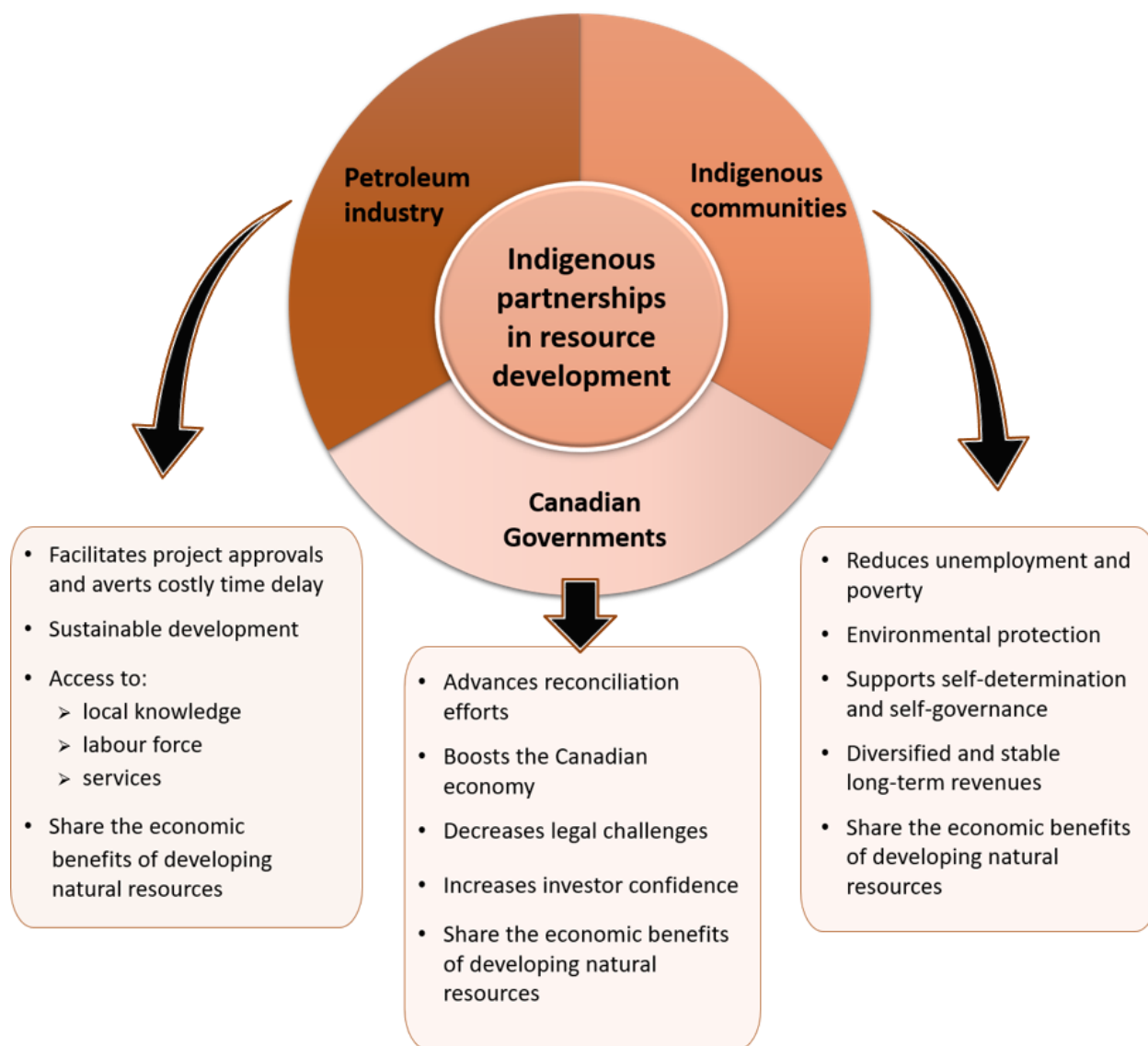


Figure 2. Summary of how Indigenous partnerships in resource development can benefit federal and provincial governments, Canada's oil and gas industry, and Indigenous communities.

Table 1. Policy recommendations and evaluation

Policy Recommendation	Equity	Costs	Political Considerations
<i>1a. Provide federal loan guarantees for large-scale infrastructure projects</i>	<ul style="list-style-type: none"> + Dividends received by communities can be reinvested back into communities + Equal opportunity for Indigenous groups to participate in large infrastructure projects (e.g., pipelines) 	<ul style="list-style-type: none"> – The government could face backlash from non-Indigenous businesses – This is an expensive and risky option for the federal government, as well as taxpayers, to assist Indigenous communities in loan guarantees 	<ul style="list-style-type: none"> + Enhances efforts towards reconciliation by the federal government + May help to attract foreign investment + Public support is likely
<i>1b. Strengthen the capacity of Aboriginal Financial Institutions to support small-scale businesses</i>	<ul style="list-style-type: none"> + Equal access for Indigenous groups in accessing financial services + Increased opportunity for Indigenous peoples to participate in the resource industry 	<ul style="list-style-type: none"> – Increased AFI funding will create trade-offs between federal government spending on other forms of Indigenous program spending and non-Indigenous program spending for Canadians 	<ul style="list-style-type: none"> + Enhances reconciliation efforts by the federal government + Public support is likely
<i>2. Educational support for environmental monitoring and management training</i>	<ul style="list-style-type: none"> + Promote active and informed participation of Indigenous communities throughout all phases of oil and gas development – Not all interested candidates may meet the qualification criteria 	<ul style="list-style-type: none"> – This program will create trade-offs between federal government spending on other forms of Indigenous program spending and non-Indigenous program spending for Canadians – If no action is taken, the gap between Indigenous and non-Indigenous training and employment may widen – If no action is taken, Indigenous groups may have less control over environmental protection plans 	<ul style="list-style-type: none"> + Enhances reconciliation efforts by the Federal government + Addresses education and employment gaps between Indigenous and non-Indigenous, as per Budget 2018

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