Impact and Benefit Agreements in Relation to the Neoliberal State: the Case of Diamond Mines in the Northwest Territories

by

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Abstract

This thesis investigates the Canadian state's relation to bilateral, confidential agreements — referred to commonly as Impact and Benefit Agreements (IBAs) — between Indigenous communities in Northern Canada and mining companies that seek to extract resources from their traditional territory. A case study of IBAs over diamond mines in the Northwest Territories has been employed.

There is a gap within the literature on IBAs addressing the state — such as understanding how the state benefits from the IBA process, what its role has thus far been in the process, and how to understand broader questions of Indigenous-state relations based on the state's hands-off approach to IBAs. This research addresses these gaps, and concludes that IBAs in the North can be better understood through a framework of neoliberalization, according to which the interests of the state are being conveniently looked after.

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List of Acronyms

AANDC- Aboriginal Affairs and Northern Development Canada

AIP- Agreement in Principle

BHP- Broken Hills Proprietary

CSR- Corporate Social Responsibility

DIAND- Department of Indian Affairs and Northern Development

IBA- Impact and Benefit Agreement

IFA- Inuvialuit Final Agreement

IIBA- Inuit Impact and Benefit Agreement

IMA- Independent Monitoring Agency

INAC- Indian and Northern Affairs Canada

FPIC- Free, Prior, Informed Consent

GNWT- Government of the Northwest Territories

NLCA- Nunavut Land Claims Agreement

NWT- Northwest Territories

SCC- Supreme Court of Canada

TFA- Tlicho Final Agreement

TFN- Tlicho First Nation

TLE- Treaty Land Entitlement

YKDFN- Yellowknives Dene First Nation

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Chapter 1: Introduction

1.1: Research Aim and Question(s)

The central aim of this thesis is to build on the existing body of research on Impact and Benefit Agreements (IBAs) by analyzing and theorizing the state's position in relation to IBAs in Northern Canada. Focusing on a case study of IBAs signed over the diamond mines in the Northwest Territories (NWT), this thesis will home in on a particular set of IBAs, amidst a plethora of such agreements that are being signed throughout the Canadian North. As the literature review will demonstrate, there has yet to be an analysis of the state's position in relation to IBAs which expressly questions the interests of the state, and how IBAs help to facilitate these interests. Fidler and Hitch (2007, 2009) point out some of the ways in which the state has benefitted from IBAs — particularly in areas where land claims have yet to be settled — but their observations do not elaborate on the broader processes at play that add context to the ways in which the state is behaving.

By elaborating on these broader processes, our understanding of IBAs can be more nuanced and developed. Rather than focusing exclusively on the interests of the direct signatories to these agreements (Indigenous organizations and resource extraction companies), paying closer attention to the ways in which the state benefits from these processes, and how the state has thus far behaved in relation to IBAs, can not only further inform us of IBAs as a tool of governance in Northern Canada, but can also add insights into the evolving Indigenous-state relationship. This evolving relationship has recently been analyzed and theorized through an understanding of the Canadian state as operating within a neoliberal global order.¹ The analytical and theoretical

¹ An overview and discussion of this body of literature is found in Chapter 3.

examination of the state's relation to IBAs within this thesis understands the state as a social relation that functions under the influence of neoliberal forces.

Following in the footsteps of these two bodies of literature (IBAs in Northern Canada, and the relationship between the neoliberal state in Canada and Indigenous peoples), this thesis seeks to answer the following central question(s): *How can we explain the state's relation to IBAs in Northern Canada, and what does this tell us about the evolving Indigenous-state relationship in the North?*

1.2: Research Context and Literature Review

An IBA is a term used to describe bilateral agreements that are signed to ensure the sharing of benefits and the mitigation of negative impacts from a resource extraction project.² While the term 'IBA' has occasionally been used to describe agreements signed between an industrial proponent and the government, as well as between the government and an Indigenous organization (such as in British Columbia), the majority of IBAs are signed between an Indigenous organization and an industrial proponent. Generally speaking, these agreements include measures such as: employment quotas for the Indigenous community, skills training and other educational benefits, contracting and joint venture opportunities for the Indigenous community, financial compensation, environmental mitigation-related measures, and even cultural-related benefits (Gibson & O'Faircheallaigh, 2010). This research will focus on IBAs as signed between an Indigenous organization and an industrial proponent, and does not consider

² IBAs are referred to by several different terms, depending on both the land claims agreement in which they are addressed, as well as the author who writes about them. They have been referred to as 'Benefits Agreements', 'Benefit-Sharing Agreements', 'Cooperation Agreements', 'Concession Agreements', 'Agreements', 'Negotiated Agreements', 'Participation Agreements', and 'Supraregulatory Agreements'.

the other types of IBAs, which occur far less often, and are not as relevant for the purposes of this research.

When referring to an IBA in this manner, it is also important to distinguish between IBAs negotiated and completed under the requirements of a Comprehensive Land Claims Agreement (CLCA), and an IBA signed in an area that does not have a CLCA. Fidler and Hitch (2007) note this distinction in their research, pointing out that in some modern treaties³ the proponent is obliged to negotiate — and in some cases, conclude — an IBA with the regional (Indigenous or Indigenous-controlled) government in advance of mineral development, whereas in areas where a modern treaty has yet to be signed, IBAs take place completely outside of the scope of governmental and regulatory oversight (p. 2). While I will be sure to acknowledge the distinction between these types of IBAs, unlike Fidler and Hitch (2007), who refer solely to the latter form of IBA, my research will also examine those IBAs that are signed under a CLCA provision.

The reason for exploring IBAs that are signed under a CLCA provision, as well as those which are not, is the starting point for looking at the context of my research. The very fact that IBAs exist in both of these contexts is what drew me to researching these agreements. My research interests were originally focused on CLCAs, where I was interested in how the state sought to achieve legal and economic certainty over Indigenous traditional territory for large-scale resource extraction projects. As chapter 2 will demonstrate, numerous scholars have observed that the state has been far more interested in negotiating and concluding CLCAs with Indigenous communities whose traditional territory is situated in an area that is rich with natural resources to be extracted. In advance of large-scale resource extraction projects on Indigenous

³ See Chapter 2 for an examination of the differences and similarities between historic treaties and modern treaties, which are officially referred to as Comprehensive Land Claims Agreements (CLCAs).

traditional territory, the state has concluded CLCAs in order to obtain greater certainty over the financial sustainability of a major industrial project (Angus, 1992; Mitchell, 1996).

In the early nineties, after enormous diamond deposits were discovered in the Great Slave region of the Northwest Territories (NWT), regulatory permits were issued to Broken Hills Proprietary (BHP)⁴, an Australian-based multi-national mining company, for the purpose of building a large-scale diamond mine on Indigenous traditional territory. Despite the fact that modern treaties had yet to be signed with the Dogrib Treaty 11 Council (currently referred to as the Tlicho First Nation), or with the Akaitcho Treaty 8 Council — both of which asserted the land in question as part of their traditional territory — the resource development project proceeded. Therefore, the settlement of land tenure issues, which clarifies who owns, controls, and manages lands and resources, had yet to be conclusively settled through a CLCA. In the interim, in order for resource extraction to move forward while negotiations over the settlement of land tenure carried on inconclusively, IBAs were signed with the impacted Indigenous communities. IBAs were therefore being used as a tool — I argue — whose ultimate goal was to attain economic certainty over the land needed for the resource extraction project.

The Environmental Assessment Review Panel recommended that IBAs be signed in advance of the beginning of the operational phase of the project. The federal government agreed with this recommendation, and put forth a condition upon which BHP would be issued a water license.⁵ Department of Indian Affairs and Northern Development (DIAND) Minister Ron Irwin mandated that within sixty days, there would need to be “significant progress” made in the negotiations over IBAs between BHP and those Indigenous communities who at that point in time had yet to reach an agreement with the mining company. It is difficult to determine how the

⁴ This company is now called BHP Billiton, which in 2011, was ranked as the third most profitable company in the world. It is also the world’s largest mining company (Hitipeuw, 2011).

⁵ The water licence was a requirement for the project to move forward.

government would have known if “significant progress” was made in the event that the agreements were not concluded within the sixty day period, since the negotiations were bilateral and confidential. Nonetheless, the federal government made it clear to BHP that they would likely need to strike a deal with the impacted Indigenous communities in order to get issued the necessary permits for the project.

Out of this *ad hoc* approach, wherein the government mandated that “significant progress” be made over negotiations regarding the realization of benefits and the mitigation of impacts to Indigenous communities from large-scale mineral development, there emerged some research that criticized the state’s position in relation to IBAs. Keeping (1998) asked:

Was it acceptable that the communities had to face negotiations with BHP without the support of a government sanctioned framework? Was it fair that those negotiations were forced to take place within a period of time chosen on an ad hoc basis by the federal Cabinet? These and other procedural matters could be established by regulation or legislation, thereby creating a fairer environment for the negotiation of benefits agreements (p. 29).

Others, such as the Canadian Institute of Resources Law (1997), and O’Reilly and Eacott (1999), asked similar questions, and concluded — much like Keeping — that the federal government acted irresponsibly through its ad hoc approach to IBAs. It was the federal government’s fiduciary obligation to ensure that the interests of Indigenous peoples were being met, and while the attaining of local benefits would be a part of this obligation, it was argued that this ad hoc approach — which left Indigenous communities in the precarious position of negotiating an agreement in the absence of a regulatory framework or policy guidelines — was, according to Keeping (1999), inconsistent with the Crown’s responsibility.⁶ Kennett (1999) wrote a document for the Mineral and Resources Directorate of DIAND, in which he offered policy options for

⁶ The fiduciary obligation or fiduciary responsibility of the Crown is taken up by both the federal and the provincial Crown. In the NWT, there is no provincial Crown, so the federal Crown, as represented by the federal cabinet, assumes the responsibility. Refer to Chapter 4 for further discussion.

DIAND to pursue in order to clarify the government's position in relation to IBAs, which he also concluded, was in many ways problematic.⁷

In addition to the above-mentioned research, which largely critiques the government's position over IBAs based on BHP's Ekati diamond mine, research on the topic of IBAs began to look at the rationale for them, and attempted to relate IBAs to other regulatory and supraregulatory processes within the NWT (Keeping, 1999; Kennett, 1999; Sosa & Keenan, 2001; Galbraith, 2005). The rationales offered for these agreements discuss the negative history of mining in the North, in which Indigenous peoples were left out of the development projects, the environment was left contaminated, and the profits flowed south without addressing local benefits (Kennett, 1999). There was also an emphasis on IBAs being entered into because of the gaps and failures within the regulatory framework of the North (Kennet, 1999; Keeping, 1999), or more specifically, the shortcomings of Environmental Assessment, which does not address local benefits (Galbraith, 2005; Galbraith et al., 2007). Sosa and Keenan (2001) note that the government may have mandated the IBAs over Ekati out of its fiduciary obligation to Indigenous peoples (p. 8). This, they acknowledge, is likely to occur in situations where land claims have yet to be settled.

While there are a number of rationales for IBAs offered in the literature, and several comparisons made between IBAs and other types of agreements, there is a dearth of research that relates IBAs to land claims agreements, and that notes the connection between these two types of agreements. The overlap that is apparent is that both of these agreements aim to create the certainty that is necessary for large-scale resource extraction projects to take place on Indigenous traditional territory. Therefore, they are both essential to the continued accumulation of capital. Galbraith's (2005) Master's research on supraregulatory agreements in the NWT over the

⁷ See Chapter 4 for a detailed discussion of this document.

diamond mines does make a connection between IBAs and the need to attain certainty — which has been historically attained through a treaty — where she mentions that some Aboriginal and non-governmental respondents from her interviews agreed with the idea that IBAs stem from a lack of Indigenous involvement in resource extraction projects of the past, but that the respondents also “argue(d), more cynically, that IBAs are like historical treaties between aboriginal groups and the federal government.” Therefore, the respondents argued, “these agreements stem from government and developers’ interest in clarifying the legal rights of aboriginal people and aim to limit these rights with respect to the diamond mine development” (pp. 75-76).

Galbraith (2005) continues to develop this so-called ‘cynical rationale’, noting that “some government and non-government respondents see IBAs as a means to avoid confrontation and conflict in the courts rather than a means to create good working relationships between the developer and aboriginal groups. Here, certain conditions in IBAs function to avoid confrontation between these two groups at a minimal cost to the government and the developer....” (p. 76). These observations are both useful to describe the role that IBAs play in creating the certainty similarly obtained from historical treaties over access to resources (as well as modern treaties), and in highlighting both the government and the developers’ mutual interests in attaining this level of certainty.

IBAs and modern treaties, or CLCAs, are relatable, but the connection between them is not the central focus of this research.⁸ Their relationship is important to highlight, though, since they work in tandem to sustain the project of capital accumulation in the North, and increasingly,

⁸ This research initially sought to focus more on the nexus between CLCAs and IBAs but the lack of data and research available on this connection, along with the lack of interest in discussing this issue in-depth amongst several respondents, limited the potential for this to play a larger role in my research. Nonetheless, CLCAs and IBAs are contextualized side-by-side in Chapter 2, and the connection between them is considered in Chapter 4, as well.

in the global economy within which the North is unavoidably intertwined. Indeed, they are both important components of the Indigenous-state relationship in the North, as they are central tools used in the governing of Indigenous peoples. It is more certain what the state's relationship is to CLCAs, since the state has manufactured the entire negotiation and implementation process, and is responsible for concluding these agreements with Indigenous nations across the country. Meanwhile, with IBAs — at least in areas without a CLCA⁹ — the state has no formal role in the process.

Despite the state being largely absent from the IBA process, it would be naive to assume that the state is therefore indifferent to IBAs, receives no direct or indirect benefits from IBAs, or that it has no role or responsibilities in relation to IBAs from a normative, or even legal, standpoint. Within the literature on IBAs — in addition to the criticisms of the state's handling of the IBAs over the Ekati diamond mine — there has been some research on the ways in which the state relates to the IBA process. Ultimately, however, this research is lacking. Kennett (1999) discusses the ways in which the state *could* play a further role in the IBA process, but his report, being commissioned by DIAND, did not approach the subject through a critical analysis of DIAND's role in the North, and how the historical and current governance practices in the North — and the role that the state has played within this landscape — relates to IBAs.

In more recent research on IBAs, Fidler and Hitch (2007, 2009) make an important contribution to the critical literature on IBAs by indicating the ways in which IBAs are signalling a more disconnected relationship between Indigenous peoples and the state, and how therefore,

⁹ IBA provisions in modern treaties tend to include a formal, yet limited role for the state. For instance, in the Inuvialuit Final Agreement (IFA), 'Participation Agreements' allow for the federal government to establish a timetable and negotiations procedures when an agreement is not reached. There is also an arbitration option in the event that an agreement is not reached. However, the IFA still envisages 'Participation Agreements' as an agreement between the proponent and the Inuvialuit. Other land claims, such as the Nunavut Land Claims Agreement (NLCA), also allow for a certain level of governmental oversight, including ministerial oversight, and fits within the regulatory system in Nunavut (Kennett, 1999, pp. 8-9).

industry is acting as the Crown's surrogate in certain circumstances. In one such important set of circumstances, they note how the industrial proponents are relieving the Crown of its fiduciary responsibilities, such as the duty to consult and accommodate, in order to minimize uncertainty. They note that "[w]hile the onus does not necessarily reside on the proponent to carry out these measures and negotiate adjunct agreements, it is increasingly common in Canada, since the vested interest of the company can be affected by the uncertainty of aboriginal-government relations ..." (2007, p. 6). In a case study conducted with the Tahltan of B.C., Fidler and Hitch (2009) note how the Tahltan perceived the government's obligation towards their First Nation to be lessened as a result of the IBA signed over a resource extraction project, when in fact, the privately negotiated IBA is separate from "the judicially confided government duty to consult..." (p. 6). The desire to create certainty over resource extraction, coupled with the state's behaviour of delegating responsibilities to civil society, indicate — based on my understanding — the influence of neoliberal¹⁰ processes within the domain of Indigenous-state relations and Northern resource extraction.

These neoliberal processes have been alluded to already in the IBA literature, but the explicit connection between neoliberal processes of welfare state restructuring and IBAs has not been elaborated on. Keeping (1997) is skeptical of the breadth of IBAs, arguing that benefits such as adult education to achieve basic literacy should be in the hands of the state rather than for industry to provide. She goes on to deduce that this can be seen as a corollary of government retrenchment at all levels, excluding Aboriginal government (p. 205). Sosa and Keenan (2001) have hinted at the neoliberal nature of these agreements, as well, pointing out that "[i]n the context of government cutbacks to social programs and environmental regulation, the wide scope

¹⁰ Neoliberalism is described briefly in the 'Theoretical Approach' section of this chapter, and substantively in Chapter 3.

of these agreements and the reduced government role in their negotiation and execution has led to criticism that IBAs are a form of government downloading that sees companies act as welfare providers and communities as environmental watchdogs” (p. 9). This significant insight is not one that is found in most of the literature on IBAs, which goes to show that this body of literature — while providing practical explanations and prescriptions (Galbraith, 2005; Gibson & O’Faircheallaigh, 2010; Hitch, 2005; Kennett, 1999; Lukas-Amulung, 2009; Prno, 2007; Siebenmorgen, 2009) — fails to adequately situate IBAs within the broader political economy of Northern resource extraction.¹¹

1.3: Theoretical Approach

The use of theory will be important in this thesis, as both the position of the state in relation to IBAs, and the type of governance which IBAs exemplify, will need to be explained. Clement (2005) notes that “[t]heories offer explanations, that is accounts which attempt to ‘make sense’ of things by clarifying why things happen as they do” (p. 4). Also, in order to explain the position of the state in relation to IBAs, the state itself, as a social relation, will need to be conceived of. There are innumerable conceptions of the state within the political economy literature, however, and reconciling these differing views is a project all of its own. This thesis seeks to explore the connections between pieces of this literature, the state in the neoliberal era, and the processes and outcomes of IBAs.

¹¹ An exception to this is Gibson’s (2008) PhD dissertation on Tlicho cosmology and the diamond mining in the NWT, wherein she does employ a political economy analysis to the diamond mining economy. My research, while focusing on the same case study, aims to build on her research, but focuses more heavily on the position of the state in relation to IBAs. After a first draft of my thesis was already completed, an article by Hall (2012) was published in *Antipode*, which also, in part, critiques the IBAs signed over diamond mining in the NWT. Hall’s article is similar to my thesis, in that it draws on theories of political economy to expose IBAs as fitting within the broader interests of the Canadian and transnational capitalist class.

Neoliberalism, as indicated by Purcell (2008), is “a project to both destroy impediments and create assistance to capital wherever and whenever possible” (p. 15). It has been marked by the retrenchment, or ‘rolling back’ of the welfare state, and the subsequent ‘rolling out’ of state functions, or what Purcell refers to as “aidez-faire”, in which the void created through cuts to social spending are filled by private and non-governmental entities, and governed largely in a market fashion through the facilitation of the state. A central objective of this thesis is to apply this framework to the governance of Indigenous peoples and Northern resource extraction through IBAs, using the diamond mines of the NWT as a case study.

The research draws on some of the Marxist political economy and neo-Foucauldian governmentality literature to explain the behaviour of the neoliberal state. As well, the work of critical geographers will help in situating the state’s position within a framework of *neoliberalization*. Neoliberalization can be described as the variegated process through which the newest form of capitalist expansion — neoliberalism — weaves through space and time in various scales across the globe (Peck & Tickell, 2002). There have been many interpretations of neoliberalization, but the two most common threads have come out of the Marxist political economy and neo-Foucauldian governmentality literatures (England & Ward, 2007).

As chapter 3 indicates, neo-Marxist conceptions of the state view the boundaries of the state as increasingly porous, rather than fixed, conceiving of the state as a set of relations (Howlett, 2007). This conception of the state can work alongside the neo-Foucauldian governmentality literature; though they will work together in a “productive tension”, as noted by England and Ward (2007, p. 14). Both bodies of literature are deemed to be useful towards understanding the complex nature of the state and its relation to IBAs. This is because they both

understand neoliberalization as a process — not as an end state — in which the localized and globalized capitalist interests are realized through the active participation of the capitalist state.

Processes of neoliberalization have permeated Canadian society as early as the 1980s, and have thus been shaping Indigenous-state relations in Canada for quite some time. The framework of neoliberalization that has been employed in this thesis has also been applied in recent research on Indigenous-state relations in Canada. Chapter 3, which examines the theoretical framework, makes connections between the various forms of governance of Indigenous peoples in Canada through discourses and processes of neoliberalization with the prevalence of IBAs in the North, and the ways in which these forms of governance overlap in certain ways with the kinds of governing that can be seen through IBAs.

At times, the words ‘state’ and ‘government’ are used interchangeably, particularly in Chapter 4, as the interviewees sometimes preferred to use the term ‘government’, when they were not directly referring to any particular level of government, but to ‘government’ in general. When I am referring to ‘the government’ or ‘government’ without specifying the level of government, I am effectively referring to the ‘state’. However, the ‘state’ encompasses more than simply the elected government, or the bureaucracy, which are institutions of the state. Other institutions of the state include, for example: the judiciary, the police, the military, the educational system, the health-care system, and several other institutions found within society.

In sum, I work primarily with a neo-Marxist understanding of the state, as articulated by Poulantzas (1978), Gramsci (1992) and Jessop (1990), in order to investigate the broader interests of the state in relation to IBAs. This literature is particularly helpful at situating IBAs within the broader political-economic context, demonstrating the class interests that are being met through IBAs, and how the state has facilitated the negotiation of IBAs, in part, to satisfy

these interests. Critical geographers Harvey (2003, 2005) and Peck (2001) provide conceptions of the neoliberal state that also serve to guide our understanding of these processes through a Marxist political economy lens. In order to come to terms with the ways in which IBAs relate to broader trends in Indigenous-state relations in Canada, particularly the neoliberalization of subjectivity, I draw on Foucault's account of governmentality and interpretations of this work as advanced by Dean (1999), Larner (2000) and Olssen (2003).

While some scholars have rightly observed that these two bodies of work on the state are in several ways incompatible, my aim here is not to reconcile them. It is, rather, to investigate different dimensions of Indigenous-state relations, as these relate to IBAs specifically but more broadly to the extraction of northern resources and the accumulation of capital in the Canadian North. The productive tensions between different conceptualizations of the state invoked here should be read, then, as analytical provocations rather than as a reconciliation of relatively distinct bodies of thought on the nature of the state.

1.4: Methodological Context and Research Methods

This thesis is grounded in a political economy approach. Clement (1997) points out that "... political economy is historical and dynamic, since it seeks to locate the motion of society in the forces of change as production and reproduction transform. It seeks out tensions and contradictions within society that produce struggles and resistance to the prevailing order" (p.12). This approach will be present in each chapter — and particularly in Chapter 2 — as it will aid greatly in framing the research, and positioning it in such a way so that the theory can then be applied to provide the explanations sought out through the case study. An assumption consistent throughout my research is that the Canadian state is by nature a capitalist entity, and hence, is instrumental in perpetuating the project of capital accumulation.

This research uses a case study methodology, focusing on one case — or one jurisdictional area, being the NWT — to investigate the state in relation to IBAs in the North.¹² The IBAs signed over the diamond mines in the NWT constitute a unique case of IBAs signed in Northern Canada. With the first diamond mine, Ekati, the state involved itself by mandating that “significant progress” be made within sixty days in negotiations over IBAs between BHP and the representatives of the impacted Indigenous communities. The state has not interfered on an ad hoc basis in the IBA process in any other jurisdiction in Canada (and IBAs have become ubiquitous throughout Northern Canada). In trying to understand what the state’s relation to IBAs in this context tells us about the evolving Indigenous-state relationship in the North, the fact that three sets of IBAs have been signed with Indigenous communities in this region allows for a rich case study to investigate the experiences of these communities, and the position of the state in relation to these experiences. Flyvbjerg (2001) notes that a typical case may appear to be more representative on the surface, but is less likely to be the richest in information. Therefore, he argues that “atypical or extreme cases often reveal more information because they activate more actors and more basic mechanisms in the situation studied” (p. 78).

It is perhaps rather simplistic to look at the nature of this research and determine that only one case is being looked at, since there are a few layers to the jurisdictional case being examined. While there is one overall case in that the IBAs over the diamond mines within the NWT are being looked at, there have been three sets of IBAs signed — Ekati, Diavik, and Snap Lake (see Table 1). In all fairness, the three sets of IBAs are not being thoroughly examined and compared

¹² While IBAs have been signed with the Tlicho (Ekati, Diavik and Snap Lake mines), the Yellowknives Dene First Nation (YKDFN) (Ekati, Diavik, and Snap Lake mines), the Lutselk’e Dene First Nation (Ekati, Diavik and Snap Lake mines), the North Slave Métis Alliance (Ekati, Diavik and Snap Lake mines), the hamlet of Kugluktuk (Ekati mine) and the Kitikmeot Inuit Association (Ekati and Diavik mines), this research only looks closely at the experiences of the Tlicho and the YKDFN, and considers the experiences of the other Akaitcho members, being the Lutselk’e and Deninu K’ue. There have not been interviews conducted with members of the North Slave Métis Alliance, the hamlet of Kugluktuk and the Kitikmeot Inuit Association. See Table 1 for a list of signatories to these IBAs.

in detail, so it does not make sense to characterize this project as three case studies. However, the experiences of the Tlicho First Nation (TFN) — who have signed a modern treaty — and the Akaitcho Treaty 8 (to be referred to subsequently as the Akaitcho), who have not signed a modern treaty, will be examined, and in certain areas, compared. The reason for this is that it allows me to bring the issue of land claims into my analysis of the experiences of these two treaty nations with IBAs, acknowledging that a settled land claim alters an Indigenous organization's relationship with the state. Therefore, it may be possible to regard my research as two case studies — being the TFN and the Akaitcho — within a larger case study, which is the IBAs signed over the course of three diamond mines in the NWT.

Project	Proponent(s)	IBA signatories and date signed
Ekati Diamond Mine <i>(began production in Oct. 1998)</i>	BHP	Tlicho Government (<i>then Dogrib Treaty 11</i>) (Oct. 1996), Lutselk'e Dene First Nation (Nov. 1996), Yellowknives Dene First Nation (Nov. 1996), North Slave Métis Association (Jul. 1998), Kitikmeot Inuit Association (Dec. 1998)
Diavik Diamond Mine <i>(began production in Jan. 2003)</i>	Diavik Diamond Mines Inc. (Aber Diamonds and Rio Tinto plc)	North Slave Métis Association (Mar. 2000), Tlicho Government (<i>then Dogrib Treaty 11</i>) (Apr. 2000), Yellowknives Dene First Nation (Oct. 2000), Kitikmeot Inuit Association (Sept. 2001), Lutselk'e Dene First Nation (Sept. 2001)
Snap Lake Diamond Mine <i>(began production in Jul. 2008)</i>	DeBeers Canada	Yellowknives Dene First Nation (Nov. 2005), Tlicho Government (Mar. 2006), North Slave Métis Alliance (Aug. 2006), Lutselk'e and Kache Dene First Nation (Apr. 2007)

Table 1: List of signatories to the IBAs that are addressed in this research

The TFN — which includes the communities of Behchoko, Wha ti, Gameti, and Wekweti — signed IBAs over the three diamond mines. The Akaitcho — which includes the separate First Nations of Deninu K'ue, Lutselk'e Dene First Nation and the Yellowknives Dene First Nation

(YKDFN) — have signed IBAs over the three diamond mines, except for Deninu K'ue, which was excluded from all three of the IBAs.¹³ The TFN signed a land claims and self-government agreement — known as the Tlicho Final Agreement (TFA) — with the federal and territorial government in 2003, which then came into law in 2005. This agreement followed the land partition model, which is the model through which the state prefers to settle land claims (McArthur, 2009, p. 205). The land partition model divides ownership of the traditional territory between the Indigenous organization and the state. McArthur (2009) points out that “[t]he Tlicho government has authority to control, govern and manage Tlicho lands and assets; to represent Tlicho in various resource comanagement arrangements; to manage benefits; to deliver and regulate social services to members; and to regulate and direct other activities” (p. 202). The Tlicho, according to Prno (2007), were in a better position to negotiate and implement an IBA both prior to having signed the land claims and self-government agreement, and in relation to the Akaitcho.

The Akaitcho, on the other hand, have neither a modern treaty nor a self-government agreement with the state. The Akaitcho — having already signed Treaty 8 in 1899 — suggested coexistence through the good-faith implementation of the historic treaty, but the federal government was not interested (McArthur, 2009, p. 205). Instead, the state offered to establish reserves for those Indigenous groups who were signatories to treaties 8 and 11, as reserves were promised yet never established within these territories¹⁴. Establishing a reserve is done through the Treaty Land Entitlement (TLE) process, which Slowey (2008) argues is similar to a land claims agreement from the perspective of the state, since it creates certainty over land tenure and facilitates “government off-loading of control over band-related political and economic

¹³ The reasons for this and its consequences are addressed in Chapter 4.

¹⁴ See Chapter 2 for further discussion of treaties 8 and 11.

matters...” (p. 10). This process has been rejected by the Akaitcho, and while a land claims agreement is in the process of being negotiated (AANDC, 2012a), the Akaitcho have an Interim Measures Agreement that aims to protect Akaitcho lands during the negotiation process.

Figure 1: Location of diamond mines in relation to both Yellowknife and the Tlicho community of Behchoko, where many of my interviews were conducted.

It is crucial to recognize that both the TFN and the Akaitcho were without any type of agreement to protect their traditional territory when the mineral staking rush over diamonds took place within their traditional territories. As Hoogeveen (2008) notes, the free entry staking laws in the NWT allowed for the interests of the prospectors to take precedence over those of the traditional occupants. Essentially, the land staked by the prospector ensured that the minerals

below the surface of the land became the property of the prospector, as legislated through the NWT and Nunavut Mining Regulations. Therefore, in the case of the TFN and the Akaitcho, by the time they had started negotiations over land tenure rights in their traditional territories, the most financially valuable land was already taken off of the table (Gibson, 2008).

By the time that the third diamond mine — Snap Lake — was established, the TFN had a land claims and self government agreement in place, and were therefore in a much stronger position in relation to the state than the Akaitcho were. Within the larger case study of the state's position in relation to the IBAs signed over the diamond mines in the NWT, this research seeks to understand the experiences of these two First Nation treaty groups in relation to one another, so that the state's position in relation to the IBAs over the diamond mines in the NWT could be better understood. In order to explain the state's position in relation to IBAs in this case study within Northern Canada, various research methods were employed. The use of semi-structured interviews with key informants provides the bulk of my data.

Semi-structured interviews were deemed the most appropriate style of interviewing for this research. With unstructured interviews, the interview is too flexible and directionless, whereas with fully structured interviews, there is a lack of flexibility, which limits the potential to gain insights from the interviewee's unique perspective. Semi-structured interviews allow for the interviewee to elaborate on what is deemed most relevant, but the predetermined questions ensure that the interview is guided and controlled to a certain degree. Therefore, the standard questions can be compared between interviewees (Howlett, 2007, pp. 23-24). The interviewees were selected based on their knowledge of and experience with IBAs in Northern Canada, and particularly within the NWT. An attempt was made to interview various stakeholders to IBAs, as well as experts and consultants on this issue. I e-mailed individuals and communicated by phone

in advance of my trip to the NWT, wherein I was able to make use of snowball sampling through the few contacts I had made before arriving.

Altogether, twenty-one key informants were interviewed, of which sixteen are quoted and/or referenced in this thesis. The interviews for this research were conducted over a three-week period in Yellowknife¹⁵ and Behchoko in the NWT; Gatineau, Quebec; and by telephone from my home in Ottawa, Ontario. Prior to beginning interviews in the NWT, I obtained a research license from the Aurora Research Institute (see Appendix B), and had my ethics application approved by the Research Ethics Board of Carleton University (see Appendix C). All interviewees consented to the interview by signing an information and consent form, or providing their oral consent. Interviews were roughly one hour in length and a voice recorder was used if consent was given by the interviewee, so that an accurate transcription could be made of the interview at a later date. Two of the interviews were conducted with two interviewees at once, and one of the interviews was conducted with three interviewees. The key informants who were interviewed consist of: current and former NWT territorial government employees, Aboriginal Affairs and Northern Development Canada (AANDC) employees based in both Yellowknife and Gatineau, First Nation leaders within the TFN and the Akaitcho¹⁶, consultants, lawyers, and other experts.

In addition to the interviews I conducted — which constitutes the bulk of the data that I analyzed for this research — I have also referenced reports and documents that are available on IBAs both generally, as well as particularly pertaining to the case study. There is a substantial

¹⁵ Several of my interviews were conducted in the YKDFN community of N'dilo, which is considered part of the City of Yellowknife.

¹⁶ Three interviews were conducted with members of the Akaitcho: two were members of the YKDFN, and one was a member of Deninu K'ue. I was not able to interview anyone from Lutselk'e Dene First Nation, which is the third First Nation which makes up the Akaitcho. See Bielawski (2003) for a detailed account of the Lutselk'e's experience negotiating an IBA with BHP over the Ekati diamond mine.

amount of academic research and government, industry and NGO reports on IBAs, especially focusing on the diamond mines in the NWT. This body of literature was an important component of my case study, as it served as a foundation upon which I was both able to formulate my questions, and situate them in relation to an established body of literature. My third source of data comes from a workshop on IBAs I attended, and from informal discussions I had with an employee and a leader of the TFN. These three sources of data combined allow for *triangulation*, which addresses the weaknesses inherent to focusing exclusively on one source, or technique, of research.

The workshop on IBAs that I attended took place in Yellowknife. It was run by Ginger Gibson — a scholar who has conducted doctoral research on the IBAs over the diamond mines in the NWT — and it was funded by the Walter and Duncan Gordon Foundation. The workshop was well attended by leaders from the TFN and Lutselk'e, as well as by those in the labour movement and other interested community members. I am fortunate to have been given the opportunity to sit in on this workshop and take detailed notes of the discussion. If there is any part of my research that could be considered 'fieldwork', it would constitute this day-long workshop in Yellowknife. In addition to this workshop, I also met with members of the Tlicho community in their office in Yellowknife, having informal discussions with a few people there. Both the workshop and these discussions helped inform my research, but are only referenced minimally within my analysis.

A key limitation to this thesis stems from the fact that IBAs are confidential documents. Therefore, while IBAs are the central focus of this thesis, I have not seen the contents of any of the IBAs considered in this research. Nonetheless, my interviews with several individuals who have negotiated, signed and are implementing these agreements have given me enough of an

understanding to conduct research relating to this thesis. The academic and grey literature on IBAs is quite voluminous for such a relatively novel type of agreement, and has therefore played a key role in my understanding of these agreements. It is also important to note that this research is considering these agreements in a way that does not require me to know the precise contents contained within them, since I am looking at the ways in which these agreements relate to broader processes at play.

To conclude this section, it is important to recognize my positionality in conducting this research. I am a white, fourth generation Canadian from an upper-middle class background. I acknowledge the enormous privilege that has brought me to this position, and have striven to conduct this research — which has involved interviewing Indigenous peoples on their traditional territory — with the respect and gratitude that they deserve. I feel honoured and privileged to have had the opportunity to visit the traditional territory of the YKDFN and the TFN during my trip to the NWT. I do not pretend to be conducting this research from a position of impartiality, for I do not think that such a position is possible to take for any researcher. Particularly in situations of oppression, it is morally irresponsible to assume a position of neutrality. The Indigenous-state relationship continues to be one in which colonial domination is painfully present. I have, nonetheless, sought out the opinions of as many stakeholders as I could on this issue, and have attempted to shed light on the complex nuances that accompany Indigenous-state relations in Northern Canada.

1.5: Chapter Summaries

Chapters 2, 3 and 4 serve a specific purpose and seek to achieve their own objectives within this thesis. Chapter 2 explores the historical relationship between Indigenous peoples and the state within the context of resource extraction in Northern Canada — focusing particularly on

the Dene of the sub-Arctic. The aim of this chapter is to demonstrate how the Indigenous-state relationship has always been shaped by the interests of capital accumulation, and that with the emergence of IBAs, this historical position needs to be taken into close consideration. At the same time, IBAs signal novel ways of governing Indigenous peoples of the North, and this chapter provides the necessary historical context for situating these forms of governance.

Chapter 3 sets up the theoretical framework of the thesis, making connections between the neoliberal state in Canada, processes of neoliberalization, and the emergence of IBAs in the North. Drawing on research conducted on Indigenous peoples and neoliberalism in Canada¹⁷, as well as on theories and assumptions within the Marxist political economy and the neo-Foucauldian governmentality literatures, this chapter's aim is to lay the theoretical foundations for my case study analysis contained in Chapter 4. This chapter, following chapter 2 which positions the research historically, seeks to position the research theoretically.

Chapter 4 looks at the state's position in relation to IBAs more closely, using the case study of the three sets of IBAs over the diamond mines in the NWT. The analysis considers the position of the government of the Northwest Territories (GNWT), AANDC, and the federal government more generally when making connections between IBAs, the state, and neoliberalization. Kennett's (1999) policy document is used to temporally situate the case study, so that I can compare his findings about the IBA policy options for DIAND in 1999 to the research I conducted in 2011. While the focus of this chapter is on the case study, it also deals with the position of the state — and in particular, the federal government's position — in relation to IBAs in the broader context of Northern Canada. The conclusions in this chapter about the

¹⁷ There is also some literature on this issue coming out of Oceania, which my research also draws on, but to a lesser extent.

role of the state in relation to IBAs are drawn from the interview and document analysis presented here and findings from the previous two chapters.

Finally, Chapter 5, the conclusion of this thesis, offers some final thoughts on the research. I then summarize the findings of the research and note its contribution to both the body of literature on IBAs, and on the connection between neoliberalism and Indigenous peoples in Canada. Lastly, I propose areas for future research.

Chapter 2: Indigenous-state Relations and Northern Resource Extraction in Historical Perspective

“With growing resource development in their traditional territories as the result of huge, unrelenting commodities-demand in the world markets, and legal decisions requiring genuine consultation, Aboriginal Canadians for the first time have real leverage over a substantial area of the Canadian economy. This results in an unprecedented opportunity to forge a new era of self-reliance” (Helin, 2006, p. 30).

2.1: Introduction

In order to provide the context through which the state’s relation to IBAs can be better understood, this chapter will provide a historical overview of the role of the state in securing the interests of capital in Northern Canada — and particularly, the sub-Arctic. A political economy approach will be used in order to situate the interests of the state in relation to Indigenous peoples of the North, and in relation to the accumulation of capital through the extraction of staples — or resources — from the environment. Following in the tradition of Canadian political economy, which views Canadian society as a complex matrix of cultural, political and social interactions (Clement, 1996), this chapter will employ such an approach in tracing the historical role of the state and its relations to Indigenous peoples within the landscape of Northern resource extraction. However, the theoretical implications will only be minimally reflected on in this chapter, as Chapter 3 will delve further into the ways in which the state’s role in relation to Northern resource extraction can be further theorized.

Ultimately, this chapter demonstrates how the Canadian state has sought to sustain the accumulation of capital as part of its staples economy, where the North has been of increasing economic interest. While Indigenous peoples in Canada have historically been marginalized within a settler project of colonizing land and exploiting resources from Indigenous territories, there are interesting historical circumstances in Northern Canada which tell a more nuanced and

complicated history. Nonetheless, much like in southern Canada, Indigenous peoples of the North have been both pressured into becoming a part of the Canadian mainstream society through adopting capitalist practices, and have simultaneously been treated as a racialized class with minimal access to commercial opportunities (Satzewich & Wotherspoon, 2000, p. 255). Most importantly, the state's desire to create legal and economic certainty for the interests of capital accumulation has had a significant influence over the relations between Indigenous nations and the state, regardless of where Indigenous nations find themselves geographically within the Canadian polity.

A more thorough understanding of the history of Indigenous-state relations within the landscape of Northern resource extraction will demonstrate the convenient reality that IBAs play for the ongoing historical project of capital accumulation. Northern Indigenous peoples have fought hard to advance their interests within this landscape, and have achieved numerous victories and concessions through their resistance to imperialist domination, revealing that the history of Northern resource extraction has not been one in which Indigenous peoples are simply passive victims¹⁸. The emergence of IBAs within this landscape can tell us much about how the state relates to Indigenous peoples, and the role that the state assumes in relation to capital. Furthermore, this chapter seeks to extend our perception of IBAs temporally — critically situating them within a colonial and capitalist historical trajectory — which has been largely absent thus far within the IBA literature.

¹⁸ It is important to note that the historical account I provide here focuses primarily on the interests and activities of the Canadian state, and is not grounded in a thorough understanding of Dene history. My analysis of Dene responses to the transformations of the North over the past century is informed by secondary sources, most of which have been authored by non-Dene. Although I make an effort to consider Dene interests, practices, motivations, and concerns throughout this chapter, these are only as accurate and representative as the literature upon which I draw, which is itself shaped by settler understandings of Dene and the Canadian North.

2.2: Canada's Staples Economy in Early Settlement

With the arrival of Europeans in what was then the north-eastern part of North America, the initial commodity that was shipped back to the colonial centres in Europe was codfish. As Harold Innis (1930) — the pre-eminent Canadian economic historian — notes, “[t]he long return voyages from Europe to America in small sailing vessels with relatively large crews involved a dependence on trade in a commodity which brought immediate and large returns” (p. 9). Codfish, rather than fur, was the dominant commodity along the Atlantic coast, since large-scale fur trade development needed “a vast territory drained by great rivers such as characterize the north temperate climates, and a population with cultural traits peculiar to a hunting economy” (Ibid). Hence, as Europeans moved further inland in their quest for more staples, the Canadian North became a significant part of the territory in which the fur trade went on to flourish.

The staples thesis — developed by Innis (1930) in his classic text *The Fur Trade in Canada* — argues that Canada's economy is inextricably linked to the resources found within its borders, which are sold as commodities on the international market. Such commodities are essential to the functioning of the Canadian economy, as these largely unfinished goods are sold abroad, and high value-added goods are bought in return. The key problem with a staples economy is that these commodities are sold on the global market, and thus, their prices are subject to the fluctuations of international supply and demand (Hessing et al., 2005, p. 30). As the European settlers expanded westward throughout the country, they continued to exploit the staples commodities on which they could depend; be it fur, fish, timber and minerals. The inherent instability of this economic system — due to the volatility of commodity prices — would have serious consequences, not only for the nascent colonial polity, but for the Indigenous peoples who became integrated into this volatile economic system.

Before the establishment of the Dominion of Canada, Northern resource extraction was facilitated by the Hudson's Bay Company (HBC), which was vested with state-like powers to exploit furs from Canada's northern frontier. While the HBC assumed sovereign control over Rupert's Land and territories further westward, the North West Company competed with it over control of the fur trade within the territory that was to become the Dominion of Canada. Eventually, the North West Company was forced to merge with the HBC, monopolizing commercial control over the entire fur trade in the hands of a British colonial company. The role of the nascent state as a facilitator of capital accumulation is evident through the fact that Canada generously compensated the HBC for its loss of powers when the monopoly was relinquished in 1870 (Loxley, 2010). Loxley (2010) remarks that the subsidizing of merchant capital defines the early role of the state in the staples economy, which later translated into the subsidization of industrial capital. This can be seen through the building of railways, roads, schools, hydro-electric dams and the use of police to silence opposition; these all worked towards the continued accumulation of capital by the owners of the resource extraction industries (p. 105). The signing of the numbered treaties with Indigenous peoples would also be instrumental in providing the conditions for the continued accumulation of capital.

The early years of European settlement were characterized by the largely peaceful coexistence with Indigenous peoples. As Indigenous peoples were still the dominant population in eastern North America, Europeans were not interested in controlling them, but rather, in avoiding hostilities that could have interfered with the extraction of staples from the environment. It was not until after two hundred years of staples exploitation that the European powers were interested not simply in Indigenous cooperation in the extraction of these resources; the interest now lay in the land encompassing their vast traditional territories. Industrial

capitalism became dominant in the east, and a need for new territories for the purpose of staples extraction to feed this economy — as well as an agricultural hinterland to feed the growing urban populations — emerged (Zlotkin & Colborne, 1977, p. 164). Naturally, the search for such commodities was both westward, and northward.

2.3: Historic Treaties in the North

The European powers sought to gain legal and economic access to these newly settled areas through the signing of treaties. Once the Aboriginal title¹⁹ to the vast territory was surrendered or extinguished through the signing of a treaty, European imperialist interests could continue to accumulate capital from the newly discovered staples, knowing that they had legal title to the land which contained these staples. As Northern historian Rene Fumoleau (2004) points out: “Most treaties and land surrenders were signed after Indians lost control of their territory. Their only choice was to lose their land with treaty, or to lose it without one” (p. xxv). This was a historical injustice on a grand scale, with such treaties covering most of Ontario, the prairies, and eventually, the northern hinterlands.²⁰

Of interest here are treaties 8 and 11, which were signed in 1899 and 1921 respectively. These treaties cover the majority of the present-day NWT, as well as the northern parts of the Prairie Provinces. While the other numbered treaties and land surrenders were pursued

¹⁹ Aboriginal title is a common law concept that acknowledges the Indigenous peoples’ long-standing use and occupancy of land before the settlement of and colonization of their lands by Europeans. It is an exclusive property interest which can be owned only by an Aboriginal group, and can only be sold or ceded to the federal Crown (McNeil, 2000 as cited in McArthur, 2009, p.192).

²⁰ The treaties referred to here are what are known as the ‘numbered treaties’, rather than the hundreds of treaties signed between the British Crown and Indigenous peoples from the 17th to the 20th century, which were for the purposes of military or commercial alliances (Dussaut & Erasmus, 1994, p. 12 as cited in Goulet, J.-G., 2010).

predominately to open up land for further European settlement, treaties 8 and 11 were in a remote location with little to no agricultural potential, and hence had quite limited potential for large-scale settlement. According to Zlotkin and Colborne (1977), the insatiable appetite for resources in the international market, alongside the Canadian state's dependence on staples to fuel its economy, led the government to sign treaties with Northern Indigenous groups to open up the land for oil, gas and mineral development (p. 166).

Fumoleau (2004) has meticulously documented the context surrounding the signing of treaties 8 and 11, showing how the Canadian state's attempt at extinguishing Aboriginal title to these lands was done in a highly contested manner. While the Indigenous peoples of these territories — namely the Dene — were under the impression that treaties 8 and 11 were peace and friendship treaties, the state's motivations were starkly different. To the state, the treaties were a tool to be used in the legal dispossession of the Dene from these territories (Fumoleau, 2004). Satzewich and Wotherspoon (2000) argue that the treaty-making process was a central part of the primitive accumulation of capital in Canada, as it legally separated Indigenous peoples from the land and opened it up to the interests of private property and state control (p. 18).

Fumoleau (2004) argues that the Dene were very much interested in signing a treaty, largely because of the high levels of sickness, starvation and physical hardship they had endured in the face of European encroachment into their territories. Treaties would give them the rations and care that they needed in order to cope with these trying times. They were also increasingly concerned about the growing number of settlers, and how this was impacting upon access to their traditional territory. A treaty, from the Dene's perspective, would be able to address the issue of southern prospectors and miners coming through their traditional territory. However, the

government at the time was not interested in relieving the Dene of their hardships or substantively addressing settler encroachment on their lands. Not until the discovery of gold, which sparked the Klondike Gold Rush, did the government initiate treaty negotiations with some of the Dene (Ibid, p. 24). In spite of the desperate times that the Dene found themselves in upon negotiating Treaty 8 — as presented by Fumoleau (2004) — they made themselves clear about their refusal to sign a treaty that would not respect their essential rights to hunt, trap and fish in perpetuity within their territories. It was not until the Treaty Commissioner promised the Dene that they would be able to continue living their traditional lifestyle in an uninterrupted fashion that the Dene consented to signing Treaty 8 (Ibid, p. 103).

In Fumoleau's (2004) view, the negotiation and signing of Treaty 8 in a dishonest fashion — drafted by state officials in Ottawa with little knowledge of the Indigenous peoples of the North — would repeat itself with Treaty 11. Once again, the Dene in the territories of what would become Treaty 11 land were in need of governmental assistance, and the state only became interested in providing some relief through treaty settlement after oil was discovered within their territories (Ibid, p. 128). Much like Treaty 8, and arguably, like the other treaties and land surrenders signed south of the sixtieth parallel, the language that was used was foreign and incomprehensible to the Dene representatives (Ibid, p.176). The terms were agreed to orally by the Dene, since they could not read what was contained in the written text, nor would they be able to relate to the language it contained, which is centred on the Western conception of land as *property*. In spite of the Dene's desperation for governmental assistance, the state took advantage of this as an opportunity to sign a treaty that claimed to extinguish title to the Dene's traditional territory.

Regardless of the signing of treaties 8 and 11, the Dene were not cleared off of the land, which they depended on for their subsistence. While the treaties called for the setting aside of reserves, Zlotkin and Colborne (1977) noted that “there was no reason to isolate Indians from white development and little immigration at that time. The Indians were not in the way of capitalist expansion. Similarly, agricultural reserves could not be established because it was impossible to exist by farming that type of environment” (p.166). This was different from the treaties signed to the south, wherein Indigenous peoples were consigned to reserves and expected to become proficient farmers on their small plots of land. In the case of the more southern reserves, the goal of the state was similarly to create the conditions upon which the state could open up access to staples for the benefit of capital accumulation. Reserves effectively removed Indigenous peoples from their resource base, and attempted to assimilate them into Canadian society. According to Zlotkin and Colborne (1977), the hinterlands could then become consumer markets for the goods produced in the metropolises, while also being both agricultural and mineral bases of staples production (p. 168).

In a sense, as Abel (2005) points out, the failure on the government’s part to set aside reserves as was promised in treaties 8 and 11 worked to the advantage of the Dene (p. 204). The Nelson commission was established in 1959, and was given the task of dealing with the lack of implementation of the reserves as stipulated in treaties 8 and 11. Elders who were signatories to these treaties did not recall any mention of reserves at the time of signing, and were highly skeptical of the government’s motivations in pursuing this. The Department of Northern Affairs and Natural Resources²¹ finally pursued the issue of setting aside reserves when in the late 1950s

²¹ This department became the Department of Indian Affairs and Northern Development (DIAND), which has also been referred to as Indian and Northern Affairs Canada (INAC), and is currently referred to as Aboriginal Affairs and Northern Development Canada (AANDC). The latter three terms will be used throughout the rest of the thesis

there was speculation of further resource development in the region. This is much like the Canadian government's stalling with regards to negotiating treaties 8 and 11 in the first place (Ibid, p. 241). Fumoleau's (2004) research has highlighted not only the historical injustice of the signing of treaties 8 and 11, but the failure to uphold the government's promise of securing the Indigenous rights to their traditional lifestyle.

2.4: The Introduction of Mining and the Transition to a Mixed Economy

As previously mentioned, there was no need to remove the Dene from their land for the interests of capitalist expansion. This allowed for the Dene to continue living their traditional lifestyles; practising hunting, fishing and trapping, and moving freely in their nomadic patterns. The fur trade was the lucrative staples industry of the North, and thus depended on Indigenous trappers as commodity producers, rather than wage-earners (Watkins, 1977, p. 84). Leading up to the signing of treaties 8 and 11, the fur trade had gone unchallenged by the other staples of the remote region. However, the stability of this economy was largely dependent, as all staples economies are, on external factors — namely, high market prices in relation to trade goods and productive surpluses (Asch, 1977, p. 52). Fumoleau (2004) argued that due to white trappers and the failure of the government to control their unsustainable trapping practices, the latter problem of productive surpluses was persistent. However, Asch (1977) acknowledges that it was the former problem that would prove to be the key factor in decimating the fur trade, as the demand for fur significantly diminished while the price of trade goods rose significantly (p. 52).

By the early 1930s, mining became a much more common phenomenon in the North, without the Dene being consulted on the use of their traditional territory. In addition, there was

in reference to the same entity. Their interchangeable usage is dependent on the period of time in which the department is mentioned.

very minimal Indigenous employment in this sector. The Dene were willing to concede some of their territory so long as they could continue to practice their traditional lifestyle (Fumoleau, 2004). It was bothersome, therefore, when mining companies staked claims within their confined game preserves, and the government was both not willing to listen, nor willing to ensure that the Dene receive any of the benefits from the mining taking place within their preserves (Abel, 2005, p. 213). Furthermore, due to the lack of regulations necessary to protect the environment, mining companies were able to extract resources in a highly destructive manner, leaving behind contaminated sites that to this day are being cleaned up and managed with the use of public funds (Prno, 2007).

With the collapse of the fur trade as the dominant Northern staples industry due to the Depression and the discovery of oil and minerals in the NWT in the 1930s, Indigenous peoples were forced to pursue wage labour. At this juncture in history, the state became more involved in promoting Northern resource extraction — namely mining — and pressuring Indigenous peoples to become assimilated into the capitalist system. This can be seen through government control over the education of Indigenous children, which was designed to assimilate them into the dominant culture and to train them to work in the emerging resource extraction industries (Abel, 2005, p. 232). Like in the southern part of Canada, Indigenous peoples in the North were sent to residential schools, or mission schools, where they were often forbidden from speaking their native language up until the early 1970s, and were restricted from participating in traditional activities for the duration of their stay. At times, they were subjected to physical, psychological and sexual abuse (Castellano, 2008; Milloy, 1999; Poelzer, 2009, p. 432).

Another example of the state taking a more active role in assimilating Northern Indigenous peoples can be seen through the trapline policy, which, as Abel (2005) mentions, was

the northern version of the southern policy of giving Indigenous peoples plots of individual land to farm. The trapline policy, Abel argues, was designed to confine the movement of Indigenous peoples to their own traplines, which was regulated and authorized by the state. Through this policy, “northern Natives could be pushed towards Canadian concepts of property ownership and entrepreneurial outlook through individual management of a piece of trapping country” (Abel, 2005, p. 220). Such ways of governing Indigenous populations sought to assert power and control within the political economic order. However, Indigenous peoples frequently resisted attempts by the state to enforce Western systems onto their traditional lifestyles, as is evident from their resistance to abide by the trapline policy (Bouchard, 2006 as cited in Goulet, 2010, p. 20).

It should be noted that despite efforts to incorporate Indigenous peoples into the dominant economic system, there was blatant discrimination against Indigenous peoples that restricted their chances of equality within this system. Satzewich and Wotherspoon (2000) argue that it is difficult for federal and provincial governments to support successful Indigenous businesses and labour, making it therefore difficult for Indigenous peoples to escape positions of inequality within society. These interests may be in direct competition with non-Indigenous businesses and labour, who make arguments of unfair competition. While today in the Northern territories this may no longer be the case due to the demographic prevalence and political influence of Indigenous peoples in the political system, this was certainly a noteworthy feature of the history of the North.

Abel (2005) highlights these tensions through the white trappers’ unregulated activities during the fur trade (p. 206), the preferential treatment given to white commercial fishermen during the booming commercial fishing industry of the late 1940s (p. 224), and with the few

mining jobs available for the Dene in conjunction with the migration of white labour to the North (p. 232). There was only minimal employment of Dene and Métis in the mines, which left the majority of them with a small number of options other than government welfare cheques; the few, largely seasonal wage opportunities of the North; and the supplementation of these with their traditional economy of hunting, fishing, gathering and trapping. It was the preservation of the latter activities that drove the Dene to stand up for the wellbeing of their homelands.

2.5: Indigenous Resistance and the Berger Inquiry

The sustainability of the Indigenous traditional economy came to the attention of the wider Canadian public in the 1970s with the Berger Inquiry into the Mackenzie Valley Pipeline proposal. The proposal was put forth by a consortium of twenty-seven American and Canadian oil and gas companies with an interest in building the biggest infrastructure project in the world: a pipeline that would traverse through the Mackenzie River Valley, supplying gas to southern (mainly American) markets. In the meantime, Pierre Trudeau's government's assimilative White Paper of 1969, which aimed to solve the "Indian problem" through removing all legislation that distinguished Indigenous peoples from settlers — including acknowledgement of Aboriginal rights and title — garnered strong resistance from Indigenous peoples across the country. In fact, the White Paper sparked the mobilizations of strong Indigenous organizations, such as the newly-emerged Indian Brotherhood of the NWT, and eventually led to formation of the Dene Nation, which would become the voice of resistance of the First Nations and Métis of the NWT (Goulet, 2010).

The government subsequently scrapped the White Paper, and was pressured politically to initiate a Federal commission that would investigate the impacts of the proposed pipeline on the Indigenous society. Thomas Berger was chosen as the commissioner, having recently

represented the Nisga'a Council in the *Calder* (1973) case and gaining their trust and respect. According to Page (1986), from the point of view of the government, if the American investors were to gain confidence in the project, the Indigenous communities in the Mackenzie River Valley needed to gain the trust — or at least appear to be appeased by — the government (p. 92).

Trudeau's government was not simply being pressured politically, but was now in a legal position to handle this issue after the *Paulette Caveat* (1973). A group of Dene chiefs filed a caveat in 1973 to retain legal title to 400,000 square miles of land in the North (Cox, 1987, p. 228). Justice Morrow (1973) of the Supreme Court of the NWT concluded that the signatories to treaties 8 and 11 were under the impression that these treaties were peace and friendship treaties, and therefore, there was "enough doubt as to whether the full aboriginal title had been extinguished ... to justify the caveators attempting to protect the Indian position" (p. 49). While Morrow's decision was overturned by the Supreme Court of Canada (SCC) on a point of law, there was no contention regarding the lack of certainty surrounding the extinguishment of Aboriginal rights and title to the lands of treaties 8 and 11. This created a vacuum of uncertainty, complicating matters for the interests of capital, and ultimately, the Canadian state.

Morrow's hearing of the Dene's case was, in fact, strongly opposed by an arm of the Canadian state — the federal Department of Justice. In Cox's (1987) view, the fear was that Morrow's sympathy for the Indigenous position would lead to a favourable decision for the Dene, which would then give them legitimate grounds to seek further land claims from the state (p. 227). The Department of Justice tried to prevent the hearings from happening by filing a Writ of Prohibition, and after that failed to work in the Crown's favour, the Crown withdrew from the case just before the hearings were to begin. Cox (1987) contends that the Crown's aim through the latter action was to have a judgment in favour of the Dene by default, which could be easily

reversed (p. 228). Morrow still heard the Dene's case and was able to make a landmark decision, challenging the credibility of the state's insistence of previous extinguishment of Aboriginal title in parts of the North.

With the Dene having pursued their grievances in what they deemed to be a success in the NWT through the *Paulette Caveat*, the federally-commissioned Berger Inquiry became a venue for the Dene to challenge the colonial nature of the state on a much larger stage. *The Dene Declaration*, as released by the Dene Nation (1975), expressed the Dene assertion of self-determination, and characterized the Dene as a nation being exploited as an internal colony within the Canadian state (as cited in Watkins, 1977, p. 3). The Berger Inquiry made recommendations that were in line with the demands of the majority of the Dene — specifically, that pipelines should be permanently disallowed from the Northern Slope of the Yukon, and that there should be a ten year moratorium on any pipeline in the Mackenzie River Valley so that land claims could be settled (Page, 1986, p. 117). By the end of the inquiry, the interests of the proponent had changed, as the price of these staples on the international market had dropped to a level that jeopardized the financial viability of the project.

What was becoming increasingly clear around the time of the Berger Inquiry was the vulnerability of the Indigenous economy to the state-sanctioned project of opening up the North to large-scale resource extraction. Berger's political objectives were clear: he was interested in establishing a framework through which to conduct Northern development. This framework had to include the voices of the Indigenous peoples of the North as sovereign nations within Canada (Page, 1986, p. 91). The obvious rejection of the Mackenzie Valley Pipeline by the majority of Indigenous peoples of the North was considered, and through their testimonies and their

declaration, their views of development were presented. Their primary concern was for their traditional way of life being undermined by the influences of colonial interests in distant places.

Berger was also a strong advocate for the maintenance of the Dene traditional economy, but his ideas diverged from those Dene who espoused the ideas of *the Dene Declaration*. Asch (1987) points out that while the Dene proposed a system whereby they would obtain rents and royalties from resource extraction companies on their traditional territories to provide capital and infrastructure for a viable traditional economy, Berger was in favour of generous government transfer payments (p. 236). Asch preferred the Dene proposal, largely on the grounds that he was concerned that large government grants would be influenced by capitalist institutional parameters. In other words, with the large-scale government grants, there would be strings attached, wherein the values of a capitalist system would be imposed on the uses of those grants (p. 237). Berger was against the Dene's proposal because of his concern that the Dene would be tempted to use this capital towards interests that would not provide the capital and infrastructure necessary for the traditional economy to compete and thrive alongside the modern, capitalist economy.

While Asch (1987) acknowledged Berger's concerns, he was still interested in preserving the communal manner that characterized the Dene traditional economy, and thought this to be a feasible option. He believed that with the royalties obtained from leases and rents on their land, the Dene could avoid becoming incorporated into the mainstream wage-labour force, and would not have to accept transfer payments directly from the government. In his view, this would protect against the capitalist functions of wage labour, and the individual household-receiving of government-transferred cash payments, which he saw as capitalist encroachments on Dene society. The overarching idea is that resource rents "... would be controlled by the Native

community as a whole, and thus would remain consistent with their traditional framework which emphasized communal ownership of resources” (p. 237). The different views of Asch and Berger are reflective of the salient nature of the Dene’s struggle within the psyche of southern, leftist thinkers in Canada at this time. Such views should in no way overshadow Dene perceptions of their own interests, but are presented here with the aim of demonstrating the long-held opinion that the traditional economy could be sustained and even thrive alongside the capitalist economy.²³

It is important to note that neither the Dene Nation, nor any single Indigenous community or nation, are monolithic entities.²⁴ Berger came across several Indigenous leaders during his inquiry who openly embraced the prospects of non-renewable resource extraction, but only after land claims were settled so that the Dene could benefit from these projects. Others were completely opposed to any project that could threaten their traditional economy, while still others welcomed anything that could bring more technological conveniences to their lives (Sabin, 1995, p. 30). If there was a consensus around anything, it appeared to be the need for Indigenous communities to have a say and a stake over what was going on in their traditional territories. The means for them to achieve this was presented to them by the state through the comprehensive land claims process. But as Nadasdy (2002) argues, Indigenous groups have entered into the land claims process “because of the realization that land claims are the only realistic way to preserve their way of life in the face of increasing encroachment of Euro-Canadians” (p. 202). Much like historic treaties, these so-called ‘modern treaties’, or CLCAs, are being used by the state in a similar fashion, and are being adopted by Indigenous groups for similar reasons.

²³ While there is still the presence of a mixed economy in the NWT, there is no doubt that the traditional economy has been largely subordinated by the wage-based economy, which IBAs play a role in facilitating.

²⁴ Monture-Angus (1999, p. 21, as cited in Tomiak, 2011) points out that “as Aboriginal Peoples ... are not homogenous, there is no single Aboriginal ‘perspective’ on anything, let alone governance.”

The Dene Nation, which represented all of the Dene and Métis of the NWT, sought a land claims agreement with the federal and territorial government which would allow them to receive benefits over the development of their lands and resources in the aftermath of their victory in resisting the Mackenzie Valley Pipeline. Without going through a detailed account of these negotiations, Dene Nation President Georges Erasmus echoed the reasoning behind a vote by the Dene Nation Assembly in 1990 to ultimately reject signing the agreement, after having signed an agreement in principle in 1982 (Abel, 2005; Goulet, 2010). Erasmus, in his speech, argued that the SCC was recognizing Aboriginal rights as the Crown was trying to extinguish these rights through a land claims agreement. For modern treaties were, after all, calling for the extinguishment of Aboriginal title in exchange for specific rights to small segments of traditional territory (Asch & Zlotkin, 1997).

It therefore appeared to many in the Dene Nation that their long term interests could be jeopardized by a final agreement with the state while the judicial system was in the process of clarifying their rights. This view was not shared by all, however, which led to the breakup of the Dene Nation as an umbrella organization representing all of the Dene and Métis in the NWT in negotiations over land claims with the state. The state subsequently began negotiating CLCAs on a regional basis, and some groups went on to sign land claims, while others, to this day, have not. The following section reflects on this disparity, critiquing the CLCA process, and relating it to the interests of capital and the state.

2.6: Creating a Basis for Legal and Economic Certainty through CLCAs

In the previous era of Northern staples production, the HBC was able to control the fur trade through an ambiguous form of land-ownership, but in the modern era of large-scale non-renewable resource extraction projects, there needed to be clarity over rights to extract those

resources from the land, and to transport them on the land (Watkins, 1977, p. 88). The *Calder* decision of 1973, while won by the Crown, was still able to establish that Aboriginal title exists in common law, and unless clearly extinguished, is still retained by Indigenous peoples²⁵ (Frideres & Gadacz, 2005, p. 209). British Columbia (B.C.), much of Quebec and Eastern Ontario, and the Northern territories do not have historic claims — or historic claims that expressly extinguished their Aboriginal title to the land (as in the cases of treaties 8 and 11). These areas therefore create uncertainty for developers, who want to be ensured that their projects progress swiftly and predictably; and that means that there is clarity over who owns and controls the land in question.

Woolford (2005) points out that while attaining foolproof certainty through land claims is unlikely, 92% of mining executives think that Aboriginal land claims are a major concern, according to a survey of mining companies operating in B.C. (p. 151). So, while the Indigenous community seeks to gain reconciliation from the state and further control over its future through the recognition of their rights to their homelands, the state is predominately interested in clarifying land tenure, so that certainty can be achieved for the sake of unencumbered economic development (Angus, 1992, p. 69; Mitchell, 1996, pp. 343–344, 347; Rynard, 2000). It would appear that the goals of the capitalist state, at the very least in this instance, are synonymous with those of the capitalist class. Slowey (2008) points out that “[s]ettled land claims create an environment conducive to investment, required for all-important resource development, by clarifying issues of land title and resource ownership” (p. 10). Upon looking further at the

²⁵ The Crown can no longer unilaterally extinguish Aboriginal title, as it was legally capable of doing before the *Constitution Act, 1982*. Within this act, section 35 guarantees that the Crown must protect Aboriginal rights and title, and therefore, Aboriginal rights and title can only be extinguished with the consent of an Aboriginal group (Slattery, 2000, pp. 204-206).

experience of negotiating CLCAs, the dual interests of the state and industry can often be seen as incompatible with the goals of Indigenous communities.

The incompatibility of these goals stems from the state's desire to gain legal certainty over Aboriginal title to the vast majority of Indigenous traditional territory, which has been sought out through forms of extinguishment of Aboriginal rights and title. Woolford (2005) notes that "[t]he language of extinguishment has proven itself against legal challenges and has provided non-Aboriginal governments with the finality and legal and jurisdictional clarity they desire" (p. 145). CLCAs usually follow a set guideline, which is imposed on the Indigenous group through a state-designed process. The state is setting the parameters through which these agreements are to be negotiated, signed and implemented, in order to achieve a set of objectives. This has created much skepticism coming from Indigenous peoples, including Mohawk scholar Taiaiake Alfred (1999), who describes the CLCA process as displaying a progressive facade through which "an advanced form of control, manipulation, and assimilation" (p. 119) exists.

AANDC states that while these agreements are unique in each circumstance, "they usually include such things as land ownership, money, wildlife harvesting rights, participation in land, resource, water, wildlife and environmental management as well as measures to promote economic development and protect Aboriginal culture" (ANDC, 2007). However, in bringing clarity to these issues, rights to the large majority of the traditional territory become ceded to the Crown, which creates uncertainty for Indigenous nations. According to Woolford (2005), demanding that certain rights be extinguished in perpetuity is demanding that Indigenous peoples reify their group identities through the parceling up of land into bounded properties (p. 177). The entire process is one which is predicated on Western conceptions of property, and thus, for Indigenous groups to engage in this process, Nadasdy (2002) argues that they "help assure that

property remains a hegemonic discourse in the arena of Aboriginal-state relations” (p.258). The process of negotiating CLCAs is one in which Euro-Canadian conceptions of property and relating to nature dominate over Indigenous worldviews, which attests to the colonial nature of the process (Ibid). It is also worrisome that the finalizing of rights in the present may exclude Indigenous groups from future advancements in Aboriginal rights through the courts (Woolford, 2005, p. 147). Stevenson (2000) argues that certainty for Indigenous groups is not about extinguishing rights, but rather, about ensuring socially, economically and culturally healthy communities (p.121).

The Coolican Report, which was commissioned by Minister Crombie for Murray Coolican, aimed to determine how to make improvements to the federal treaty process. Coolican found that modern treaties should be living documents, should contain more self-government arrangements, should call for the co-management of resources, and should eliminate the extinguishment clause (Indian and Northern Affairs Canada, 1985). Crombie was preparing to present the report to Cabinet, but during the preparations, he encountered strong resistance from several federal departments, including Energy, Mines and Resources; Environment; Fisheries and Oceans, and Transport. Ultimately, he never brought forth these proposals to Cabinet due to such strong opposition, which stemmed from a disinterest from the state in the sharing of jurisdiction and management over lands and resources (Fenge & Barnaby, 1987).

The state has, nonetheless, acknowledged the widespread opposition to the extinguishment clause within land claims agreements, and has pursued alternative language in creating the certainty they wish to attain through these agreements (Alcantara, 2009). Instead of calling for the extinguishment of Aboriginal rights and title, modern treaties are now calling for the modification of rights; the ceding and releasing of rights; and with the recent TFA, the non-

assertion of rights²⁶ (Hurley, 2009). Alcantara (2009) points out that in substance, these are just different ways of expressing the same state objective, which is the certainty and finality achieved through extinguishment of Aboriginal title. Extinguishing, ceding and releasing, or failing to assert rights is about finality, which is not what Indigenous groups have expressed an interest in.

History has shown that if the state is not in a position where it feels the need to negotiate a settlement for the sake of creating legal certainty in advance of a major resource extraction project, then it would prefer to maintain the status quo. The Indigenous group is therefore in the position of having to convince both levels of government (federal and either provincial or territorial) to sign an agreement (Alcantara, 2008, p. 80). With CLCAs, Mitchell (1996), in her investigation of the effects of capitalism on Inuit life, argues that the state initiated land claims with Inuit based on the need to develop resources within Inuit traditional territory (p.343). Therefore, the geographic position of resources is a key determinant of the level of reconciliation that the state is willing to achieve with Indigenous nations through modern treaties.

The first modern treaty to be signed was the James Bay and Northern Quebec Agreement, which was signed in 1975. It was pursued relatively rapidly by the state — having been negotiated in about two years — in order to create the certainty needed to build a hydro-electric dam megaproject on large swathes of Indigenous traditional territory (Penikett, 2009, p. 547). The state went ahead with the project without settling underlying Aboriginal title, but through the Cree and Inuit seeking an injunction through the courts, Justice Malouf decided in favour of the Cree and Inuit, who were opposed to the hydro-electric development. While the decision was overturned by the Quebec Court of Appeal, it still sent an important signal to the state to negotiate an agreement with the impacted Indigenous groups so as to minimize

²⁶ The TFA — while using the language of the ‘non-assertion’ of rights in section 2.6 — also calls for the “cede, release and surrender” of those rights that may interfere with non-Indigenous rights (see subsections 2.6.9 and 2.6.10)

uncertainty. Under these circumstances, Indigenous groups have felt the need to sign the agreement, since they have felt that development will go ahead with or without their consent, so it is in their best interests to reap state-issued benefits (Angus, 1992). It has come to the point, though, where Indigenous groups are realizing that the failure of the state to take seriously the repeated Indigenous concerns with these negotiations, along with the enormous costs of negotiating these agreements, are leading to a rejection by some groups of this process. This, Alcantara (2008) notes, has sparked a greater interest in alternative means of obtaining benefits from the development of the resources contained within Indigenous traditional territories, such as through bilateral agreements.

2.7: IBAs as an Alternative and/or Additional Form of Certainty

As the negotiations for CLCAs are notoriously lengthy, and industry is looking for immediate certainty over the land in question, bilateral agreements such as IBAs have come to fill this void of uncertainty. As Fidler and Hitch (2007) put it: “Aboriginal groups are advancing their aspirations to have their interests recognized by mining companies, to stand-in for unsettled Crown-related matters” (p. 5). When land claims have yet to be settled, it is in the best interests of the resource extraction company to negotiate an IBA in order to ensure that the Indigenous group is in support of the project (Gibson & O’Faircheallaigh, 2010, p. 31). In the same sense that CLCAs seek to bring legal and economic certainty, IBAs are seen as a mitigating measure to deal with the potential for blockades, protests or other forms of potentially disruptive activities. As a First Nations consultant commented in reference to Indigenous resistance which creates uncertainty: “So, it’s basically like: what’s the price of getting rid of that [uncertainty]? And if the price is in jobs and some training and some yearly cash — that may well be worth your investment.” (I-1)

While it is in the interests of capital accumulation to have land claims settled for the benefits of legal and economic certainty, the Indigenous group may fail to come to an acceptable agreement with the state over the land to be developed for an impending development project. If the state were to give in to the Indigenous group's demands (which may resist attempts to create clear ownership over traditional territory), this runs the risk of jeopardizing the general interests of capital accumulation. The demands of the Indigenous group may in fact hinder the goal of creating legal certainty over land tenure for the interests of capital, if, for example, the Indigenous groups are demanding that the agreement allow for future flexibility and re-negotiation (thereby challenging the aim of clear extinguishment and hence the clarity over ownership of property), or that the land and resources throughout the traditional territory be jointly owned and co-managed (Woolford, 2005, p. 149). Several Indigenous groups in the North have proposed these alternatives, but they have thus far failed to convince those in positions of state power to accept their proposals (McArthur, 2009, p. 225).

When looking at IBAs and CLCAs as tools for creating certainty for the interests of capital accumulation, it seems that IBAs provide a convenient outlet for the state to temporarily satisfy all of the actors within the landscape of Northern resource extraction, while avoiding having to handle long-standing grievances within the CLCA forum. However, the form of certainty attained through CLCAs is both legal and economic (Woolford, 2005), while with IBAs, economic certainty is almost guaranteed, but the issue of legal certainty is still rather ambiguous (Gibson & O'Faircheallaigh, 2010). This may, in the future, create problems for the Crown through the courts, which is an issue that this thesis explores further in Chapter 4.

IBAs, as mentioned in Chapter 1, address positive issues related to participation for Indigenous businesses and employment, environmental stewardship, and consultation. In contrast

to the historical treatment of Indigenous peoples in the North, where they were significantly disadvantaged when seeking employment or business opportunities, their lands were contaminated, and they were not consulted over the use of their traditional territory, IBAs signal a significant shift from these previously harmful relationships. IBAs, meanwhile, also signal an altered relationship between the state and Indigenous peoples, as the private sector is beginning to assume a greater role in its relations to Indigenous groups, and the state is in a position of devolving responsibilities to third parties. This shift in governance will be explored theoretically in Chapter 3, and through the case study in Chapter 4.

2.8: Conclusion

This chapter has sought to trace the historical relations between Indigenous peoples in the North and the Canadian state, with a particular focus on the landscape of resource extraction in the sub-Arctic. This relationship has transitioned from one in which Indigenous peoples were largely ignored by the state and its interests, to one in which the state has taken responsibility for providing for the welfare of these people, due in no small part to the consequences of the prior terms of the relationship. In a North in which most land claims have been settled, and IBAs have become a de facto regulatory requirement, the state appears to be devolving risks and responsibilities to both Indigenous organizations, and to third parties, such as mining companies. This has heralded a type of governance that is able to advance the project of capital accumulation, but in a neoliberal fashion, as Chapter 3 will further examine.

Certainty over the development of the vast resources of the North cannot be overlooked as a central theme in our understanding of the history of Northern resource extraction; this chapter has demonstrated how this remains the same. IBAs, no doubt, are a modern tool used to provide a large measure of this certainty. As chapter 4 will investigate, the state's relation to

IBAs is complex, and while attaining economic certainty for the interests of capital is important, it does not account for a comprehensive understanding of the ways in which the state relates to IBAs.

Indigenous resistance and the discourses surrounding this resistance have been managed by the state through the processes of land claims and other Indigenous-state agreements, thereby marking another shift in the Indigenous-state relationship. *The Dene Declaration* (1975) called for the recognition of Dene self-determination within their homelands, and for the Dene to no longer be a part of the Fourth World (as cited in Watkins, 1977, p. 4). CLCAs have been used as a tool by the state to address the former and partly the latter issue, while the latter issue is being further addressed through economic development measures, wherein IBAs are playing a significant role. Current discourses, rather than focusing on the Dene's traditional rights — as was a focal point of discussion within the Canadian left and amongst many Indigenous peoples in the North (as evidenced through *the Dene Declaration*) — have focused largely on Indigenous participation in the economy, and the benefits of being relieved of their state of dependency through the promise of self-reliance. Chapter 3 will also examine the theoretical dimensions of these discourses, and determine ways of thinking about the state's relation to IBAs theoretically.

Chapter 3: IBAs and the State- a Theoretical Examination

“Overall, the existence of neoliberal Aboriginal governance reveals new difficulties for Indigenous peoples as it suggests that Indigenous movements must constantly re-position themselves in response to the state’s concessions in order to bring their unresolved concerns out of the de-politicized spheres created through devolution and into public political spaces of contest, debate and accountability” (MacDonald, 2011, p. 270).

3.1: Introduction

While Chapter 2 put forth a political economy analysis of the state’s historic role in mediating both resource extraction in the North and its relations with Northern Indigenous peoples, Chapter 3 seeks to position IBAs theoretically. Chapter 2 showed how the state has acted largely in the interests of capital, wherein Northern resource extraction — for the interests of capital accumulation — has predominantly shaped the state’s relationship with Indigenous peoples. With the signing of CLCAs and IBAs, Indigenous groups have gained a degree of political leverage in Northern governance, and are becoming participants in the extraction of resources from their traditional homelands. In tandem with this, the private sector has taken on the partial role of providing socio-economic benefits, and at times vital services, to some of the Indigenous peoples of the North. This chapter emphasizes how these phenomena have coincided with the rise of the neoliberal state in Canada, and the neoliberalization of Indigenous-state relations in other areas of governance.

This chapter will also explain the various ways of perceiving the *neoliberal* state, demonstrating that both the Marxist political economy approach and the neo-Foucauldian governmentality approach can help contribute to a greater understanding of the (neoliberal) state in Canada, and can be used in our understanding of the state’s relation to IBAs. The main objective of this chapter will be to position IBAs theoretically, thereby facilitating the analysis of the neoliberal state in relation to IBAs in Chapter 4, which deals with the case study.

To problematize the argument put forth by industry, government and certain scholars — that IBAs are simply an economic development measure that ensures Indigenous participation in resource extraction — this chapter takes a more critical perspective on this issue. It is through the Marxist political economy literature that the benevolence of the state will be brought into question, demonstrating how the state's project of capital accumulation must be regarded as central to our understanding of IBAs. Neoliberal governmentality, meanwhile, will be particularly useful in helping us to understand the ways in which Indigenous peoples are governed through IBAs — as the state seeks to transform Indigenous peoples into self-governing subjects²⁷.

3.2: Reflections on the Neoliberal State using a Marxist Political Economy Approach

Neoliberalism has become a ubiquitous term used to describe the dominant ideological and political system of our time. It is perceived, by Marxists, as a bourgeois project of facilitating the continued accumulation of capital throughout the globe in the face of the economic profitability crisis of the 1970s (Gordon, 2006, p. 17). This project can be traced to the ideological foundations set in place by economist Friedrich Hayek, and initially put into policy by Margaret Thatcher and Ronald Reagan (Harvey, 2005). Hayek (1944) advocated towards the 'rolling back' of the state to allow for a society which is governed by market mechanisms (as cited in MacLeavy, 2010, p. 136). The role of the state, according to Hayek (1944), is to intervene in the economy only to the extent that private property rights and other individual freedoms are safeguarded.

²⁷ The term 'subject' is based on the Marxist perspective on subjectivity, which is the idea that capitalism requires the production of subjects who imagine themselves "to be autonomous, self-posessed, bounded, agentic individuals..." (Rose et al., 2006, p. 90).

Polanyi (1957) disagreed with Hayek's assessment of the 'free' market, arguing that the market is never independent of the state, and is hence never entirely 'free'. The reason for this is what he referred to as the 'double movement'²⁸, which did not come about in a unified and conspiratorial fashion to undermine the supposed miracles of the 'self-regulating' market, but rather, as a natural and spontaneous tendency of fractions of society to protect themselves from the perils of such a system (p.147). Following the Second World War, Western governments adopted the Keynesian 'welfare-state' model, which is characterized by the central role of the state in actively regulating the economy, and providing social services and welfare assistance with the use of public funds. The adoption of this model was largely the result of working-class efforts to achieve some stability within a capitalist system; stability from the forces described by Polanyi. During the tenure of this model, labour had achieved a relatively strong position in relation to capital, with reasonably high levels of prosperity throughout the Western world. However, this changed with the neoliberal shift in the 1970s, wherein welfare states became subject to "pressures of retrenchment, reform and reduction, becoming (in some accounts) worlds of 'post-welfarist' capitalism" (Clarke et al., 2007, p. 15).

With a turn to neoliberalism due to the profitability — or over-accumulation — crisis, the working class fell under brutal attack. Poverty and marginalization increased with the cutting of social services (Harvey, 2005). Something else was needed in order to ensure that this elitist project could be implemented without extreme backlash — namely, the importance of ideology and the production of consent. Gramsci's (1992) idea of 'cultural hegemony' — wherein the dominant class projects its worldview onto the subordinate classes in a way that it becomes the 'common sense' — offers a useful tool towards understanding the neoliberal state. The dominant

²⁸ The 'double movement', as referred to by Polanyi, is the natural response of society to the socially catastrophic impacts of a free market system. Polanyi argues that the 'double movement' is a necessity in order for those affected by free market capitalism to be able to protect themselves from the effects of social dislocation.

class must convince the subordinate classes that its rule over them is justified, and has ultimately been consented to. In the event that consent is not possible to achieve, then coercion can be used in order to maintain the hegemonic order in place, or what Gramsci (1992) refers to as the 'hegemonic bloc'. From a Gramscian perspective, neoliberalism can be viewed as an ideological hegemonic project in that the new logic of governing societies is subjected to subordinate groups across different spaces and scales, wherein both consent and coercion are used as a means to perpetuate the project of the continued accumulation of capital (Johnston & Saad-Filho, 2005).

In Harvey's (2003) *The New Imperialism*, he discusses the modern form of primitive accumulation, which he refers to as 'accumulation by dispossession'. Harvey notes that accumulation by dispossession is in some ways very similar to the primitive accumulation of the beginnings of the capitalist state, consisting of, for example, the removal of Indigenous peoples or peasants from their land in order to enclose this land for private interests (Gordon, 2006, p. 17). However, accumulation by dispossession also reflects on more modern forms of dispossession, involving, for example, the deregulation of the financial system.²⁹ Ultimately, though, the goal has been to overcome the profitability crisis of capitalism through freeing up any means of accumulating further capital. As Harvey notes:

Since privatization and liberalization of the market was the mantra of the neo-liberal movement, the effect was to make a new round of 'enclosure of the commons' into an objective of state policies. Assets held by the state or in common were released into the market where overaccumulation capital could invest in them, upgrade them, and speculate in them. New terrains for profitable activity were opened up, and this helped stave off the overaccumulation problem, at least for a while. Once in motion, however,

²⁹ The overlap between the dispossession of Indigenous traditional territory and the privatization of state assets is the private interests that lie behind both of these areas of commodification. In both cases, the state has enabled capitalists to access these commodities, as well. However, it is important to recognize that the dispossession of Indigenous traditional territory is not a phenomenon that began in the latter half of the twentieth century, as the privatization of state assets has. Therefore, there is nothing inherently 'neoliberal' about the dispossession of Indigenous traditional territory; but the neoliberal era has opened up further opportunities for this form of capital accumulation.

this movement created incredible pressures to find more and more arenas, either at home or abroad, where privatization might be achieved. (158)

The neoliberal project is perceived here as a means of maintaining the interests of the dominant class (both domestically and globally), and in the process, subjugating the interests of the subordinate classes who had been gaining in power during the post-war Keynesian regime. This has been achieved through private interests pursuing new market access with the support of the capitalist state.

As the project of the neoliberal elite has been commonly categorized as a retrenchment of the welfare state, deregulation and privatization (Harvey, 2005, p. 3), it is important to recognize that the state has not disappeared, but has rather restructured itself (Peck & Tickell, 2002). This process has been described as ‘neoliberalization’, and can be seen through the ‘rolling back’ and the subsequent ‘rolling out’ of the state. Peck (2001) notes that through the ‘rolling back’ of the state, the state *per se* is not being hollowed out; what is being hollowed out is “a historically and geographically specific institutionalization of the state, which in turn is being replaced, not by fresh air and free markets, but by a *reorganized* state apparatus” (p. 447). The ‘rolling out’ of the state has been characterized by non-governmental entities, or third parties, that have taken on some of the responsibilities and assets previously held by the state. Brenner et al. (2009) argue — in contrast to the view of a worldwide homogenization or convergence of regulatory systems — that processes of neoliberalization are variegated, as they have “facilitated marketization and commodification while simultaneously *intensifying* the uneven development of regulatory forms across places, territories and scales” (p. 184).

Before delving further into these diverse processes of neoliberalization, it is necessary to examine the nature of the capitalist state. Poulantzas (1978) argues that the state is relatively autonomous from the capitalist class in order to work towards the general interests of capital (as

cited in Panitch, 1977, p. 86). For Poulantzas, the state must accommodate the interests of other fractions of society aside from solely the interests of the capitalist class, thereby signifying the relative autonomy of the state from the hegemonic bloc. The state, nonetheless, can be seen as a custodian of capital, ensuring that the interests of capital accumulation are maintained and reproduced (Poulantzas, 1978). While the analysis in this thesis does not align entirely with Poulantzas' structural conceptions of the state, especially in its use of governmentality, it is important to note his contribution to our understanding of the continued maintenance of the capitalist system.

These conceptions of the state, while able to conceive of the state's relation to capital in useful ways, have inspired more recent, nuanced conceptions of the state and its relation to capital in the neoliberal era. Jessop (1990) sees the state as a being in constant motion, containing "multiple boundaries, no institutional fixity, and no pre-given formal or substantive unity" (as cited in Howlett, 2010, p. 460). A way in which the changing role of the state can be described is in a change from *government* to *governance* (Jessop, 1999, p. 9). Jessop (1999) explains the shift from a Fordist, Keynesian state towards a neoliberal state that depends on *governance* as such: "Organizationally, the Fordist period was one of large scale, top-down hierarchical structure and this model spread to the state's economic and welfare roles. This paradigm is being challenged by a new 'network paradigm' that emphasizes partnership, regulated self-regulation, the informal sector, the facilitation of self-organization, and decentralized context steering" (p. 9). Jessop's conception of the capitalist state as a fluid and evolving set of relations transmits effectively to processes of neoliberalization, in which forms of

governance that prioritize the market over the control of the central state apparatus take precedence in society.

To summarize, the neoliberal state, from the perspective of Marxist political economy, is a social relation that is influenced and shaped by ideological (i.e.: market) forces, and is in constant motion. It has been regarded as both a hegemonic project, but also as a variegated process involving similar types of forces within and across various spaces and scales. Peck (2001) characterizes neoliberal adjustments (or processes of neoliberalization) as a

basic treatment (which) is pretty much the same: purge the system of obstacles to the functioning of 'free markets'; restrain public expenditure and any form of collective initiative; celebrate the virtues of individualism, competitiveness, and economic self-sufficiency; abolish or weaken social transfer programs while actively fostering the 'inclusion' of the poor and marginalized into the labour market, on the market's terms (p. 445).

The variegated nature of neoliberalization — as it is referred to by Brenner et al. (2009) — requires us to pinpoint such processes, so that they can be examined in specific contexts to further our understanding of these phenomena.

3.3: Reflections on the Neoliberal State using a Governmentality Approach

Larner (2000) notes the importance of seeing neoliberalism as indicative of modern changes in governance. She states that “[n]eo-liberalism is both a political discourse about the nature of rule and a set of practices that facilitate the governing of individuals from a distance. In this regard, understanding neo-liberalism as governmentality opens useful avenues for the investigation of the restructuring of welfare state processes” (p. 6). Governmentality is a term introduced by Foucault (1991), which can be understood as ‘the art of governing’, or the ways in which populations and subjects have been governed in society. Li (2007) understands the ‘art of governing’ as “the liberal art of governing the polity in an economical manner, intervening in the

delicate balance of social and economic process no more, and no less, than is required to adjust, optimize and sustain them” (p. 277). Neoliberal governmentality is a form of governmentality in which populations and subjects are governed through self-regulation, which the state is able to facilitate through various technologies of governance that seek to ‘govern at a distance’ (Rose, 1999).

Lemke (2001) — through his interpretation of Foucault’s lectures of 1978 and 1979 — states quite similarly to Peck (2001) that the reduction in the forms of welfare state intervention should not be construed as a loss over the power to regulate and control. Lemke describes this phenomenon as a “re-organization and re-structuring of government techniques, shifting the regulatory competence of the state onto the ‘responsible’ and ‘rational’ individuals” (p. 12). The sovereignty of the individual consumer and local community is expressed through the discourse of ‘social capital’. Such a discourse conveys the values of self-reliance and an independence from government, shaping individual subjects that are self-governing (Dean, 1999).

In order for the governed subjects to become self-governing, regimes of government³¹ use certain ‘technologies’ in order to facilitate this self-directed behaviour. Dean (1999) refers to these technologies as technologies of *agency* and technologies of *performance*. According to Dean (1999), the welfare state has been substituted with a different conception of the ‘social’, wherein “the social will no longer be inscribed within a centralized and coordinating state; it will be reconfigured as a set of constructed markets in service provision and expertise, made operable through heterogeneous technologies of agency, and rendered calculable by technologies of performance that govern at a distance” (1999, p. 193). Similarly to the form of governance identified by Jessop (1999) in the Marxist political economy literature, neoliberal

³¹ Dean (1999) refers to regimes of government as “the relatively organized and systematized ways of doing things, such as curing, caring, punishing, assisting, educating and so on.” They are “the subset of regimes of practices concerned with ways of directing the conduct of self and others” (p. 211).

governmentality identifies a change in governance from the dominance of the Keynesian welfare state. As well, the neoliberal governmentality literature acknowledges a continued role for the state to play in such processes.

According to Olssen (2003), while classical liberalism perceives state power as being inherently negative — in that it restricts the freedom of the individual — neoliberalism, or advanced liberal rule, conceives of the state as playing a positive role, which facilitates the appropriate market through the use of laws and institutions (p. 199). Olssen (2003) notes that “in classical liberalism, the individual is characterized as having an autonomous human nature and can practise freedom. In neo-liberalism, on the contrary, the state seeks to create an individual that is an enterprising and competitive entrepreneur” (p. 199). It is not that the self-interested subject is no longer present, but that in an age of universal welfare in the global North, Olssen (2003) argues that the possibilities for indolence require the state to govern indirectly through forms of distant control, with technologies such as accounting, performance appraisal and management (p. 200).

A governmentality approach, rather than “... seeing any single body — such as the state — as responsible for managing the conduct of citizens,” acknowledges that “... a whole variety of authorities govern in different sites, in relation to different objectives” (Rose et al., 2006, p. 85). This approach allows us to ask a series of important questions that will foreground the case study analysis. Governmentality seeks to understand who is being governed, why they are being governed, through what means they are being governed, and to what ends they are being governed. Due to the fact that the state plays a central role in the case study, considering such questions will help to tease out the practical ways of governing that may work towards the

interests and objectives of state institutions, but are employed through various sites or networks within society.

Jessop (2006) notes that while Foucault is widely regarded as holding conceptions of the state that are quite contrary to those found within the Marxist literature, there is a growing interest within Foucault's work with statecraft, and in bridging the divide between his philosophical views and those of certain Marxist conceptions of the state (p. 35). In the latter years of Foucault's academic career, he began to argue, along similar lines to neo-Marxist theorists, that "capitalism has penetrated deeply into our existence, especially as it required diverse techniques of power to enable capital to exploit people's bodies and their time, transforming them into labour power and labour time respectively to create surplus profit" (as cited in Jessop, 2006, p. 36). Acknowledging the central importance of capitalism in shaping individual subjects towards the aims of a capitalist economy, Foucault begins to acknowledge a role for the state within this framework. Jessop (2006) notes that Foucault regarded the state as a relational ensemble through which there is a "non-essentialized set of political relations ... rather than a universal, fixed, unchanging phenomenon" (p. 39). As mentioned in the previous section of this chapter, Jessop (1990), who is considered to be a neo-Marxist scholar, regards the state in a very similar fashion.

So, while England and Ward (2007) point out that post-structuralist theories of the state are those that challenge the notion of the state as being autonomous from society, we can find some common ground between Jessop (1990) and Foucault, wherein both regard the state as a set of relations that are in flux, and are in many ways embedded across scales and spaces within the society from which it has been considered a part. Regarding the state in such a manner allows me to continue to theorize about the role of the state, while being clear that by the 'state', I am not

referring to a monolithic entity. Nadasdy's (2003) definition of the state will prove useful here, and is one which he employed in his study of Aboriginal-state relations in the Yukon. It is useful to quote his conception of the state at length:

Rather than viewing the state as a thing ... we do better to see it as an ideological project, one that confers legitimacy upon the complex constellation of government institutions and processes that have many different (and often contradictory) agendas and interests. As it turns out, this is consistent with how people actually experience state power, since they must deal with the competing — sometimes contradictory — interests and agendas of various agents of the state. It is therefore more accurate to think of state power itself as emerging from the complexity of state processes and people's day-to-day interactions with those processes rather than as a quality possessed and wielded by a monolithic state-as-entity. (p. 4).

Based on this conception of the state, the governmentality approach would see the neoliberal state as a set of discourses and practices, evident at times through the institutions of the state, that seek to govern through technologies which facilitate the self-governance and self-regulation of the individual subject, and of targeted populations.

While this approach has not been commonly drawn on within the Northern Canadian scholarly context, the following section discusses a recent use of this approach employed by Julie-Ann Tomiak (2011). Tomiak (2011) uses a governmentality approach towards understanding the continued colonial domination of urban Indigenous peoples, which she argues, allows the state to 'govern at a distance' through certain technologies of government. Her use of governmentality is also made in reference to processes of neoliberalization, which she argues, are occurring within the urban Indigenous landscape. As my case study will demonstrate, and which this chapter will further discuss, similar technologies of government are being used in the context of Indigenous peoples and IBAs.

The use of a governmentality approach to aid in our understanding of colonial and postcolonial forms of governance has been employed as well by Tania Murray Li (2007) in the

context of Central Sulawesi, Indonesia. Li (2007) argues that *practices of government* limit “the possibilities for engaging with the targets of improving schemes as political actors, fully capable of contestation and debate” (p. 281). This is due to a demarcation that exists between the trustees and the governed, which perpetuates the authority of the trustee over the target population through the privileging of expertise. This, she argues, is the same in the Dutch colonial period as it is in the neoliberal era. Only, through the neoliberal development paradigm promoted by the World Bank, the governing of target populations is conducted through rendering these groups entrepreneurial and responsible. Governmentality allows us to comprehend the ways in which target populations are governed to the point where they are engaging in these projects through their own self-directed action.

3.4: Neoliberalism and Indigenous Peoples in Canada

Canada has taken on many neoliberal policies since the 1980s, with welfare state restructuring occurring across different spaces and scales. Albo (2007) recognizes that beginning in the 1990s in Canada, neoliberalism came to dominate governmental policy, regardless of the party in power. As Abele and Papillon have summarized, “[i]n Canada, as in other OECD countries, social policies are now less about protecting citizens and ensuring socio-economic equality through direct support and more about ‘enabling’ citizens’ participation in the market economy.” This reality has impacted heavily on Indigenous peoples in Canada through both the challenges and opportunities that have been presented through these processes of welfare state restructuring.

Slowey (2008) and MacDonald (2011) point out that both the neoliberal and the Indigenous critique of the Canadian welfare state share the same disdain for the paternalism that both views claim are endemic to the welfarist ways of governing. Indigenous peoples have a

deep mistrust of the state in general (and hence direct forms of government), which stems from the colonial history³² of intervention, forced assimilation, and a divide and conquer strategy used towards Indigenous communities (MacDonald, 2011, p. 263). This deep mistrust is accompanied as well by a strong desire to be self-determining as sovereign nations within Canada. The welfare state — by administering over Indigenous peoples through government ministries and perpetuating the poverty through which they have been subjected to through systems of dependencies — is seen as a colonial presence that treats Indigenous peoples as ‘wards of the state’, thereby impeding opportunities for autonomy and self-determination (Slowey, 2008, p. 18).

The neoliberal state, meanwhile, has sought out domains in which it can devolve administrative responsibilities, be it to the provinces, or to Aboriginal and other local governments (Abele, 2004, p. 27). By devolving certain policy areas from the federal level to the level of Indigenous communities, areas such as education and child welfare — which have deep-rooted colonial legacies — can be freed from the responsibility of the state, and can simultaneously appear as a concession from the state to Indigenous communities (MacDonald, 2011, p. 265). Furthermore, the discourses of neoliberalism, which emphasize the importance of self-reliance and a withdrawal of the state from individual and local initiatives, appear attractive to Indigenous communities who wish to overcome their status as ‘wards of the state’ (Slowey, 2008). The compatibility of the Indigenous and state perspectives on neoliberalization are important, but as can be seen here, the motivations behind the interests in welfare state restructuring are quite different, and do not necessarily lead to increased self-determination — or

³² The Indian Act of 1876 represents the federal government’s historical policy towards Indigenous peoples. Tomiak (2011) notes that the Indian Act was “driven by racist and paternalistic notions of Indigenous peoples as in need of being segregated from settler society and thus ‘protected’ from ‘modern’ society, until they could be civilized through an aggressive form of assimilation” (p. 134). The Indian Act is still being used to govern Indigenous peoples in Canada, indicating the colonial presence in which we find ourselves to this day.

the kind of self-determination that is most appropriate — for Indigenous peoples (MacDonald, 2011, p. 263).

The devolution of powers to Indigenous communities allows the state to ‘govern at a distance’ through various technologies of performance. Dean (1999) notes that technologies of performance, such as auditing and cost accounting, devolve risk onto individuals, communities, and workplaces, and allow these units to be governed indirectly (p. 206). These technologies are being used on Indigenous communities who have been given limited control over local areas of policy and administration. Prince and Abele (2002) point out that as certain responsibilities were purportedly devolved to Indigenous communities, “[s]ervice delegation was subject to monitoring, reporting requirements and controls by federal officials. In most service fields for most First Nations, real decision making powers still today are not devolved” (p.10). Furthermore, the federal transfers made to Indigenous communities and organizations are conditional, with a strong emphasis by AANDC on program compliance. These communities are subject to audits, and the unspent balances are expected to be returned to the federal government (Ibid, p. 15). According to Peck (2001), the devolution of delivery systems works against the interests of oppositional movements by overstressing capacities and diffusing their energy, instead of “opening up the space for more progressive local initiatives” (p. 452).

In research conducted regarding Indigenous peoples living in urban centres in Canada, Tomiak (2011) offers a nuanced conclusion on the impact of technologies of government on Indigenous organizations and subjects living within cities. She notes that:

Although current political arrangements that have emerged as a result of neoliberalization construct urban Indigenous peoples as active participants in urban governance, neoliberal technologies of government at a distance continue to reinforce state control and the colonial logic of erasure. Partnerships are premised on the conceptualization of urban Indigenous peoples as individuals and an at-risk population rather than as rights-holders and citizens of Indigenous nations (p. 59).

While Tomiak critiques the technologies of government which seek to ‘govern at a distance’ through auditing and accounting measures, she is arguing nonetheless that urban Indigenous partnerships are “simultaneously expressions of neoliberal logics of urban governance *and* Indigenous struggles for self-determination” (p. 283). Larner’s (2000) analysis of neoliberal governmentality and the Maori struggle for self-determination in New Zealand also acknowledges the simultaneous, interconnected nature of welfare state restructuring and resistance (pp. 17-18).

There are several other authors who are skeptical of the kinds of avenues that are open to Indigenous self-determination coming out of neoliberalism. Dempsey et al. (2011) critique the neoliberal discourse encapsulated by the proposals of Alcantara and Flanagan (2002, 2004, 2005) to expand private property rights on reserves. They argue that Alcantara and Flanagan’s idea of equality for First Nations is shallow, in that it assumes equality will come through Western notions of property, which “is made possible only by a complete bracketing of historical geographies of dispossession” (Dempsey et al., 2011, p. 4). The language of self-reliance and responsibility therefore “hijack” notions of self-determination, leaving First Nations with the opportunity to “self-determine” within the narrow confines that are stipulated by the white capitalist elite (Ibid, p. 26).

Slowey (2008), while arguing that neoliberalism can offer benefits to Indigenous communities that can lead to increased political authority and an improved economic situation (p. xv), also points out that self-determination through devolution “is not based on inherency and that many First Nations do not achieve their goals via devolution” (p. 53). However, she goes on further to argue that despite these limitations on self-determination, “devolution itself does not inhibit the eventual realization of those self-determination goals. Therefore, even though the

assumptions guiding federal policy and activity may not reflect First Nations concepts of self-determination, devolution still facilitates the realization of First Nation's goals of economic self-reliance and jurisdictional autonomy" (p. 53). For Slowey (2008), the neoliberal state apparatus can offer very tangible and notable improvements for Indigenous communities, while she still acknowledges the limited nature of such forms of self-determination.

Kuokkanen (2011) challenges Slowey's contention that neoliberal adjustments can lead to a reduction in dependency, arguing that "[s]uch an analysis fails to recognize that while the dependency of the Mikisew from the government might have decreased to some extent, it has only created a new dependency on corporations exploiting the natural resources in the Mikisew territory" (p. 285). Slowey's largely positive assessment of the benefits provided to Indigenous peoples through neoliberalism is agreed upon by MacDonald (2011), but — much like Kuokkanen (2011) — with a significant degree of skepticism (p. 260). MacDonald makes the important point that "[n]eoliberal manifestations of Indigenous autonomy or self-government are ... vulnerable to criticisms launched against practices of privatization. These practices include a variety of policies that promote shifting contentious issues out of the public sphere, thereby limiting public debate and collective — that is, state — responsibility" (p. 258). This critique of the neoliberal formations of Indigenous autonomy makes apparent the link between neoliberalization and IBAs.

3.5: Understanding IBAs through a Marxist Political Economy Approach to Neoliberalization

When theorizing IBAs from a framework of neoliberalization, it is important to distinguish between our understanding of IBAs as a means of securing access to natural resources for the continued accumulation of capital, and our understanding of IBAs as a means of governing Indigenous subjects in a certain manner. We can use theories of Marxist political

economy to help us make sense of both of these ways of understanding IBAs. When viewing IBAs as a means of securing access to natural resources, which is one important way of perceiving them, neo-Marxist understandings of the state can aid us in understanding the macro-political realities that are at play.

Harvey's (2003) notion of 'accumulation by dispossession' would present IBAs as a neo-colonial tool of dispossessing Indigenous peoples of their land — by enclosing it and commodifying the resources contained within it — for the private interests of capital (Hall, 2012). More specifically, it is through the negotiation and signing of IBAs that a contractual consent is given by the Indigenous organization on behalf of the Indigenous community, allowing large — and in this case multi-national — resource extraction companies to invest surplus capital into a new and profitable means of capital accumulation.

Due to the profitability crisis of the 1970s, and the subsequent need to find new resources and new markets for those resources for the interests of transnational capital, opening up large swathes of Indigenous traditional territory (whether it be ceded or unceded) while further incorporating Indigenous peoples into the consumerist capitalist system and labour market, can certainly be seen as a logical means of achieving these ends. The Canadian North as the new frontier for 'development', and hence an enormous opportunity for the continued accumulation of capital, fits rather neatly into the goals of the neoliberal project. This view offers us at least a partial understanding of how IBAs, as a tool used in the continued accumulation of capital, can be perceived in relation to the neoliberal state.

In order for the state to enable industry to extract resources from Indigenous traditional territory, there needs to be an assurance that the general interests of capital accumulation are not compromised. Poulantzas' (1978) notion of the relative autonomy of the state from the capitalist

class can be applied to IBAs, where the state's responsibility towards the interests of certain fractions of society — that is to say Indigenous peoples and concerned civil society organizations — requires there to be an emphasis on the (limited) sharing of wealth, as well as the 'participation' of Indigenous peoples within the processes of resource extraction. For the general interests of capital accumulation, these fractions of society need to be appeased, and through the signing of an IBA, consent from the community is likely to be secured for the duration of the resource extraction project. While the immediate interests of the capitalist class would arguably seek to secure as much of an immediate profit as possible from the project, the general interests of capital need to be protected. Therefore, the role of the state can be viewed as being the non-neutral arbiter between the fractions of society, ultimately acting in the general interests of capital through a mandating of IBAs over Ekati, for example, and an indirect acknowledgement and approval of IBAs afterwards.

From a framework of neoliberalization, Peck's explanation of a 'rolling back' and a 'rolling out' of state functions portrays a state that is not quantitatively less powerful, but is, rather, differently powerful; this signals a qualitative change in the power of the state apparatus (2001, p. 447). As already mentioned, there is a shift from *government* to *governance* (Jessop, 1990), which is apparent through the existence of IBAs. IBAs, from a neoliberal perspective, represent a form of governance that indicates a general absence of government, yet a form of governance that comes more from dispersed sites of power, rather than from the top-down. The state is seen to be encouraging IBAs — as they fit into the general interests of capital accumulation — but has not behaved in ways that intervene heavily in the process.

In this age of the neoliberal state in Canada, the discourse surrounding welfare state restructuring and Indigenous communities has focused largely on 'partnerships'. According to

McBride and Smith (2001), in the late 1980s the federal government began devising a labour market strategy that would be used in relation to Indigenous peoples, consisting of a focus on partnerships with corporations, and a ‘human capital’ component emphasizing education and training (as cited in Taylor & Friedel, 2011, p. 818). These partnerships can be understood as a way of gaining the consent of Indigenous communities to resource extraction within their traditional territory. As Slowey (2008) points out: “In order to avoid hearings and protests so that resource extraction can take place unencumbered, the corporate approach has been to develop long-term relationships with First Nations so that they can deal with any grievances on an ongoing basis” (p. 69). Peck and Tickell’s (2002) explanation of neoliberalization through the “rolling back” and the “rolling out” of state functions can help to explain this discourse around partnerships.

IBAs, as a form of partnership between Indigenous communities and the private sector, can be seen as both a ‘rolling back’ and a ‘rolling out’ of state functions. The ‘rolling back’ of the state is evident through a form of privatization, or the “sharing or delegating of authority to non-governmental agents” (Handler, 1996, pp. 78-80). With IBAs, the fiduciary obligation of the state — which involves the duty to consult and when appropriate, to accommodate Indigenous peoples in the event that Aboriginal title is infringed upon, and the assurance that the best interests of Indigenous peoples are looked after — has been, in part, delegated to corporations³³. The corporation, which seeks to extract resources from Indigenous traditional territory, is put in the position — either constitutionally under IBA provisions contained within CLCAs, or implicitly through the de facto regulatory requirement to successfully negotiate an IBA— to ensure that the interests of the Indigenous community are being met.

³³ See Chapter 4 for further discussion.

Furthermore, benefits accrued to the community directly relieve the state from some of its traditional functions, such as the building of physical infrastructure within communities, training and educational programs, and in some cases, the continued issuance of income support payments through the presence of government clawbacks. While companies have regarded these efforts as part of their mandate of Corporate Social Responsibility (CSR), Sadler and Lloyd (2009) argue that corporate codes of conduct are essentially a “displacement of core regulatory functions (over issues such as working conditions and environmental sustainability) from the state to the corporate sector” (p. 613). This, according to Sadler and Lloyd, is an example of ‘roll-out’ neoliberalism, as it “includes a tendency for corporations to take responsibility from states” (p. 615). ‘Roll-out’ neoliberalism, as described by Peck and Tickell (2002), is designed to deal with the negative effects of ‘roll-back’ neoliberalism. If an Indigenous community has been negatively affected by welfare state restructuring such as through social cutbacks and the general shrinking of the welfare state, then CSR can step in to fill this void through the signing of IBAs, serving as a ‘rolling out’ of state functions.

Understanding ‘privatization’ as a way of looking at IBAs may be seen as misleading, as the term originally referred to the sale of state assets to the private sector. However, the term “is now invoked to reference an overall shift in public policy and political orientation that involves both the contraction and re-regulation of the public as well as the expansion of the private” (MacDonald, 2011, p. 259). Based on that definition, IBAs may be perceived as a key part of neoliberalizing relations between the Canadian state and Indigenous peoples. The expansion of the private is evidenced by the corporation’s increasing role in providing socio-economic services for communities, which does not take place within the realm of public scrutiny or regulation. The confidentiality of these agreements, and overall lack of government involvement,

can also be interpreted as a signal of changing relations between Indigenous peoples and the federal Crown, wherein privatization has played a significant role.

The connections made herein between the Marxist political economy approach(es) to neoliberalization and IBAs helps to set up the case study analysis in Chapter 4. The neoliberal state in Canada is heavily influenced by global pressures surrounding the ever-growing demand for access to new markets, which includes the vast deposits of natural resources in the Canadian North. While neoliberalism can be seen as a global hegemonic project, it is also important to note the diversified processes of state restructuring — or neoliberalization — which brings more nuance and depth to the forces at play in particular contexts.

3.6: Understanding IBAs through a Governmentality Approach to Neoliberalization

Advanced liberal regimes of government, which are commonly used by the neoliberal state, involve technologies of performance and technologies of agency (Dean, 1999, p. 168). Technologies of performance, such as auditing and cost accounting, attest to the government's strategy of 'governing at a distance', whereby devolved central state functions are monitored and influenced from afar. Technologies of agency, meanwhile, "seek to enhance or deploy our possibilities of agency" (Ibid). These technologies of agency are used for individuals, groups, or communities that Dean refers to as a 'targeted population', for they are considered to be high risk, or consist of individuals who are considered to be high risk. Indigenous communities and Indigenous subjects certainly fit within this category from the perspective of the neoliberal state. The two kinds of technology of agency, which are referred to as the 'new contractualism', and technologies of citizenship, present useful tools through which we can better understand the state's relation to IBAs.

The first kind of technology of agency is seen as a proliferation of contract, referred to as the 'new contractualism'. Contractualist doctrines, which are to be found in liberal democracies such as Canada, are broadly defined as "those which require social obligation to be mediated by some form of individualised consent. This means that social processes, outcomes and relationships have to be made accountable to individualised inquiry and judgment" (Yeatman, 1998, p. 227). Yeatman (1998) argues that a new contractualism, which she refers to as a 'social' rather than a 'liberal' version of contractualism, is evident through an extension of the status of individualised personhood to everyone, regardless of social background (p. 228). IBAs, as contracts that are signed and tailored towards the negotiated desires of Indigenous communities, take into consideration the collective cultural needs of Indigenous peoples within the workplace, to ensure that some of their cultural traditions can be maintained in the face of a largely Westernized environment. In this sense, the community has signed a contract which then leads to the individuals within the community being 'transformed' into normalized, self-regulating subjects. The contract helps to facilitate this second kind of technology of agency, which are technologies of citizenship.

Technologies of citizenship are described by Cruickshank (1993, 1994) as "the multiple techniques of self-esteem, of empowerment and of consultation and negotiation that are used in activities as diverse as community development, social and environmental impact studies ... the combating of dependency and so on" (as cited in Dean, 1999, p. 168). Furthermore, technologies of agency also include "the instruments of 'voice' and 'representation' by which the claims of user groups can enter into the negotiation over needs" (Yeatman, 1994, p. 110 as cited in Dean 1999, p. 168). Technologies of citizenship are apparent in IBAs, as can be seen through training and educational programs for employment in the labour market, priority contracting given to

Aboriginal businesses, as well as the community ratification votes that sometimes accompany the signing of IBAs. Such technologies regard Indigenous peoples as responsible, free and engaged citizens, being given the chance to accept 'development' within their territory, which is also negotiated in a way that seeks the overall consent of the community members. These technologies facilitate the development of agents who have become responsible for their own risk, within communities that have become responsible for their own self-governance.

Lawrence (2005) examines the presence of training programs that are used in mining projects in Australia and finds that they reflect the same discourses and rationalities used in understandings of neoliberal governmentality. She states that "... we can identify ways in which discourses and problematizations concerning welfare dependency are deployed to rationalise specific practices and strategies of government. For instance, where the state is contriving artificially independent job markets through financial grants to encourage the mining industry to provide employment for Indigenous populations, Indigenous people are being formed into particular kinds of entrepreneurial and competitive subjects" (p. 43). Through neoliberal governmentality, the kinds of governance we see allow the state to relieve itself from the responsibilities of caring directly for its subjects, as these subjects (especially those who are deemed at risk) are transformed into economically rational citizens who can participate independently in the market economy, and thereby assume their own risk. In this particular case in Australia, the state has played an active role in funding certain programs that are tailored towards incorporating Indigenous subjects into the mining workforce, under the guidance of the private sector.

The state, as is visible through its subsidizing of these training programs, has not simply allowed for a 'free', 'self-regulating' market to take its course, but has actively helped to shape

the market in a way that can allow it to ‘govern at a distance’. In this regard, Indigenous subjects can be governed in a way that facilitates their own self-governance, independent of the state’s direct involvement. This literature, which seeks to understand modern forms of governance through the technologies and rationalities of the state, allow us to question the role that IBAs play in the governance of Northern Indigenous peoples. As the case study examines, the state’s relation to IBAs may be reflective of technologies and rationalities of government that are used by the neoliberal state to govern Indigenous peoples. It may be through these technologies and rationalities that relationships become transformed in ways that prioritize the individual over the collective, shaping them into self-governing subjects.

3.7: Conclusion

The use of the theoretical approaches of both Marxist political economy and neo-Foucauldian governmentality to understand neoliberalization has been criticized by Barnett (2005), who sees these two theoretical approaches as implying “different models of the nature of explanatory concepts; different models of causality of determination; different models of social relations and agency; and different normative understandings of political power” (p. 3). Nonetheless, while England and Ward (2007) concede to Barnett’s critique that these approaches are not entirely commensurable, they are adamant about the engagement of these approaches due to the many points of connection that exist between them (p. 14). I have chosen to follow in this path of working with these approaches in “a productive tension” (Ibid), with the hopes of beginning to think about IBAs in novel and more critical ways³⁴. I have also identified

³⁴ For an example of research that successfully uses both governmentality and Marxist approaches, see Li’s (2007) *The Will to Improve: Governmentality, Development, and the Practice of Politics*.

similarities and overlaps between these approaches and their conception of the state, bringing to focus the nature of the state within this analysis.

The goal of this chapter has been to begin to understand IBAs through critical theoretical approaches. This chapter has argued that IBAs can be understood as part of the neoliberal project of increasing capital accumulation that the state has played a decisive role in. The altered relationship between Indigenous peoples and the state through IBAs can be explained by the mutual opposition towards the welfare state, coming both from Indigenous peoples and the neoliberal state. However, it is important to note that the motivations behind the subsequent restructuring of the state are different, and that Indigenous self-determination is, in part, being influenced by the desire of the state to create rational, self-governing subjects, which works well towards the project of the continued accumulation of capital in Northern Canada.

Chapter 4 will look at the case study of the diamond mines within the NWT, homing in on the experiences of the Akaitcho and the TFN to investigate further the link between neoliberal processes and discourses, and the experiences of these communities within the IBA process.

Chapter 4: an Analysis of the Canadian State's Relation to IBAs in the NWT

"It's a private agreement. Any agreements we make here has nothing to do with Canada — it's a private agreement. If it wasn't for a private agreement — if Canada wanted to sit in and be part of it — this mine wouldn't be up there. We'd probably object. Because we have our freedoms and are able to negotiate with the company one on one, we work out arrangements with them, and that's why it became so successful. Canada has a way of interfering, but in this case they decided to step aside" (I-14).

4.1: Introduction

After having provided some theoretical insights in Chapter 3 relating to IBAs and neoliberalization, Chapter 4 relates the case study to the Canadian state by looking at how the state has been largely absent from the IBA process. This chapter draws heavily on the interviews I conducted in and around Yellowknife in late-August and September 2011, as well as from Ottawa and Gatineau in the latter part of 2011. It also draws on the grey literature and some of the academic literature on IBAs generally and — more specifically — those IBAs signed over the diamond mines in the NWT, as well as on my own observations in the minimal 'fieldwork' portion of my research. The case study looks at the IBAs signed over diamond mines in the NWT, with a focus on the experiences of the Akaitcho and the TFN. Based on a concrete understanding of the connections made between the case study and the state, I will be able to consider how these connections can be related to neoliberalization, taking into consideration both Marxist political economy and neo-Foucauldian governmentality approaches.

These are the questions that will be guiding me in this chapter³⁵: 1) What are the consequences of the state's lack of substantive role in the IBA process? 2) What does the state's position in relation to the IBA process indicate to us about its relationship with Indigenous peoples? And 3) Is a framework of neoliberalization appropriate for understanding the state's

³⁵ These questions will not be answered in chronological order. They are overarching questions in my research that the analysis will allude to and attempt to answer throughout the course of the chapter.

relation to IBAs? The case study will be useful in trying to answer all three questions. However, this research has also considered the potential of the federal government addressing IBAs through a policy or legislative framework that would apply throughout Northern Canada. The potential for this will be entertained briefly in this chapter, and due to the scope of this question, it does not pertain specifically to the case study.

4.2: The Status Quo Remains

Steven Kennett, a former researcher with the Canadian Institute of Resources Law (CIRL), was contracted by the Mineral Resources Directorate of DIAND to write a report about the policy issues and options surrounding IBAs. Kennett (1999) interviewed individuals from government, industry, Indigenous organizations, environmental organizations, and business consultants as part of the research required to complete the report. In this report, he highlighted a number of disconcerting issues regarding IBAs — in addition to their positive attributes — and ultimately concluded that there was a consensus among his interviewees that the *status quo* was inadequate in terms of dealing with IBAs from a policy perspective.

Having presented the report in May of 1999, its release came in the aftermath of the IBAs signed over the Ekati diamond mine³⁶, and during the process of negotiating IBAs over the Diavik diamond mine. The status quo was therefore referring to the *ad hoc* approach that the government took towards the IBAs that were negotiated and signed over the BHP diamond mine, and the lack of policy guidelines or regulatory framework that characterized the BHP and the Diavik negotiations. It was simply inadequate — from the perspective of all parties directly and indirectly affected by these agreements (who were interviewed by Kennett) — for government to

³⁶ For further details on the context of the BHP IBAs, refer to Chapter 1.

have such an unclear approach to these agreements, thereby creating uncertainty over expectations from the parties involved. Therefore, it was noted by Kennett (1999) that of the interviewees, “the vast majority felt that DIAND could and should be doing more to [*sic*] in the way of facilitating, structuring or participating directly in the negotiation and implementation of IBAs” (p. 62).

Kennett’s report was sent to the Mineral Resources Directorate of DIAND in 1999, and to this day, the federal government has yet to take any actions to change their approach towards IBAs. They have become *de facto* regulatory requirements in Northern Canada (Sosa & Keenan, 2001), but there is no legislation or policy mandating that they be negotiated or signed outside of settled land claims areas. Kennett commented that after he wrote the DIAND-commissioned report he “... handed it off to them; they thanked me very much. I think there were a few comments from people, but when I stopped tracking this issue a long time ago, there was no indication they would do anything” (personal communication, December 14, 2011). I was under the same assumption, until I found a document that suggests otherwise.

In 2009, the GNWT responded to previous regulatory improvement initiatives and the more recent McCrank report (2008)³⁷ — a report commissioned by Chuck Strahl, former Minister of DIAND, and prepared by Neil McCrank — on the kinds of improvements that could be made to the regulatory environment in the NWT. The report recommended to DIAND that the “federal government should give priority to developing an official policy on the purpose, scope and nature of Impact Benefit Agreements in the North” (McCrack, 2008, p. 21). In the GNWT’s (2009) official response, they noted that “INAC has been in the process of drafting a policy for

³⁷ This report is entitled *Road to Improvement*. Its overall conclusion is that the NWT is in need of a regulatory overhaul due to the abundance of comanagement boards, and the lack of timelines and predictability for the interests of industry.

several years. The status of this project is not known. Additional analysis is required to determine the need for a policy or other solution to this matter, and the GNWT's role in determining any solution" (p. 21). The 'matter' that is being referred to is the uncertainty for proponents with regards to IBAs, which will be referred to in greater detail later in the chapter. There is also a recommendation within this GNWT document that the status of the INAC file on IBAs be determined (p. 21).

In my interviews with GNWT employees, there was no knowledge of any status update of an IBA file being developed by AANDC, over two years after the release of the GNWT report. In addition, in my interviews with AANDC employees, there was no knowledge of the status of this file. One high-end employee at AANDC in Yellowknife was under the impression that the individual who was working on this particular file had retired a few years ago (I-2). It is quite possible that his expertise was not passed on, and/or that his absence from working on the file allowed it to be dismissed as less of a priority than other important issues. My interview with a high-end employee with AANDC at their headquarters in Gatineau sought to determine what the status of the file was. The interviewee was completely unaware of any such file, but promised to find out who was working on it, and what had been developed. However, after waiting a few weeks for a response, and then attempting to reach this interviewee through several e-mails and phone calls — including a couple of detailed voicemail messages — I realized that he was not going to get back to me.

One can come up with many hypotheses as to why the status of this report was not revealed to me, but it is fair to assume that the federal government does not have an interest in making clear its position on the lack of regulatory oversight or policy guidelines for IBAs. It can also be safely assumed that there are likely many reasons why the federal government has not

pursued this issue, which was debated and considered as far back as 1999. Kennett (1999) addresses many of them in his report for DIAND. In reviewing the reasons mentioned by Kennett, I will relate them to the findings of my own research on the case study through the interviews I conducted, and the grey literature that has emerged on IBAs and the case study since Kennett's document was completed in 1999.

4.3: From 1999 to the Present: Thirteen Years of State Silence on the IBA Process

The federal government sees many advantages to maintaining the status quo according to Kennett (1999). First, there is the notion that by refraining from either legislating over the matter through a regulatory framework or issuing a policy with guidelines, the government allows mining companies and Indigenous organizations maximum flexibility in coming towards a mutually beneficial agreement. The major problem with this viewpoint, as Kennett points out, is that the lack of rules governing the negotiations and stipulations of these agreements may work to the benefit of one party over the other.

While the government's *laissez faire* approach seems like it could allow for maximum flexibility, there are concerns that the bargaining power of both parties are inherently unequal. My research findings largely confirm this. One expert on IBAs commented:

Why do local communities need the benefits that flow from IBAs? It's because they're vulnerable and underdeveloped, and need to benefit from the industrial activity. So given that, that seems to me by definition to mean that they can't negotiate on equal terms, because if they were equal to BHP or DeBeers, we wouldn't be talking about this. There'd be no need to talk about this. (I-3)

This concern was reiterated when speaking to Indigenous negotiators to some of these agreements. Leaders from Akaitcho felt that the government should involve themselves in the IBA process purely for this reason. One of them argued that "... in the future when groups negotiate IBAs they should be properly resourced up front. Government should be acting as

some sort of a watchdog to ensure that industry isn't taking advantage of these groups who have limited resources and experience in negotiating such arrangements" (I-4). Even a high-ranking AANDC employee admitted that "[i]n terms of offering help, or being part of the process in order to establish a proper equilibrium, it could very well be that in certain circumstances, we should have a role to play" (I-5).

A second advantage to maintaining the status quo — as identified by Kennett (1999) — is the desire on the part of the state to avoid having to design and implement an IBA policy and regulatory framework that would satisfy all parties involved, and remain relevant and effective into the future (p. 61). As one of my interviews with a high-ranking employee at AANDC confirmed: "When you look at building a policy for establishing what the Government of Canada's position would be on IBAs ... the differences in regimes and the complexity of all of this makes it a very daunting task" (I-5). Indeed, there are different regulatory regimes in different regions of the North, and this complicates the project of coming up with an IBA policy or regulatory framework for Northern Canada more generally. Even within the NWT itself, the complex web of regulatory requirements was summed up by a territorial government employee:

When it comes time to review projects here it's a real maze cause you've got the Mackenzie Valley Resource Management Act and out of that you have local boards that are borne out of the resource management act, you have territorial boards that are borne out of the resource management act, and you have all these boards that all more or less interact with each other, and you have to take into account the existence of the various Aboriginal organizations (I-7).

While this point is noteworthy, there are also wider complaints regarding the regulatory messiness of the North that for the interests of space this thesis will not explore in-depth (see *supra* 36 of this chapter).

Kennett (1999) points out a third advantage: if the federal government were to establish policy guidelines and/or regulations concerning the negotiation of, and the stipulations contained

within IBAs, this could possibly have the adverse effect of restricting the potential for these agreements to evolve in their own direction, which could hypothetically move in a direction that government would not necessarily predict (p. 61). So, an absence of such government action could allow for further experimentation with what works and what does not work as Indigenous communities continue to sign IBAs over development projects in their traditional territory. With regards to the case study, it was stated by two of the three interviewees from Akaithcho, as well as a consultant for the Akaithcho, that the first IBA was based on a coerced consent, not providing the kind of agreement that satisfied the leadership. However, each successive IBA seemed to allow for the negotiation of a more favourable agreement (I-4, I-6). The Tlicho interviewees pointed out the same trend, and both Indigenous groups concurred that having the land claims provision strengthened the bargaining power of the Tlicho considerably in relation to their prior agreements, and in relation to the First Nations of Akaithcho. It could be argued that the government's inaction on this issue may have reflected positively on the improved bargaining position of Indigenous groups over time³⁸, and the consequent potential for more creative measures within these agreements. Unfortunately, the confidentiality of these agreements makes it difficult to test such a hypothesis.

The final reason as to why the state would see the status quo as advantageous — as identified by Kennett (1999) — is that the issue of IBAs could be seen as transitory; as land claims agreements are settled, they would establish the regulatory framework to deal with these issues (p. 162). In an interview with a high ranking employee with AANDC in Yellowknife, he reiterated this point:

³⁸ Prno et al. (2010) note that there are rising expectations from the Indigenous community with each subsequent IBA signed, as new forms of benefits are anticipated. With the TFN, the IBA signed with DeBeers in 2006 over the Snap Lake diamond mine focused largely on 'cultural benefits', which build on the economic benefits accrued from the previous two IBAs signed (p. 8).

I mean, until BHP, there were no major developments in the NWT. People's energies, including the federal government, were focused on negotiating land claims and dealing with other issues. And those claims and those other issues would set the framework for the future. So I think ... people weren't going to spend their energies on that type of policy [IBA policy] when there wasn't a lot of development and they were negotiating land claims that would probably answer some of those issues. As land claims negotiations have taken longer — in some cases longer than the negotiating parties originally thought — and as development has begun to occur, at the same time throughout the world, particularly Canada, the idea of IBAs had taken hold, were being used by industry, were being encouraged by government in various projects. (I-2)

In relation to the latter part of that quote that comments on the lengthy duration of land claims negotiations, Kennett (1999) acknowledges the slow pace of some of these negotiations in questioning the validity of this governmental reasoning. Since Kennett's report, the TFN signed a land claims and self-government agreement, but the Akaitcho, the Deh Cho and the NWT Métis Nation have yet to sign a CLCA after a long period of negotiations. Therefore, this governmental reasoning is insufficient in addressing the regulatory vacuum for this particular issue.

Furthermore, Kennett notes that while the Nunavut Land Claims Agreement (NLCA) provides some general guidelines for IBA negotiations and basic provisions, the Inuit Impact and Benefit Agreement (IIBA) requirement is by no means a foolproof solution to all of the issues that arise from benefits agreements (p. 9). The Kitikmeot Inuit Association put out a report on IIBAs, in which they state that "there is still considerable latitude for interpreting the degree and magnitude of elements which should be in an agreement. It is this latitude that has created further concerns about what is expected of the mining industry in terms of IIBA provisions, their roles and responsibilities in ensuring the agreement achieves its objectives, and the relative roles and responsibilities of other parties to these agreements" (Christenson, 1999, p. 2). It is also worth noting that the bilateral, confidential nature of IBAs, whether they are signed under land claims provisions or not, is still problematic. There is, however, ministerial oversight of IIBAs, which

limits the entirely bilateral, confidential nature of IBAs more generally. But without full public disclosure (aside from, perhaps, certain proprietary and cultural details), it is arguable to what extent the eyes of the Minister of Aboriginal Affairs can relieve the tensions associated with these confidentiality clauses.

4.4: Indigenous Position on the State's Involvement

An advantage to maintaining the status quo that Kennett does not mention, in part due to his own research findings, is the possibility that Indigenous groups would prefer that the state not play any formal role in the IBA process. The state, by interfering in a bilateral process, could potentially worsen its standing in the eyes of Indigenous groups. His research notes that all of his participants felt that the status quo was inadequate, which would include the Indigenous respondents whom he interviewed. While the status quo may be seen by many as inadequate, to what degree would Indigenous groups support a greater role for the state? On this particular question, my interviews, which have been conducted twelve years after the release of Kennett's report, and hence after the signing of two more sets of IBAs over Northern diamond mines, express the sometimes stark differences of opinion on this question from the various interviewees.

A consultant for the Akaitcho was highly skeptical of there being support from Indigenous groups for any degree of state involvement in the IBA process. He said very confidently — in response to a question asking if Indigenous groups would be opposed to the government playing any role in the IBA process, that: “That’s 100%, no question. I think certainly ones I work with — ‘get away from here.’ And the work I do in BC, where IBAs are negotiated with the provincial Crown and trickled down to the First Nation, the First Nations are like ‘screw you’” (I-1). He went on to argue that Indigenous groups see IBAs as a slap in the face

to government, in that Indigenous groups are now seen as powerful enough by industry to be negotiated with directly. This symbolizes a degree of autonomy and power that is separate from government — from the Indigenous group’s perspective — especially where the Crown still claims to own the land, as is the case under the unsettled claims areas, and in the majority of the settled claims areas.³⁹

A territorial government employee was also very skeptical of Indigenous groups supporting any kind of formal state role in the IBA process. This, he argues, is because “the only way you can involve the federal government, if you feel the IBAs are not resulting in what they should be resulting, then it would be to make sure the federal government is one of those parties involved in signing and negotiating those IBAs. It’s fully involved in the process. I can guarantee you that 99.9999% of First Nations would reject that because they’d see it as paternalistic” (I-7). An involvement of the state in a process that is between a proponent and an Indigenous group may very well be seen as paternalistic; especially when one considers the ongoing colonial nature of the Canadian state in relation to Indigenous peoples (Alfred, 1999; Coulthard, 2007; Hall, 2012; Irlbacher-Fox, 2009; Tomiak, 2011). While the involvement of the state in the negotiating process could be seen as paternalistic in the sense that the state may consider Indigenous groups to be incapable of pursuing their own best interests, having the state regulate the process and/or provide further support for Indigenous organizations can also be seen as a way to ensure more balance and fairness in the process (Fidler & Hitch, 2007; Keeping, 1997; Kennett 1999; O’Reilly & Eacott 1999; Caine & Krogman, 2010).

In addition to having the state regulate IBAs, having the state serve as an intermediary in the process does not necessarily require the government to be at the negotiating table and does

³⁹ Since modern treaties are based on the *partition model*, the large majority of Indigenous traditional territory ends up under Crown ownership after the signing of a CLCA.

not require it to be a signatory to an IBA⁴⁰. The state could do far more in the way of ensuring that Indigenous organizations have the sufficient funding in place in order to participate effectively in the negotiations. O'Reilly and Eacott (1998) point out that in the negotiations for the Ekati IBA between BHP and Lutselk'e, the federal government only provided Lutselk'e with \$7,500. This was insufficient funds for Lutselk'e to participate properly in the negotiations, as they had to hire people who could help them navigate the process, as well as those who could translate English into Chipewyan.⁴¹ A DIAND representative gave this explanation: if the government offered to provide further funding, they would have been accused of paternalism. Others, however, have interpreted this as an excuse to opt out of a process that involves spending money — something that the state is attempting to avoid in many areas of governance.

It was the opinion of a few of the Indigenous negotiators to these agreements who were interviewed — one from the BHP negotiations and another from the Diavik negotiations — that the state should be playing a stronger role in the IBA process. As an Indigenous negotiator in the BHP negotiations pointed out:

Government shouldn't just wash their hands. They have a fiduciary obligation which clearly states that when Aboriginal peoples are in a situation that requires certain resources, to ensure that there's a fair treatment of their citizens in their own territory, and that they're there to ensure that things are done properly and that industry isn't just ramrodding whatever they want through with Aboriginal people in their own homeland. So it's a concern. (I-4)

It has been frequently argued that the Ekati IBA, which was mandated by the state — but on an ad hoc basis — was done in an irresponsible manner on the part of the state (Caine & Krogman,

⁴⁰ As the quote that begins this chapter indicates, this member of YKDFN does not want the government to be at the negotiating table. He points out that having them at the table would have meant that an agreement would never have been reached, as his community would not have accepted it.

⁴¹ For the Diavik diamond mine, Lutselk'e signed an IBA with Rio Tinto, in which the federal government provided them with \$20,000 for the negotiations (Missens et al., 2006, p. 299). It is not clear if this amount was sufficient for Lutselk'e to negotiate on more balanced terms with the proponent, but it is certainly a marked increase from \$7,500 in government funding. I was unable to interview anyone from Lutselk'e, so this issue remains unclear.

2010; Keeping, 1997; Kennett 1999; O'Reilly & Eacott 1999; Sosa & Keenan, 2001). To what extent did the IBAs that followed improve, and does the improvement in the Indigenous bargaining position or the benefits they have been given relieve the state from playing any formal role; especially in terms of regulatory oversight?

An Indigenous leader from YKDFN who played a significant part in the negotiations process for the Diavik diamond mine was very satisfied with the deal that they negotiated (I-6). He describes the deal as “much larger than the first one. We did a really big deal and I was pleased with it.... But ... to me, IBA's a quick fix. It's not going to solve our problems. I think it's going to make more problems for us in the future” (I-6). This, he argued, is because the money that they are receiving from IBAs is being spent now, so when the mine shuts down in the next few decades, they will be left in a vulnerable position of once again depending on the state. When comparing the experiences of these two leaders within Akaitcho to those whom I interviewed in the TFN, the different responses are quite revealing about the contexts within which these neighbouring treaty groups find themselves in relation to the state. Again, the latter has a land claims and self-government agreement, and the former has neither.

Of the two members of the TFN who took part in the IBA negotiating process who I interviewed, neither seemed interested in engaging much in the subject of further state involvement in the IBA process. The questions were posed, but for the most part, the conversations were led in different directions. One of the interviewees was far more interested in talking about the devolution Agreement in Principle (AIP) signed between the federal government, the GNWT and two of the eight Indigenous groups in the NWT — being the Inuvialuit and the Métis (I-8). He was particularly frustrated by the lack of proper consultation with all of the Indigenous groups in the NWT prior to the signing of an AIP, which failed to

include the majority of the Indigenous stakeholders in the NWT. This member of TFN did have a few things to say about state involvement in the IBA process, though. It is worth noting that when bringing up the issue of the state, his focus was really cemented on the most recent injustices coming out of the state (the GNWT and the federal government over devolution), which may have had an influence on his outlook towards state involvement in the IBA process.

He was, on the whole, very encouraged by the presence of IBAs, and found them to be a very positive reality. When presented with criticisms of the process, he responded:

... if you want to look at it in terms of putting a proper perspective: was it a good thing or a bad thing? I say it was a good thing. It's better to be employed and to access wealth than to live in poverty. Poverty has never contributed to a quality of life for Aboriginal people. And some people say: 'well, they have too much wealth. They don't know how to manage money; they get a high rate of alcohol and drugs because of these high wages.' Well I say: 'what the hell do you people want?' (I-8)

It was not as if the interviewee was skirting the issue of governmental regulations or further involvement within the IBA process, but his responses inferred that having government involved any more than it already is would be an unfavourable option that is not worth seriously considering. He commented that "...there's too much government in the lives of everybody, and the way I look at it, I don't like too much government in the lives of Aboriginal people. You've got to look at it that way, too. We want our own independence. We don't want to be told this and that all the time" (I-8). His responses indicate a deep mistrust of government along with a strong desire to be self-reliant and independent of government.

The second interview conducted with a leader of the TFN also did not produce the kinds of answers that directly addressed questions regarding an increased role for the state in the IBA process. The interview did, however, produce some interesting criticisms of the state's position in relation to IBAs thus far:

Well there's IBAs that are happening across the country now. There are a lot more now than there were before and they (the government) encourage it — there's no doubt that they encourage it because it lessens the pressures on their social purse strings.... If you totally just go on the social purse, which is what all governments look at — it's to ensure you have the basic requirements of survival — but IBAs are a little bit different because it becomes a benefit. Governments will try to claw back on those benefits any time, every chance they get. They continue to do that with us every year on our IBAs. So in some ways it's a plus for governments, but they need to re-look at how they do the clawbacks. It's not worth the effort. I think they spend more of the social money on clawbacks where the return to them is far less than the effort they put in. So those kinds of things need to be re-adjusted. They haven't been looked at. I mean, we lobby for them all the time but nobody wants to do that; change the social order and how they do things. (I-12)

This criticism touches on a potential benefit of IBAs for the state, which is the financial relief that comes out of the IBA payments to Indigenous organizations and their respective membership. These clawbacks are not surprising if one considers the neoliberal climate within which IBAs have taken hold.

4.5: Neoliberalization and IBAs in the NWT

Following the signing of IBAs with BHP over Ekati, the GNWT began clawing back on income support payments to welfare recipients from communities that were signatories to these agreements (Northern News Service, 2002). As pressure from these communities increased, the GNWT finally decided to investigate the issue, and to eventually “fix the problem” (Northern News Service, 2004). Former Minister of Education, Culture and Employment Jake Ootes argued that the clawbacks were justified, since the confidential nature of IBAs made it difficult for the government to determine if IBA payments were in fact compensation for the use of Indigenous traditional territory. The government deemed these payments to be “unearned income”, which falls into the same category as lottery earnings. Therefore, an IBA payment of several hundred dollars a month would mean deductions of the same quantity coming off of the income support payments to Indigenous citizens.

However, it was not until September 1, 2007 — after four years of “consultation” — that the GNWT implemented a policy that would enable NWT residents who are on income support to keep \$1,200 annually in gifts and IBA payments (CBC News North, 2007). While this may still only be a fraction of what they are receiving annually from their band leadership⁴² (which they administer through funds from the proponent negotiated through the IBA on a monthly basis), it is still considered to be an improvement for those individuals who are trying to scrape by with the little income that they have. In an informal conversation with an employee of the TFN, he told me that the Tlicho were the first Indigenous community to take money from IBAs and put it towards post-secondary education, and that per capita, the TFN are doing this more than any other Indigenous group in the NWT (personal communication, September 6, 2011). There has been a significant amount of disapproval with this use of funds amongst many members of the TFN, arguing that the money should go directly to individuals — as it does in other communities in the NWT — such as communities within Akaitcho. The concern from the leadership, though, is that the GNWT will continue to enforce clawbacks. Even though there is a change in policy that restricts the amount of clawbacks, clawbacks are still being pursued by a cash-stricken government whose services cannot keep up with the pace of Northern resource extraction (Galbraith, 2005, p. 82).

Interestingly, the amount of money that the GNWT was saving in its clawbacks for IBA payments to income support recipients was very minimal. According to former minister Ootes, it was less than “millions” (Northern News Service, 2004). Such a position taken by the GNWT, which stayed in place from the initial payments of the Ekati diamond mine until nearly a decade later (Fletcher, 2003), was saving them insignificant amounts of money in the grand scheme of things. It is important to question the motives behind such actions, when they ultimately do not

⁴² This is all speculation, since the amounts given are confidential.

save the government much money. I would argue that through the close monitoring and auditing of individual earnings, the neoliberal state is 'governing at a distance', putting pressure on individuals to become less reliant on government and turn to the market for solutions that would enable them to govern themselves.

Meanwhile, distrust over the government's intentions continued to grow, and those who are of the lowest rung of society suffered as the government pursued a drawn-out consultative process to address the issue of clawbacks. Former Treaty 11 Executive Director Violet Camsell-Blondin said that "industry is essentially subsidizing government" when government takes away vital payments to families living in poverty. She added that "[t]he government has no business taking the money we negotiate" (Fletcher, 2003). MLAs argued that IBA payments should be treated as treaty payments, as they are seen as a form of compensation for the use of Dene land. Within this context, it would appear that the proponent has replaced the government as the body dealing with Indigenous groups by negotiating over the use of their traditional territory, and offering financial payouts in exchange for the use of traditional territory.

This reality can be explained through a framework of neoliberalization, as well. The state apparatus is still operating, but the actions of the state signal a desire to download responsibilities onto third parties. The outcomes of this allow for a minimized form of 'government', where the private sector assumes some of the roles and duties that have generally fallen within the realm of responsibilities of the state, but are now found increasingly within the unregulated market sphere. It would appear that with the example of the GNWT clawbacks, which started "after the first diamond was taken out of the ground," (Lafferty as quoted in Fletcher, 2003) there was an immediate, reflexive response from the territorial government to take advantage of the opportunity to save money which was presented through these private agreements. While I have

pointed out that the saving accrued from these clawbacks are minimal, it is important to question the ideological importance of these actions on the part of the state. It would appear that such actions are akin to punitive measures that discipline Indigenous communities and subjects towards a lack of dependence on the state apparatus. The issue of hauling back public funds in response to the signing of modern treaties and IBAs is an issue that has yet to be resolved in Canada, where Indigenous peoples across the country are pressing for their rights to be recognized.

In the case of education, the neoliberal shift from *government* to *governance* is apparent, as the government's exclusive responsibilities of providing education has been shifting (Taylor and Friedel, 2011, p. 819). The private sector has been taking on a significant share of these responsibilities, with the state allowing for a form of 'market governance' (Larner, 2000, p.13) in the realm of Indigenous affairs. Former AANDC Minister Chuck Strahl announced 'A New Framework for Aboriginal Economic Development', in which "the private sector will drive investment, lending, joint ventures and major projects with Aboriginal Canadians.... An approach that is responsive to economic conditions, targeted and emerging opportunities and one that leverages partnerships with Indigenous peoples to achieve sustainable long-term economic development" (Strahl, 2009, as quoted in Taylor and Friedel, 2009, p. 818). The words of the minister reflect upon the reality of IBAs as fitting into a broader state project of enabling the private sector to work in conjunction with Indigenous groups, with the aim of achieving the self-sufficiency that Indigenous groups desire. In turn, this partially relieves the state in their provision of welfare services for these communities (Slowey, 2008, p. 21), and is an ideologically powerful tool used towards shaping Indigenous subjects and communities.

Taylor and Friedel (2011) — in their article on private partnerships with Indigenous communities — highlight the dangers associated with such partnerships in achieving just outcomes for these communities. Their focus is on northern Alberta, which also falls within Treaty 8 territory. In their study on private partnerships with First Nations for business in the bituminous sands, they note the significant role that corporations are playing in determining and providing the educational needs of Indigenous youth. This is problematic as they point out, since “corporations seek a return on their investments in education and training, and therefore tend to be strategic about where they allocate funds” (p.831). While these programs are beneficial in the short term, “they raise concerns that career choices are being restricted for youth, and that broader community interests in holistic education in support of healthy, sustainable communities are sidelined” (p. 831). The education provided to these youth is designed to specifically meet the needs of these corporations, thereby blurring the divide between the ‘public’ and ‘private’.

Similarly — in the NWT — the Akaitcho and the TFN are negotiating directly with the private sector over educational and training benefits. The proponent is providing training and educational benefits to these communities⁴³ without the state necessarily knowing what these benefits are because of the confidential nature of these agreements. Caine and Krogman (2010) argue that this is an abrogation of the federal government’s fiduciary obligation to Indigenous peoples, stating that this ensures that government does not know “what is needed, or agreed to, within IBAs” (p. 88). This concern was presented to members of the territorial government in my interviews. One of them argued that since proponents have also signed Socio-Economic Agreements (SEAs) with the GNWT and the Indigenous organizations — which contain

⁴³ It is important to note, however, that while the state is not privy to the details of some of these benefits, the federal government is still in the business of heavily subsidizing industry in the North in the provisioning of some of these benefits. So while the private sector is providing the skills training, for example, the state is subsidizing these programs. This can be seen through the Human Resources and Skills Development agreement, entitled “Canada Northwest Territories Labour Development” (Government of Canada).

provisions relating to training and education — the proponent and the Indigenous organizations are not going to negotiate an agreement with the GNWT that overlaps with the provisions of the IBA (I-9). Therefore, the GNWT purportedly has knowledge of the kinds of education that are provided, and these issues are addressed as well in an agreement that they are a signatory to. The territorial government employee also argued that while there are criticisms relating to whether a proponent should be providing such provisions as opposed to government, it is very common for companies to train their employees, and this responsibility should ultimately fall on the proponent (I-9).

While these points may be seen as legitimate, it is more questionable to assume that the proponent should be responsible for providing education to achieve basic literacy, which, as Keeping (1997) has argued, should be the responsibility of government (p. 205). The issue here is not only that these programs are confidential due to the confidential nature of IBAs, since some of these educational programs are addressed explicitly in the SEAs negotiated between the proponent, Indigenous organizations and the GNWT for the Ekati, Diavik and Snap Lake diamond mines.⁴⁴ The issue then becomes more about the fact that industry is providing something as seemingly essential as basic literacy to Indigenous peoples. This is not the only type of provision that industry is assuming responsibility for. Kennett (1999) notes that:

The provision of employee and family counselling, money management training, alcohol substance abuse programs, daycare for working mothers, and other programs to assist aboriginal people to integrate into an industrial workforce are widely viewed as essential to the success of IBAs. While these issues are addressed in some IBAs and through a variety of other programs, uncertainty remains regarding the respective roles and responsibilities of government, mining companies and aboriginal organizations in providing the 'social infrastructure' for economic development (p. 36).

⁴⁴ Socio-economic Agreements (SEAs), while common for large-scale resource extraction projects in the NWT, are not commonly entered into outside of the GNWT.

The role that mining companies have recently played in the North has altered the ways in which the Indigenous-state relationship has been commonly perceived — especially under a Keynesian system of state-controlled welfare provisions. Corporations are at times subsidizing or replacing the traditional duties of the state, while the state has made way for corporations to consult with and negotiate with Indigenous communities over benefits that come out of economic development within their traditional territory.

A report done on the benefits accrued to Aboriginal communities in the NWT through IBAs by the NWT and Nunavut Chamber of Mines (2004) stated that in addition to the literacy programs provided by BHP for the Ekati mine, “DeBeers has ... on-site literacy programs for Snap Lake mine employees...” and has committed to “...work with the NWT and federal governments to encourage continued literacy programs” (p.16). The federal government is also involved in overseeing this, which should not be surprising, considering the federal government’s continued control over the Northern territories, and presumed interest in minimizing their spending. By downloading such essential responsibilities onto industry, we are seeing a privatization of social services, indicating a neoliberalization of governmental services and Indigenous-state relations in the North.

The territorial government has not withdrawn itself from the responsibility of ensuring that education and training is provided, though. For each of the diamond mines in the NWT, SEAs have been signed between the GNWT, the mining proponent, and the Indigenous communities which the state recognized as being impacted by the mine. These agreements, as argued by Galbraith (2005), establish agencies to monitor potential impacts and benefits from the diamond mines, since the GNWT is not in a financial position where it can provide its own follow-up programs (p. 82). The Deputy Premier of the NWT Jim Antoine put it this way: “As a

government, we are going broke, which is the result of the mining and oil and gas development ... [,] the increased fiscal pressures on this government and the increased demand for our services as government” (LANWT, 2003, as cited in Galbraith, 2005, p. 82). SEAs stipulate the responsibilities of the parties involved in providing benefits for the NWT as a territory — as opposed to exclusively Indigenous peoples — which IBAs address. The NWT, as a public government, facilitates the benefits accrued to its population by playing the role of providing partial funding in order to realize these benefits, and collaborates with industry to ensure that the programs are working effectively. SEAs can serve as a technology of performance for government, as it can aid in monitoring and managing the benefits achieved through these agreements.

Another means of ‘governing at a distance’ through technologies of government is with the Independent Monitoring Agency (IMA) negotiated through an Environmental Agreement, which is paid for largely by the proponent (with partial funding from the state) to monitor the environmental performance of the mining operation. It is difficult to presume ‘independence’ if the funding is coming from both the proponent and the state rather than from Indigenous organizations, but the presence of these agencies is still considered to be a welcome addition to Northern resource extraction. There is an agency in place for each of the diamond mines, and while none of their recommendations are binding on the proponent, they are made publically available, and hence, can be used by civil society actors to pressure the proponent into acting responsibly (I-16). A leader within the YKDFN reflected on the importance of the IMA, shedding light as well on the political implications involved:

They’re (the proponent) the bad guys on the block. But we don’t have the time and resources to be monitoring them.... Somebody’s got to watch them. The federal government don’t care. Maybe they go from time to time. But they’re more interested in picking up their royalty cheques and their tax cheques, regardless of what happens. They

don't care. There used to be a lot of disasters here. All they wanted was the dollar at the end of the day. So, who's going to be more accountable of our land? We. We have to do it. We have to make them accountable (I- 14).

Once again, the negative history of the state's relationship with Indigenous peoples of the North allows the state to take a more distant approach to governance. The IMA enables local self-regulation and hence, an independent need from sufficient regulatory oversight. Bielawski (2003) also notes the lack of quality governmental monitoring of the mine sites, where AANDC has been too short-staffed to inspect for compliance with the regulations that *are* in place (p.244).

While it was the federal government who mandated that "significant progress" be made on IBA negotiations as a condition for issuing the water license for the Ekati diamond mine, the results of IBAs signed over these mines show a GNWT that appears to be benefiting directly from the private provisions negotiated between these parties. But it is important to remember that the federal government is legally responsible not only for ensuring the interests of Indigenous peoples are looked after, but for the entire NWT, as well. Since the federal government still owns Crown (public) lands in the NWT, the resource revenues from these lands are going to them, as opposed to the GNWT. So the presence of IBAs provides a relief for the GNWT, but this means that the federal government, which is responsible for providing the transfer payments to the GNWT to operate its social programs, is being relieved of some of its obligations, too. There are other benefits for the federal government coming out of IBAs in Northern Canada through processes of neoliberalization, largely with the relief of attending to certain legal duties.

4.6: The Crown and its Responsibilities to Canada's Indigenous Peoples

The 'special relationship' of the federal Crown to Indigenous peoples in Canada is enshrined in the constitution. Section 35 of the Charter of Rights and Freedoms recognizes and affirms "existing Aboriginal and treaty rights" of the Indigenous peoples of Canada (Constitution

of Canada). This ‘special relationship’ — as has been the term more recently used by the state to describe the *sui generis* obligations that the Crown has to Indigenous peoples — has historically been referred to as a ‘fiduciary obligation’, or the ‘fiduciary relationship’ (I-2). It is debatable to what extent this relationship is considered to be — legally speaking — that of a fiduciary and its trust. In *R v. Sparrow* (1990), the SCC determined that the “general guiding principle” for section 35 is that “the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship” (Hurley, 2002, p. 3). However, in the SCC’s *Wewaykum* (2002) decision, the Crown is shown to not be an ordinary fiduciary, as it has to consider other parties’ interests under certain circumstances (Ibid, p. 8).

The *Delgamuukw* (1997) decision found that the Crown’s obligation to Canada’s Indigenous peoples can be compromised in situations where it interferes with the greater economic, social or environmental interests of the country. Chief Justice Lamer decided that:

The development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. (par. 165)

This allows the federal or provincial Crown to skirt its obligations to Indigenous peoples with regards to large-scale resource extraction projects, so long as national economic concerns are seen as legitimately overriding those obligations.

However, it has been decided in the Canadian courts that in the event of a potential infringement of Aboriginal title, the Crown has the duty to consult, and if appropriate, to

accommodate for the infringement of these rights.⁴⁵ The duty to consult and accommodate Indigenous peoples rests exclusively with the Crown; the duty cannot be delegated under any circumstances (Gibson & O’Faircheallaigh, 2010, p. 30). Therefore, the Crown cannot, legally speaking, be relieved of its duty to ensure that Indigenous peoples are being meaningfully consulted — and when necessary, adequately accommodated — as established through a succession of SCC cases⁴⁶, and must therefore continue to fulfill its fiduciary responsibilities. According to a high-ranking AANDC employee, the extent to which the duty to consult and accommodate needs to be implemented has yet to be clarified by the federal government, and the courts are only clarifying the matter as it handles cases brought forth by Indigenous organizations (I-2).

The situation with both the ‘fiduciary relationship’ and the ‘duty to consult and accommodate’ is hence still undefined and ambiguous to a large degree. While it is clear that the federal Crown has both a fiduciary obligation to look after the interests of Canada’s Indigenous peoples — and can accomplish this through the duty to consult and the duty accommodate infringement of established or potential Aboriginal title — the conduct with which the state is dealing with IBAs points to the continued ambiguity of these responsibilities, and the Crown’s (both federal and provincial) favourable, yet potentially risky, position in relation to these ambiguities.

⁴⁵ The Crown’s duty to consult applies both in situations where there is no known treaty right (*Haida Nation v. British Columbia*, 2004), and where treaty rights exist (*Mikisew Cree First Nation v. Canada*, 2005). The Crown must substantially address the concerns of the Aboriginal group, as set out in *Haida*. The Crown’s duty to accommodate arises when there is the strong potential to infringe on section 35 rights, and requires the Crown to find a compromise between diverging interests. The case law is less developed in the area of accommodation as compared to consultation, but both duties are necessitated by a substantiated claim to section 35 rights (Gibson & O’Faircheallaigh, 2010, pp. 30-31).

⁴⁶ For a thorough discussion of these cases, see Cobb’s (2010) Major Research Paper, entitled *Meaningful Consultation: Nation-to-Nation or Domination and Assimilation?*

4.7: Delegation of the Duty to Consult and Accommodate through IBAs

The duty to consult and accommodate rests solely with the Crown, but from a legal standpoint, the Crown can delegate procedural aspects — in the process of consulting and accommodating Aboriginal peoples — to third parties (Gibson & O’Faircheallaigh, 2010, p. 30). Third parties are under no legal obligation to consult with and accommodate Aboriginal peoples, as that obligation is assumed entirely by the Crown. What frequently happens, though, is the Crown’s duties have been relieved through IBAs, as they can assume that the Indigenous group has been both consulted and accommodated in relation to a resource extraction project that interferes with their Aboriginal title (I-10). As a consultant with the Akaitcho put it, the Crown’s approach is:

... instead of being active, being more passive but watching and monitoring. I think they hold their nose over what IBAs are, but also part of them likes the fact that they’re being done because it sort of gets them off the hook for taking care of their consultation and accommodation responsibilities. The company’s going to do it and get the First Nation to sign; then really the Crown can sort of wash its hands and say ‘consultation and accommodation accomplished. Problem solved. We don’t have to get involved. Someone else has solved it for us.’ (I-1)

The financial costs of meaningfully consulting Indigenous groups for every potential infringement of Aboriginal rights and title would, in theory, be extremely cumbersome for the state. Such a financial burden — that if put into practice would effectively cripple the state — appears to be circumvented in part through the presence of IBAs in Northern Canada, as this interviewee further acknowledged (I-1).

The Crown and the courts have justified the delegation of procedural aspects of consultation and accommodation to the proponent through the recognition that with development projects, the proponent is in the most appropriate position to handle many of these issues (I-10). It is the proponent who is familiar with the ins-and-outs of the project, such as its construction

and operation, as well as the associated impacts. Rather than involving itself concretely in the process, the Crown has allowed the proponent to deal substantively with the actual consultation and accommodation of Indigenous peoples in the circumstances of resource extraction projects. While the overall responsibility still rests solely with the Crown, the responsibility in practice appears to mean that the Crown has to be in a position to ensure that meaningful consultation and accommodation has occurred. They can therefore look at the consultation and accommodation that has been done by the proponent, take the sum of these practices, and conclude that the duty has sufficiently been taken care of (I-1; I-10). According to a territorial government employee, if the Crown were to be challenged by the courts on the issue of consultation and accommodation — with the allegation that an Indigenous group was not meaningfully consulted and accommodated upon infringement of Aboriginal rights and title — it could point to the IBA and argue that the Indigenous group has consented to the project, and has hence been properly consulted and accommodated through the signing of an IBA (I-7).

However, since these agreements are generally confidential, it would likely be difficult for the Crown to argue convincingly that the Indigenous group had been meaningfully consulted and accommodated. A high-ranking employee with AANDC remarked that:

If we want this to be an effective part of our duty — the Crown's duty to consult — then we need to know what's in them; we need to be assured. So, it's perhaps certain subject matters dealing with mitigating impacts should be made open and not confidential, but perhaps other issues — proprietary issues, commercial issues — could be allowed to be confidential because they're not rights-based from government's view (I-2).

The hypothetical example cited by the territorial government employee has not come to fruition, though, and this is likely because of the very nature of IBAs themselves.

It is common within IBAs to have what is sometimes referred to as a *non-compliance provision* (Caine & Krogman, 2010, p. 86), wherein a community has forfeited its rights to pursue any actions that could delay a development in light of changes to the project (Keeping,

1999; Kennett, 1999; O'Reilly & Eacott, 1998; Sosa & Keenan, 2001). The IBA is pursued by industry in large measure to ensure that there will be no interruptions to the project; that there is certainty that the community, or at least its leadership, has consented to the development and will allow it to go forward without any hindrances (I-10). These provisions — contained within a legally-binding IBA — serve as what Caine and Krogman (2010) refer to as a “gag order”, where Indigenous groups cannot voice concerns in light of new information as the project proceeds (p. 86). There are IBAs that allow for re-negotiation of certain elements of the agreements after specific intervals (but do not include the re-negotiation of financial provisions), but because of the confidential nature of these agreements, it is difficult to ascertain how common these are, and what the nature is of these re-negotiation terms. Ultimately, as argued by an expert on IBAs, any kind of provision that limits an Indigenous group from speaking out against a project is blatantly undemocratic (I-11). These non-compliance provisions — or any other provision contained within IBAs that restrict the right to protest for individuals within these Indigenous groups — are very problematic. In relation to the duty to consult and accommodate, if Indigenous leaders sign agreements that restrict their membership from voicing their concerns, then it limits their ability to seek legal recourse through the courts, and hence the state can continue to use IBAs as a way of effectively downloading Crown responsibilities onto third parties in the area of consultation and accommodation.

While chapter 2 presented IBAs as a means of creating certainty over a resource extraction project for the interests of the continued accumulation of capital, the ambiguity surrounding the Crown's duty to consult and accommodate creates another kind of uncertainty. Non-compliance provisions, and similar provisions that muzzle Indigenous communities and their members from speaking out publically against a development, may not always be

negotiated, as IBAs do not follow any guidelines that require that these provisions be included. An expert and consultant on IBAs noted that proponents try and sneak in whatever provisions they can that help to create the certainty and risk-averse atmosphere that the company is seeking (I-11). However, with a knowledgeable and effective negotiating team representing an Indigenous community, it is reasonable to assume that these provisions would not always be included. A lawyer representing Indigenous groups has admitted that she would never agree to such a provision, and would therefore bargain harder for an agreement that did not restrict the rights of her clients (I-10). What this means is that if a project with an IBA attached to it becomes a concern to a community, and there is no clause within the IBA preventing individuals from speaking publically against it, the issue could possibly end up in the courts, challenging the Crown for failing to provide adequate consultation and accommodation.

Isaac and Knox (2004) claim that with the absence of the Crown in the consultation and accommodation process, “[e]ven the fairest negotiated agreement relating to an infringement of s.35 (1) made without benefit of Crown consultation, procedurally fair and substantively correct, may be set aside by the Courts” (p. 13). Uncertainty therefore remains over this issue, and it may reach the courts at some point in the future, according to a high-ranking AANDC employee (I-2). A leader within YKDFN told me that in hindsight, he should have taken the federal government to court over the issue of resource extraction within his traditional territory instead of signing an IBA. He stated that: “If I were to do it all over again, I don’t think I would sign it — like I told you, I don’t think I would sign anything. I would take the government to court ... and I would stop everything” (I-6). There was pressure on him from members in his community not to ‘rock the boat’, and to therefore go ahead with at least obtaining some benefits from a project that was projected to be approved by the state — with or without their final consent. This signals an

obvious failure of the Crown's duty to consult and accommodate Aboriginal peoples based on infringement of Aboriginal rights and title.

Industry, meanwhile, wants to ensure that the government's failure to involve itself in the process is accounted for — from a legal standpoint — so that their project is not faced with potential obstacles from the Indigenous group(s). Industry is very aware of what is going on with the Crown's delegation of the procedural aspects of these duties. In an interview with a lawyer who has negotiated IBAs, she stated that the proponent, if they are savvy, will include a provision in the IBA which explicitly states that the IBA itself satisfies the duty to consult on behalf of the Crown (I-10). This lawyer also noted that generally speaking, when the government is aware that an IBA has been signed, it will refrain from negotiating an accommodation agreement with the impacted Indigenous community (I-10). While I was unable to interview anyone from the mining industry⁴⁷, through reading of the grey literature, I came across a document that contains within it a perspective from the mining industry operating in the NWT on the issue of the state's role within the regulatory process, which at the heart of it, is addressing the matter of consultation and accommodation, and to what degree industry should be responsible for these duties.

In a letter addressed to Neil McCrank in regards to the McCrank report, the Mining Association of Canada, the Prospectors and Developers Association of Canada, and the NWT

⁴⁷ I contacted each of the diamond mining companies operating in the NWT asking for an interview. I also tried to interview anyone from the NWT and Nunavut Chamber of Mines, but I was not given interviews by any of them. A negotiator from DeBeers expressed a strong interest in speaking with me, but on the date of our call, she did not respond to me. After repeated attempts to reach her, I finally gave up after realizing that this individual was no longer interested in being interviewed. I simply asked for a 'no' answer if there was no longer an interest in being interviewed, but instead, my call was never returned. There is an interesting correlation with the behaviour of the individual interviewed from the AANDC headquarters in Gatineau, who refused to inform me on the status of the 'IBA file', after assuring me that he would follow up. The AANDC employee at the headquarters in Gatineau also failed to respond in any way to the repeated attempts that were made to follow up with him.

and Nunavut Chamber of Mines expressed their dissatisfaction with the status quo over IBAs, amongst other regulatory issues. Their recommendation to McCrank regarding IBAs states that:

The federal government should develop immediately an official policy on the scope, nature and purpose of Impact and Benefit Agreements in the NWT that reflects an appropriate division of responsibility between government and proponents for the consequences of mineral resource development projects on northern communities. The policy should clarify the role played by Impact and Benefit Agreements in the context of the overall process for the assessment, approval and regulation of mineral resource developments (Northern Regulatory Improvement Initiative, 2008, p. 30).

The use of the word *immediately* in this recommendation evokes a sense of urgency coming from the mining industry to have this issue clarified. There also appears to be an insinuation that the outcome of IBAs has thus far been a division of responsibilities over the impacts of mining on Indigenous communities that has been unbalanced. In other words, there is a clear indication that proponents are not satisfied with taking on the heaviest burden of consultation and accommodation over the impacts and benefits coming out of resource extraction projects.

This imbalance has thus far worked in favour of the state, when looking at the GNWT and especially the federal government. At the same time, the uncertainty surrounding the expectations of the parties to these unregulated agreements could potentially backfire, and cause problems for the state in the future. According to a high-ranking employee at AANDC, it is therefore only a matter of time before the federal government formalizes its position in relation to IBAs:

I think that both government and the other parties have just seen that, for the time being it's been happening. And, it's been happening as a private issue between Aboriginal people and the companies. And, given that it's essentially been working ... I think there's a question as to when and how government does play a role in that process. I think what you'll see is as more development happens is more IBAs are posed, and perhaps as maybe some conflict arises as to who gets them and who doesn't, and whether they're satisfied with them, government may find itself in a position where it needs to begin to decide what its role is in setting out policy, or regulation, or legislation, around the issue of IBAs. (I-2)

As has already been demonstrated in my case study, there has been a high degree of dissatisfaction coming out of at least one of these agreements. There has also been “conflict” over who gets an IBA and who does not, which has caused much stress for the communities who have been affected by this kind of treatment.

4.8: The Consequences of a Withdrawn State from the IBA Process in the NWT

Within the Akaitcho, which has — at various points in time — been negotiating both a TLE and a modern treaty with the territorial and federal government, there is one member community, Deninu Ku’e, that has not negotiated IBAs over the diamond mines. In fact, the community, located in Fort Resolution on the south shore of Great Slave Lake, has not negotiated a single IBA over the diamond mines, while their Treaty 8 neighbours in Akaitcho all have. Leaders from the Akaitcho who were interviewed for my research complained that this was a serious injustice that has caused social upheaval within their treaty nation. They argued that they have been negotiating with the federal and territorial governments as one treaty nation over the rights to their traditional territory, and that the AIP reached over the land claims negotiations gives all members of Akaitcho Treaty 8 an acknowledged position from the state that their claim is indeed a valid one. Why then — two of the Akaitcho interviewees asked — when both the federal and territorial governments have acknowledged their claim as being valid through the signing of an AIP, have they failed to intervene when DeBeers, for instance, claims that Deninu Ku’e was not impacted by the mine built within the Akaitcho traditional territory, and therefore did not deserve an IBA? (I-4; I-6) There is also the continued existence of Treaty 8, which strengthens the section 35 rights of the Deninu K’ue to their traditional territory.

The federal government, in fact, did not define Deninu K’ue as an impacted group during the initial diamond mine scoping for the Ekati mine (Gibson, 2008, p. 157). Deninu K’ue also

did not express a strong interest in being involved in that project, whereas with the Snap Lake mine — which is located closer to the community of Deninu Ku'e than Ekati and Diavik are — they were very much interested in negotiating an IBA. According to a consultant for several Indigenous organizations (including the Akaitcho) interviewed as part of this research, it is certainly not uncommon for the state to issue regulatory permits and licenses after only one or some of the Indigenous groups with claims to a traditional territory have been negotiated with for a benefits agreement (I-1). In his experience, this has occurred on more than one occasion in B.C., as well. A leader from Deninu K'ue who was interviewed felt that the federal government was guilty of allowing this to take place. According to this interviewee

... they've created divide between our communities. The 'haves' and 'have-nots'. So the have-nots are being left behind while these guys are having opportunities. And rightfully so — they should. We shouldn't have to slow them down. It's industry that really drove a wedge between our communities by doing this. It's really affected us economically in these communities and it's affected the political stability.... So, was there cooperation between industry and government to determine who should get an IBA? I think there was. I think government had some influence in terms of telling industry, 'Yeah OK. You want to leave them out? We won't squawk about it. We're not going to protest.' We believe that in Akaitcho.... Through sources — that's why I'm saying this. They should've backed us up but they didn't. And the thing is at the end of the day they have a fiduciary obligation. We have a treaty out there that exists. (I-4)

Allegations have been made by both Indigenous groups and experts on the issue of IBAs that the 'divide and conquer' strategy that has been used against Indigenous peoples throughout the history of colonization is being used by corporations (with the sanctioning of the state) through their practices with IBAs (I-4; I-6; I-11; Gibson & O'Faircheallaigh, 2010; Kennett 1999). This case study illustrates how this is accomplished, citing how some communities gain benefits while others do not. This, in turn, allows mining companies to go ahead with their project while also creating friction between these groups, thereby deflecting attention away from the company and the state, which is less directly culpable.

This allegation of ‘divide and conquer’ has also been made in relation to those groups who do sign IBAs. Through negotiating with different communities over the same project, there is a competitive dynamic at play, which can create tensions and divisions between Indigenous organizations and their communities. The TFN signed an agreement with BHP before communities from Akaitcho, thereby building expectations within Akaitcho to come to agreements that were at least equally beneficial. Also, since the TFN had signed a land claims and self-government agreement in advance of the Snap Lake mine, they were in a stronger position to negotiate an agreement than the other parties (I-6; I-11; I-12). The clause contained within the TFA in regards to the negotiation of an ‘agreement’⁴⁸ certainly gives them some more bargaining power by being able to point to something that is constitutionally protected.

If a major impetus to signing land claims is based on creating certainty over land tenure for the extraction of resources — as even a territorial government employee pointed out (I-7) — then to be guaranteed an opportunity to negotiate an IBA means that a nation receives potential benefits based on the arbitrary location of natural (and in this case, subsurface) resources (Kennett, 1999, p. 55). The arbitrary location of resources is therefore the determinant of what creates divisions between communities, through the ‘haves’ and ‘have-nots’ that arise out of both CLCAs and benefits agreements with the traditional stewards of the land. This creates patterns of uneven development, and does not reflect highly upon the Crown’s duty to act honourably towards Indigenous peoples. Harvey (1989) and Purcell (2002) note that neoliberalization fosters

⁴⁸ It is important to note that the TFA does not require that an ‘agreement’ be concluded, only that it be negotiated. A relevant excerpt from the clause (23.4.1) reads: “Government shall ensure that the proponent of a major mining project that requires any authorization from government and that will impact on Tâîchô Citizens is required to enter into negotiations with the Tâîchô Government for the purpose of concluding an agreement in relation to the project” (p. 194). Nonetheless, it is still considered to provide leverage for the Tlicho in ensuring that a favourable IBA is signed, according to an expert on IBAs and consultant for the TFN (I-11).

competitiveness over distribution, which can be seen occurring across different scales with IBAs — both between and within Indigenous communities.

It is difficult for these communities to express solidarity through the sharing of information about their benefits agreements⁴⁹, since generally speaking these agreements have confidentiality clauses within them (O'Reilly & Eacott, 1998; Sosa & Keenan, 2001; O'Faircheallaigh, 2008). O'Reilly and Eacott (1998) point out that Indigenous organizations are restricted from fully sharing information about agreements due to these clauses, and therefore “should be allowed to work together before and during negotiations because disclosure amongst several beneficiaries could promote fairer, more equitable agreements” (p. 20). There are certain kinds of information that are preferred to be kept confidential by the Indigenous organizations, such as Indigenous cultural heritage, or financial information that could trigger government clawbacks (O'Faircheallaigh & Gibson, 2010, p. 126). This latter preference is not an ideal preference, but a preference based on the neoliberal environment that IBAs occur within.

Oftentimes, the confidentiality of an agreement limits the community leadership from imparting important information to the community. Within the case study, the negotiations over the IBAs were confidential, and certain proprietary information contained within the agreements is also confidential. While there are sometimes sound reasons for keeping the negotiations and certain parts of the agreement confidential, it can also create mistrust within a community. In the case of the Dehcho of the NWT, there was a ratification vote over an Access and Benefits

⁴⁹ At the workshop on IBAs in Yellowknife that I attended, First Nations leaders spoke about the need to work together on this issue, and not act in ways that could potentially undermine the position of another community. It was encouraging to see the camaraderie and solidarity at the workshop amongst different First Nation leaders, and a recognition of the need to ensure that all are looked after within and between their communities. Hopefully such a recognition will help put an end to the inclusion of confidentiality provisions that limit the ability of these communities to share information with one another, and with the individuals within their respective communities.

Agreement⁵⁰ for the recent Mackenzie Valley Pipeline proposal, but since the community was not legally allowed to know what the agreement contained, very few members came out to vote, and the vote had to be disqualified (O’Faircheallaigh & Gibson, 2010, p. 126).

Ratification votes can be conducted to ensure that a degree of consent is given for a project, but it may also ignore those who do not vote in favour of the agreement. For instance, some of the most heavily impacted individuals may be those who vote against the agreement (I-11). If a substantial minority votes against it, it may also indicate a potential rift that could develop within the community if the IBA is signed and the project moves forward without appeasing those concerned. Furthermore, they neglect the Indigenous cultural emphasis on consensus-building in reaching important decisions (Gibson & O’Faircheallaigh, 2010, p. 169). Ratification votes for IBAs are also not commonly established within the broader Northern context, as they are very expensive and risky from the standpoint of the proponent (I-11).

The issue of confidentiality also relates importantly to the free, prior and informed consent (FPIC) of an Indigenous community to a resource extraction project within their traditional territory. FPIC is an important component of the United Nations Declaration on the Rights of Indigenous Peoples, which Canada signed onto in November 2010. Both within this covenant and in other forms of established international human rights law, the government must ensure that Indigenous peoples in Canada are properly informed of — and provide full consent for — resource extraction within their traditional territory, before governmental approval of the project (article 32). Any confidentiality clause that limits the information necessary for members of an Indigenous community to be properly informed of an agreement, or ‘gag order’ that limits

⁵⁰ Access and Benefits Agreements are signed by oil and gas companies over access to Indigenous traditional territory for the interests of exploration. They are much like IBAs, or what are called ‘Exploration Agreements’, which are encouraged by Indigenous groups to be entered into by prospecting and exploration companies who want to conduct their work on Indigenous traditional territory.

their ability to consent to the ongoing development of the project, does not fit within the requirements of FPIC. The government is hence failing to fulfil its internationally-recognized legal obligations to Indigenous peoples by not ensuring that FPIC is sufficiently obtained within an Indigenous community prior to, or during, any resource extraction project.

4.9: AANDC and the State's Position on IBAs

The state contains several institutions, each with its own set of interests and responsibilities. The agendas of these institutions and the agents that represent them are oftentimes contradictory, and hence state power should not be seen as power wielded by a monolithic entity (Nadasdy, 2003, p. 4). Rather, one can explain the actions of the institutions contained under the umbrella of the state by examining its mandate, its constituents, and the ways it has historically operated. It is important, however, to recognize that there are structures within which these institutions operate, which pressure these institutions to act in favour of certain interests over others.

AANDC — as the name suggests — has a dual mandate. While being mandated to work concurrently towards the governing of Aboriginal peoples and towards the execution of Northern development, the constituents of this government department are both Indigenous peoples and corporations interested in resource extraction in the North. An Indigenous interviewee suggests that:

... the whole genesis there, the whole theory behind having a federal department that's going to be the benevolent father to First Nations people in the country — it's just absurd and never works, right? You just see the products of First Nations around the country. This has been the success of a hundred years of a federal department treating people as they do. So I think they're generally very misinformed. I think misinformed but also caught in a system where they're being pulled a bunch of ways. One is you have a mandate for Northern development, and you have a mandate for Aboriginal people, and often they conflict completely, right? And so it's a total joke. So having the functioning necessarily like that is pretty problematic. (I-1)

Satzewich and Wotherspoon (2000) argue that the history of the department, whose mandate in relation to Indigenous peoples is to implement the *Indian Act*, is therefore rooted in racist and assimilationist practices (p. 29). Chapter 2 highlighted this history of Indigenous-state relations in the North, where the aim of the state apparatus was to transform Indigenous peoples into capitalist wage-earners, having severely limited their opportunities to maintain a sustainable traditional economy through life on the land.

Currently, IBAs appear to fit into both of the mandates of AANDC, as it is described in the discourse as a tool to empower Indigenous groups and individuals to participate in the resource extraction industry, while simultaneously being used as a tool to create the economic certainty that the resource extraction industry is looking to attain in the North. As this chapter noted earlier, the paternalistic history of AANDC in relating to Indigenous peoples has made it difficult for the department to assert control over the bilateral nature of IBAs. A retired territorial government employee put it this way:

I think DIAND may have approached some of the groups with the idea for a regulatory structure. I suspect that the groups said ‘bugger off, we don’t want you anywhere near.’ And I suspect the reason why they took that position was ... in feeling that DIAND just really confuses their Northern development and their Indian affairs mandates, and tends to come down on the side of their Northern development mandate. (I-13)

According to Satzewich and Wotherspoon (2000), the historical bias within the department towards its Aboriginal affairs mandate can be explained by the political-economic structures in place, which pressure the department to act in ways that favour certain class interests (p.253). In other words, the state is not a neutral arbiter of the interests of fractions of society, but rather, serves the general interests of the hegemonic bloc. .

These class interests, reflecting a capitalist class that assumes predominance over subordinate groups, is being glossed over in the discourses surrounding IBAs. Through the

language of ‘partnerships’ and ‘self-reliance’, there is a false appearance of equality and neutrality, when in fact, IBAs serve the interests of capital through facilitating non-renewable resource extraction on either settled or unsettled traditional territory. That is not to say that they do not also serve particular Indigenous interests. It is to say, however, that there is a significant imbalance of power between these interests (Keeping, 2007; Bielawski, 2003; North-South Institute, 2005), and that the wider interests of capital have been prioritized over the realization of a nation to nation relationship. In Prno’s (2007) research into the effectiveness of the IBAs signed over diamond mining in the NWT, while the Indigenous interviewees “... all recognized the provisioning of benefits via the IBAs, some regarded them as akin to ‘trinkets and beads’ given both the profits generated by the mines and the increasing recognition of Aboriginal title to the land” (as cited in Prno et al., 2010, p. 5). My research indicated similar responses from Indigenous representatives (I-4; I-6; I-14).

The federal government — within which AANDC plays a central role in the North — is also working towards its own institutional interests of obtaining continued rents and royalties from resource extraction projects for the sake of its own social and material reproduction. While the territories of the North are depicted as being financially dependent on the federal government — which still owns and controls all Crown lands and the subsurface resources to these lands — the numbers reveal a different story. Abele et al. (2009) address this point, noting how for the fiscal year 2004-2005, the amount of Territorial Formula Financing (TFF)⁵¹ transfers received by the NWT was \$15, 658 per capita, which was less than the \$16, 721 per capita collected by the federal government in resource revenues from the NWT (p. 581). Even though the federal government transfers other funds to the NWT aside from TFF transfers, there is an indication

⁵¹ This is the method used to calculate the amount of money that the federal government must provide for the territories in order for them to be able to function as a service-providing government.

through these numbers that the federal government is still deeply vested in the continued extraction of resources from the North.

To identify the fact that the state has acted in the interests of capital and to consider the pressures of a neoliberal global order is not sufficient in explaining all of the ways in which the state has behaved with regard to IBAs. As has been mentioned, the mining industry has expressed its clear dissatisfaction over the lack of clarity over the expectations of the parties to IBA negotiations and implementation — particularly in areas where a land claim has yet to be settled. AANDC and the federal cabinet, as part of the state apparatus, have therefore failed to respond to the interests of the mining industry, who have expressed — very much within the logic of neoliberalism — a strong interest in having clarity over the IBA process, which the state has failed to provide them.

I would argue that, in part, AANDC and the federal cabinet have avoided handling this issue out of the general interests of capital. Poulantzas (1978) argues that state managers act in the interests of the capitalist class, becoming the custodians of the general interests of capital. Without the continuation of the capitalist system — whose form is dependent on the continuing commodification of resources and enclosure of previously collectively-held territory (such as Indigenous traditional territory) — the power and legitimation of the roles of these state managers would be seriously threatened. Therefore, the state promotes the structural interests of capitalism, ensuring that both the immediate interests of the capitalist class and the inherent contradictions of the system are smoothed over through the guidance and intervention of governmental institutions (Poulantzas, 1978). If the state were to mandate that IBAs be signed in areas without settled land claims, and that they be done responsibly with the interests of Indigenous peoples in mind, then it may jeopardize the settling of land claims based on the

state's — and capital's — interests. As several Indigenous groups have already begun to opt-out of the CLCA process for many legitimate reasons (Alcantara, 2008), offering these groups a legislatively-backed mandate to obtain benefits from resource extraction within their traditional territory may create less of a desire to go through the painful process of the effective extinguishment of their rights through land claims. Therefore, the state's interest in preserving the maintenance of the capitalist system may partially explain its failure to fulfil the regulatory clarity demanded by the capitalist class.

It is important to note, however, that having IBAs mandated in areas outside of those settled areas which require them, is not necessarily what industry is seeking. What they are seeking is regulatory clarity, but through the kind of regulations that would maximize their profits, and minimize their costs. If IBAs were mandated to be signed within certain parameters that gave significant leverage to Indigenous organizations, then industry would be in a relatively unfavourable position, and would not be tolerant of this intervention. Both industry and the neoliberal state, I would argue, are not interested in taking this risk, so the status quo may still be the most optimal option available for the interests of capital.

Another part to this answer may come from the nature of bureaucracies. As argued by a high-ranking employee at AANDC, the government bureaucracy is a very slow-moving machine (I-5). The complex angles to this issue, in sync with the nature of bureaucratic functioning, may play a larger role in this than the safeguarding of the land claims process for the structural interests of capital, and for the maintenance of industry's favourable bargaining position in unsettled areas. As pointed out by another AANDC employee, the fellow who apparently was working on the IBA file and then retired may play a significant role in this, as well. Probably the most crucial part to this question is the central role of discourse in legitimating the neoliberal

rationalities of government. An AANDC employee — who admittedly “had worked on some IBAs” — argued that:

You can't say to a company 'you will have less lawyers than these guys. You will look out for their interests.' This is a naturally evolving equilibrium here. It's a free economy. Like I said, if you were living in Russia or China or in a communist system — there has to be some sort of a free market that the system itself establishes its rule (I-5).

The neoliberal discourses of a ‘free market’ economy are being used to justify the negotiation of agreements between some of the world’s largest multi-national corporations, and economically marginalized Indigenous communities. As such discourses become increasingly hegemonic, and thus permeate the structures of government, civil society, and Indigenous peoples themselves, it becomes increasingly sensible to frame the negotiations of IBAs in these terms.

The Harper government is very much looking to the future, keeping the interests of capital at the forefront of its Northern agenda. Harper has spoken repeatedly about Arctic sovereignty, and has asserted that if Canada does not use the Arctic, she will lose it. Fenge (2009) argues that “[t]his was not a recognition of [the] age-old and ongoing hunting, fishing and trapping economy of the Arctic’s indigenous peoples”, but rather, for Canada to — among other things — “exert a more politically visible, technological presence in the region by supporting the exploration and development of non-renewable resources...” (p. 375). It is no secret that Harper’s goals are to develop the Arctic through the continued exploration and extraction of resources; with the opening of the Northwest Passage, this vision is bound to become a reality. The settling of land claims throughout the Arctic and much of the sub-Arctic has laid the groundwork for this development to occur, while mandated IBAs through these agreements are guaranteed to further incorporate Indigenous subjects into this capitalist economic system, and appease land claims development corporations with streams of revenues.

It is also important to remember that under the austerity measures of the Harper government, AANDC's budget has been reduced (AANDC, 2012b, para. 4). Like all government departments, it is subject to forms of neoliberal restructuring. The AANDC website remarks that the cuts in spending will mean that "[s]avings will be achieved through restructuring, operational efficiencies, and changes to business process, in order to improve service delivery to Aboriginal and Northern communities" (Ibid. para. 4). In such times of economic austerity, the surrogate role played by industry in providing duties of the Crown — which would otherwise be carried out to a significant degree by AANDC⁵² — cannot be overlooked.

Furthermore, the incorporation of Indigenous peoples into the capitalist workforce, especially through the mining industry of the North, allows for AANDC to take a more hands-off approach to the governing of Indigenous peoples. What makes the extraction of resources in the current era particularly neoliberal is the incorporation of Indigenous communities into the very structures of resource extraction, all the while, having the discourses surrounding 'partnership' and 'social capital' crowd out the insistence on the recognition of Indigenous rights. As the CLCA process — whose purported objective has been to settle the issue of Aboriginal rights to unceded traditional territory — has been regarded as largely a failure by several Indigenous communities (Alcantara, 2008), leaders and scholars in Canada (Alfred, 1999), Indigenous peoples are being pressured into resorting to the market (such as through IBAs) in order to fill the void left through a failure to substantively address these rights.

⁵² AANDC's website describes themselves as such: "... one of the federal government departments responsible for meeting the Government of Canada's obligations and commitments to First Nations, Inuit and Métis, and for fulfilling the federal government's constitutional responsibilities in the North. AANDC's responsibilities are largely determined by numerous statutes, negotiated agreements and relevant legal decisions" (2010, para 4). It is, however one of 34 federal departments and agencies involved in Aboriginal and Northern programs and services (2010, para 5).

4.10: (Self-) Governing Indigenous Subjects through IBAs

This case study, in certain ways, is quite useful in demonstrating the extent to which IBAs fit within processes of neoliberalization. Over the span of three diamond mines, and therefore three sets of IBAs, Akaitcho Treaty 8 and TFN have gained significant economic benefits for their respective communities. It is in the interests of Indigenous communities to reap all of the benefits that they can from resource extraction within their traditional territories. This means, however, that in taking advantage of the business opportunities that come out of these agreements, the ways in which Indigenous communities relate to the state are changing as a result.

While this chapter has focused much on how the state has benefited from these agreements, it is evident that Indigenous communities impacted by the diamond mines have also benefited, such as through improvements in certain socio-economic indicators within their communities (Prno et al., 2010, p. 4). That is not to say that there have not been a slew of social problems that have arisen as a result of these agreements in the NWT over the diamond mines.⁵³ It also does not negate the fact that the benefits accrued to these communities are seen by many members as insufficient for many reasons.⁵⁴ But, the employment of Indigenous peoples in the mines, and the economic development spurred by the mines through contracts and joint ventures established with Indigenous businesses, have undoubtedly altered the ways in which Indigenous peoples relate to the state.

Indigenous employment in the mining sector is a cited priority for government, and as Chapter 2 described, has been an aim of governance in the North for several decades. Currently, the statistics show that Canada's youthful Indigenous population is rapidly growing, while non-

⁵³ See Gibson (2008), Prno (2007) and GNWT (2012)

⁵⁴ See Prno (2007)

Indigenous Canadians are aging rapidly due to the baby-boom generation and low birth rates (Helin, 2006). Due to this important reality, a National Post article wrote — in relation to the 2012 budget — that “First Nation, Inuit and Métis people will become an increasingly important source of Canada’s labour force growth. The aim of targeted spending, Finance Minister Jim Flaherty said Thursday in his budget speech, is to ‘unlock the potential of Canada’s First Nations children’” (Smith, 2012, para. 3, 4). In tandem with the fact that there are approximately 1,200 Indigenous communities within 200 kilometres of mines and exploration properties (Mining Association of Canada, 2009), the incorporation of Northern Indigenous peoples into the mining workforce is a mutually convenient reality for Indigenous organizations, industry and the state.

Technologies of agency, as described by Dean (1999), seek to add further agency to governed subjects in a ‘targeted population’, which is a population that is considered to be high risk (p. 206). Indigenous subjects fall into such a category from the perspective of government, and through IBAs, Indigenous groups are able to exercise greater agency through the negotiation and implementation of these agreements, as well as having the opportunity to participate (however marginally) in these projects. ‘Technologies of citizenship’, which is seen as a type of ‘technology of agency’, involve the building of agency through empowerment at the local level, minimizing dependency on the state (Cruikshank, 1993, 1994 as cited in Dean, 1999, p. 168). By incorporating Indigenous subjects into the capitalist workforce through training programs, providing opportunities for joint ventures,⁵⁵ and giving contracting priority to Indigenous businesses, the entrepreneurial Indigenous subject is emerging through a novel form of governance in the North. As a former NWT politician noted:

⁵⁵ Ferrazi (1989) states that “[t]he essential elements of a joint venture are taken to be the sharing of ownership and control of a specific project by distinct parties that have other economic lives of their own beyond the joint venture” (p. 17).

I can go to a place and if I needed a job, I have capacity. I have the tools to help me do that. A lot of the other people in the Northwest Territories that didn't have a good education, that didn't have the job opportunities to work their way up the ladder to understanding, they miss out on them. These [IBAs] are tools to bring them up to that level (I-15).

The discourse here relates the Indigenous subject to a self-governing body, who is responsible for their own well-being and independence. Within such a framing, IBAs can be contextualized as 'tools' used to create further Indigenous self-reliance.

In the NWT, the entrepreneurial development within Indigenous communities — made available largely through IBAs — has been very impressive. It has been marked by business partnerships and joint ventures between Indigenous organizations, mining, and mining services companies. The Aboriginal business directory in the NWT lists over two hundred Aboriginal-owned businesses, consisting of food services, construction, trucking, transportation services, communications, and other businesses to support the diamond mining industry (NWT and Nunavut Chamber of Mines, 2004, p. 7). AANDC has played a key role in this through monitoring resource extraction and associated development; promoting and participating in the planning, funding and implementation of strategic 'partnerships', joint ventures and innovative business approaches; and by providing guidance, technical support and strategic advice to Indigenous organizations in their goals of attaining maximum economic benefits from resource extraction projects (Ibid, p. 12).

The state is therefore playing a continual role in the governance of Indigenous communities and subjects, but in a neoliberal fashion. While responsibilities are being devolved to the local level, duties are being downloaded onto industry, and risks are being downloaded onto Indigenous communities. Consequently, dependence on government is weakening, yet the emerging Indigenous self-reliance does not mean that the state has been weakened, or is in some way disappearing. The state may not be directly involved in the IBA process through regulating

them, or by being a party to their negotiation or implementation, but the state is still able govern to a large degree through IBAs, and hence, benefits from them. This form of governance allows for an increased level of Indigenous self-regulation, wherein the risks associated with mining development are being assumed by these communities, and individual entrepreneurial initiatives are exposing these communities to the competitive nature of the global marketplace.

4.11: Conclusion

On the surface, it appears that IBAs satisfy many of the goals of the Indigenous community signatory, and indirectly, those of the state. Indigenous communities are able to benefit financially from these agreements, build local capacity, and thereby lessen their dependence on the state — which are clearly-defined goals shared by Indigenous communities. Meanwhile, the state is satisfied with devolving risks and responsibilities to the local level, and allowing the private sector to assume greater responsibilities in its relations to Indigenous peoples. This relieves the state of some of its financial obligations, and allows the state to assume a more distant role in the governing of Indigenous subjects. Through IBAs, the state is able to control the population through a form of neoliberal governmentality that seeks to shape a responsible, self-governing subject that can operate rationally within the market economy.

The state continues to play a role in building the ‘social capital’ of Indigenous peoples in the North, and assisting where needed in facilitating the incorporation of Indigenous organizations, communities, and individuals into the capitalist system. When looking back to Chapter 2, this incorporation has been a central aim of the state for a very long time in the North. The Indigenous resistance to being incorporated into this system has subsided when compared to *the Dene Declaration* (1975) and the fairly unified and powerful opposition to the development

of the Mackenzie Valley Pipeline⁵⁶. Several of the Dene's demands have been mediated by the state due to the signing of numerous modern land claims agreements, which Berger had recommended to the government through the *Berger Inquiry*⁵⁷. The lack of completed CLCAs in the NWT, coupled with a further desire for economic certainty in areas within a settled claim area, has created a vacuum for IBAs to fill for the interests of resource extraction.

This chapter has cited the involvement (or lack thereof) of the state in this process, explaining the state's position in relation to IBAs within the case study (and at times more generally), and through a framework of neoliberalization. While it appears to be clear that the state — based on the case study and the grey literature on IBAs — has failed to take seriously its fiduciary obligation to Indigenous peoples through its various failures in the IBA process, it remains unclear what role the state *should* be playing in the IBA process. How can the state be working towards fulfilling its responsibilities towards Indigenous peoples through the IBA process? While this research has not been designed to adequately answer this question, it will be briefly considered in the concluding chapter. If Indigenous organizations, the proponent and the state can be seen by many as 'winners' through IBAs, it does not mean that there are not losers in this game, too.

⁵⁶ While I feel it is important to recognize that the Dene have been further incorporated into the dominant capitalist workforce, the issue of Dene resistance is one which I have not considered heavily as part of this research. Therefore, I cannot adequately characterize it. It is important to recognize, though, as Larner (2000) points out, that processes of neoliberalization are not impositions of power from above, but rather, emerge, in part, out of social struggles from below.

⁵⁷ See Berger, T. (1977)

Chapter 5: Conclusion

5.1: Concluding Thoughts

In this section of the thesis, I want to reflect further on some of the consequences of the state's lack of substantive involvement in the IBA process. Chapter 4 highlighted a few significant consequences, which are threatening to Indigenous rights in Canada. The lack of state oversight can pressure Indigenous organizations into signing agreements they may not be satisfied with, and sometimes with minimal community involvement. Confidentiality clauses and non-compliance provisions are problematic, as well. It is important that these injustices be rectified so that the Indigenous-state relationship in the North can work towards finally being viewed as a nation to nation relationship, rather than one of continued colonial domination. I do not expect the state to refrain from acting in the general interests of capital. However, I also do not expect Indigenous peoples to accept the limited options made available to them through the neoliberal environment of devolution and market governance. I expect that concessions will be made through continued struggles — both through the courts and through more direct forms of resistance — that will alter those discourses and processes, shifting them in the direction of justice for these nations.

How the state can further involve itself in the IBA process without jeopardizing the signing of these agreements is a broad and somewhat daunting question, but there are certainly ways in which the question can be approached that can allow us to tease out some practical recommendations. Based on the literature and my own research, there is an abundance of opposition towards the state being present at the negotiation table with the parties to the agreement. However, that does not mean that the state cannot play another role, such as through guiding these agreements through policy guidelines and/or legislation. I do not claim to have the

answers, but in pointing out some of the negative elements within these agreements, the responsibility falls on the state to ensure that some of these unethical practices are curtailed. For instance, there is no reason why the state should not require that the content of IBAs be made available to all members of the community, and that the community consultative process be transparent and inclusive. Without doing so, the state is not upholding the principles of FPIC, required of it by international law.

For the state to even mandate that IBAs be signed with all groups who have a claim to an area of land — whether that claim has been settled with the Crown or not — would also be a significant step in the right direction. Even in areas that already have settled claims through historic treaties, such as in the Prairie Provinces and northern Ontario, there is no provision mandating that IBAs be signed. Why should the federal government permit only those communities who have signed modern treaties to be given the assurance that they will have some form of leverage (through having a modern treaty containing an IBA or IBA-like provision) in negotiations with a mining company that wants to extract resources from their territory? What kind of a message is that sending to communities who have yet to sign a CLCA, or due to historical circumstance, are not in a position to ever sign a CLCA⁵⁸?

This uneven application of privileges can only stir divisions between communities, and lead to further contempt for government. Such contempt for government — as this thesis has pointed out — actually works to perpetuate the very forms of oppression which these groups have long resisted. Indigenous peoples seek independence from the state through this ongoing contempt, but in return, they are left to deal with a global capitalist economy that puts ever-increasing demands on the exploitation of the resources found within their traditional territory.

⁵⁸ The state only engages in negotiations over CLCAs with those Indigenous groups who have yet to sign a historic treaty, with the exception of treaties 8 and 11 due to the uncertainty raised by the *Paulette* (1973) decision.

The encroachment of unsustainable capitalist development into these communities must fall under the control of the people within these communities. This is a fundamental democratic principle that must be recognized by the state. As a high-ranking employee from AANDC has indicated, as more of these disconcerting issues arise, it will force the state to devise a policy on IBAs (I-2). Such a reactionary response to potential violations of both domestic and international law is emblematic of the continuing colonial relationship between the Canadian state and Indigenous peoples. We will have to wait and see how much longer it will take for the state to take an official stance on this important cultural, legal, and socio-economic issue to Indigenous peoples in Northern Canada.

In the larger picture, it is the responsibility of the Crown to negotiate land claims with Indigenous groups in ‘good faith’, and therefore, to be open to Indigenous perspectives and worldviews. The neoliberal emphasis on ‘partnerships’ and ‘self-reliance’ cannot detract from the recognition of Aboriginal rights and title. There are obvious differences in how the capitalist state conceives of ‘development’ and the use of resources, as compared to Indigenous perspectives (Alfred, 1999; Nadasdy, 2003). However, if Canada wants to overcome its colonial history, it must work with Indigenous peoples on a nation-to-nation basis. This cannot be achieved through neoliberalism, despite the largely short-term benefits that Indigenous communities so desperately need, and which can come out of neoliberal processes. This thesis does not condemn these concessions, but approaches them with what MacDonald (2011) calls “a significant degree of skepticism” (p. 260).

5.2: Thesis Summary

The research question for this thesis is: *How can we explain the state’s relation to IBAs in Northern Canada, and what does this tell us about the evolving Indigenous-state relationship in*

the North? This is a two-part question, so I will highlight the answers to both questions in order. The research demonstrates how a framework of neoliberalization is useful in explaining ways in which the state relates to IBAs in a particular context within Northern Canada. Through the use of a unique case study that contained multiple actors and sites of comparison — and in which the state has played a more visible role than in other Northern contexts — the state's relation to IBAs in Northern Canada was examined. The role that the state has played through IBAs over the diamond mines in the NWT has been reflective of a neoliberal state that is interested in downloading and offloading certain risks and responsibilities onto both third parties, and Indigenous organizations and communities.

The use of both Marxist political economy as well as neo-Foucauldian governmentality approaches to neoliberalization to ground the theoretical framework proved to be useful tools to use in explaining the influence of neoliberal discourses and processes in the North. Scholars within the Marxist political economy literature, such as Harvey (2003, 2005) Peck (2001) and Jessop (1999), were helpful in explaining the neoliberal environment through which processes of neoliberalization can take root across different geographical spaces and scales. In particular, these scholars were helpful in explaining how the state has shifted from that of a 'welfare' state, to that of a 'neoliberal' state that continues to serve the general interests of capital, but in novel ways that impact greatly on the subordinate classes.

The neo-Foucauldian governmentality literature — particularly Dean (1999) and Larner (2000) — was useful in connecting these larger state interests to the micro-level, showing how the discourses and processes of neoliberalization indicate a change in governance of Indigenous subjects and communities through IBAs. More specifically, governmentality can help to explain the neoliberalizing of subjectivities, and the distant ways in which the state can continue to

govern Indigenous peoples. While Marxist political economy and neo-Foucauldian governmentality approaches to neoliberalization are considered to be incompatible by some, I found that they were both able to offer valuable ways of understanding how the state relates to IBAs and Indigenous peoples, while also having enough overlapping insights to justify using them together.

Neo-Marxist theories of the state — particularly those of Poulantzas (1978), Gramsci (1992) and Jessop (1990) — were particularly practical in explaining the state's desire to create the conditions for the general interests of capital, while also establishing the 'state' as a social relation. As Chapter 4 made evident through the *ad hoc* intervention of the state in the IBA process, the state has acted as the custodian of capital, thereby conserving the hegemonic bloc (Gramsci, 1992) to facilitate the continued accumulation of capital by the dominant class (which as Hall (2012) notes, is for both the Canadian capitalist class, as well as the transnational capitalist class). While post-structuralist accounts of the state remain prominent in the neo-Foucauldian literature, the common ground that was identified, being the porous borders of the state, and the state as a 'social relation' rather than a monolithic entity, have been identified.

There is no definitive or clear explanation as to why the state has yet to officially mandate IBAs in all of Northern Canada — which would include unsettled claim areas — but there is reason to believe that the answer to this question lies at least partially in relation to the overlapping goals of CLCAs and IBAs. The interest in creating economic — and to some degree legal — certainty over the extraction of resources on Indigenous traditional territory also happens to be a central concern of industry. Neoliberalism, as Harvey (2005) has argued, signifies multi-national corporate interest in unfettered access to natural resources, and the state is expected to facilitate this access in order to ensure the continued accumulation of capital. The

CLCA process has helped the state to achieve the level of economic and legal certainty necessary for ensuring market access for surplus capital, wherein IBAs have become an additional tool to attain economic certainty. Mandating the signing of IBAs outside of this process, however, may jeopardize the potential of this process to sustain itself. One also has to consider industry's interest in maximizing profits and minimizing costs, as well as the precedent that mandated IBAs would set for Indigenous-state relations.

It is through answering this first question that I am then able to handle the second separate, yet interconnected, question that guided this research: *How can we describe the evolving Indigenous-state relationship in the North based on our understanding of the state's relation to IBAs?* The evolving Indigenous-state relationship in the North is traced in this thesis from the beginning of settler-Indigenous contact. Initially, the state was not interested in the North, and it was not until lucrative resources were discovered there that the state became involved in facilitating Northern resource extraction through the signing of treaties 8 and 11. Indigenous peoples of the North have not been passive victims in this relationship, however. The state's interest in creating legal and economic certainty over territory in the North had been stymied by the *Calder* (1973), *Malouf* (1973) and *Paulette* (1973) decisions, forcing the hands of the state to engage in negotiations over land claims with Indigenous groups. The creation of a further or alternative kind of economic certainty through private, bilateral agreements between Indigenous organizations and the proponent has provided an opportunity for the state to step back from its previous level of engagement, and allow for these market-driven agreements to — in many ways — distract from substantively addressing Indigenous rights.

It has been noted that the state has not been absent from these processes, but has rather been an instrumental part of creating the landscape within which these processes can take place.

The Indigenous-state relationship in the North is turning less into one of dependency on the institutions of the state — as has been a long-time feature of this relationship — and more on Indigenous communities' dependency on industry. Communities are forced to face the competition of uneven development that takes place through the movement of capital across the globe. Much like Slowey (2008) has argued, the discourses and processes of neoliberalism have worked towards *some* of the interests of Indigenous self-determination through the devolution of responsibilities and economic development opportunities, which have simultaneously worked towards the interests of the state to minimize government, and to facilitate more distant forms of governance, mainly through forms of self-regulation. This, however, has not come without consequences for Indigenous rights, as this thesis has demonstrated.

5.3: Contributions to the Bodies of Literature

This thesis has contributed to two growing bodies of literature: the literature on IBAs, and the literature on the connection between Indigenous peoples and neoliberalism in Canada. With respect to the literature on IBAs, a research gap was identified in Chapter 1, which is the lack of insight into the state's relation to IBAs in Northern Canada. This thesis sought to situate the state in relation to IBAs historically (Chapter 2), theoretically (Chapter 3), and in relation to a case study (Chapter 4). Through looking critically at the position of the state in relation to IBAs, a connection was established between IBAs and CLCAs, and a framework of neoliberalization was — for the first time in the literature — applied to IBAs in Northern Canada.

There has been a growing body of literature on the impacts of neoliberalism on Indigenous peoples in Canada, which Chapter 3 of this thesis examined. Slowey's (2008) case study on the Mikisew Cree First Nation's experience with neoliberalism stemming from a TLE

makes an important connection between the settlement of land claims and the devolution of responsibilities to Indigenous organizations with broader processes of neoliberalization. She notes the opportunities that come out these neoliberalized relationships — such as increased autonomy and self-reliance — while also cautioning about the limited expression of self-determination which is ultimately achieved. Skepticism towards the neoliberalization of Indigenous-state relations has also been expressed by Kuokkanen (2011) and MacDonald (2011). This thesis builds on the critiques of neoliberalism and the circumscribed forms of autonomy within a neoliberal system that the state has made available to Indigenous peoples. It has extended this critique to a new realm within this literature: IBAs.

5.4: Suggested Areas for Future Research

It is important that neoliberal processes and discourses continue to be researched in relation to Indigenous peoples in Canada⁵⁹, so that the nature of and impacts of these state-driven processes and hegemonic discourses are made visible. Perhaps future research can connect the experiences of Indigenous peoples in Canada with neoliberalization to the experiences of Indigenous peoples in other parts of the world, who have also been subject to variegated forms of neoliberalization⁶⁰. Such research would bring forth a more well-rounded understanding of these processes, and may thereby provide us with further networks of solidarity between these communities.

⁵⁹ There has been an abundance of research looking into the impacts of neoliberalization on Indigenous peoples in the global South, as well as a growing body of research into the impacts of neoliberalization on Indigenous peoples in Oceania. In the interests of time and space (MA theses allow for only so much of both), I have chosen to exclude studies of Indigenous peoples from the global South (and largely those from Oceania) from this thesis. I still acknowledge that these struggles are of utmost importance, as the hegemonic discourses and processes of neoliberalization have heavily impacted communities all over the world; especially those in the global South.

⁶⁰ See Brenner et al. (2009)

Since this thesis focused predominately on the case study of the Dene and their experiences with IBAs over the diamond mines in the NWT, future research on the relation between IBAs and the state would benefit from looking at other jurisdictions in Northern Canada. It would be interesting if future research focused on a jurisdiction in which historic treaties have been signed (and where the legal certainty surrounding them is still intact) and where IBAs are taking place, such as northern Ontario. Comparing the experiences of these Indigenous communities with those in other jurisdictions may tell us something more about the relationship between IBAs and CLCAs. Investigating this question in other jurisdictions may also point out the variegated forms of neoliberalization (Brenner et al., 2009) that constitute the different jurisdictions in which these processes may be playing out. To further test the utility of a neoliberalization framework in understanding the state's relation to IBAs, such a framework could be applied to future studies of IBAs in Northern Canada.

Appendix A: List of Interviews

Below is a list of the anonymous interviews that I conducted for this research. I have done my best to guarantee anonymity, while also being transparent about the types of interviews that I conducted. I have indicated the position of the interviewee, as well as the month and year in which the interview was conducted.

I-1: Indigenous organization employee and consultant (September 2011)

I-2: AANDC employee (September 2011)

I-3: Lawyer and expert on IBAs (October 2011)

I-4: Indigenous leader and former IBA negotiator (September 2011)

I-5: AANDC employee (October 2011)

I-6: Indigenous leader and former IBA negotiator (September 2011)

I-7: GNWT employee (September 2011)

I-8: Indigenous leader and former IBA negotiator (September 2011)

I-9: GNWT employee (September 2011)

I-10: Lawyer and consultant on IBAs (August 2011)

I-11: IBA expert and consultant (December 2011)

I-12: Indigenous leader and former IBA negotiator (September 2011)

I-13: Former GNWT employee (December 2011)

I-14: Indigenous leader and former IBA negotiator (September 2011)

I-15: Former GNWT politician (September 2011)

I-16: NGO-researcher (September 2011)

Appendix B: NWT Research License

Licence No. 14968
File No. 12 410 900
September 08, 2011

2011 Northwest Territories Scientific Research Licence

Issued by: **Aurora Research Institute – Aurora College**
Inuvik, Northwest Territories

Issued to: Mr. Tyler G Levitan
Carleton University
61 Sunnyside Ave
Ottawa, ON
K1S 0P9 Canada
Phone:
Fax: none
Email:

Affiliation: Carleton University

Funding: Northern Scientific Training Program (NSTP)
ArcticNet

Team Members:

Title: **The Canadian state's relation to Impact and Benefit Agreements in NWT**

Objectives: To dissect the Federal government's fiduciary obligation to First Nations, and to assess whether the Federal government is indeed fulfilling this obligation with Impact Benefit Agreements.

Dates of data collection: September 8, 2011 to September 30, 2011

Location: Yellowknife, N'Dilo, Dettah, Behchoko

Licence No.14968 expires on December 31, 2011
Issued in the Town of Inuvik on September 08, 2011

*** original signed ***

Pippa Seccombe-Hett,
Director, Aurora Research Institute

Aurora Research Institute - Aurora College

PO Box 1450 Inuvik NT X0E 0T0

Phone: 867-777-3298 Fax: 867-777-4264 E-mail: licence@nwtresearch.com

Notification of Research

I would like to inform you that Scientific Research Licence No. 14968 has been issued to:

Mr. Tyler G Levitan
Carleton University
61 Sunnyside Ave
Ottawa, ON
K1S 0P9 Canada
Phone:
Fax: none
Email:

to conduct the following study:

The Canadian state's relation to Impact and Benefit Agreements in NWT (Application No. 1796)

Please contact the researcher if you would like more information.

SUMMARY OF RESEARCH

This licence has been issued for the scientific research application No.1796.

The primary goal of this research is to dissect the Federal government's fiduciary obligation to First Nations, and to assess whether the Federal government is indeed fulfilling this obligation with Impact Benefit Agreements (IBAs). Through a critical examination of IBAs, and an understanding of the State's position with regards to them, the goal will be to add depth to our understanding of the Political Economy of resource extraction in the Northwest Territories.

This research will depend on interviews conducted in Ottawa with Aboriginal and Northern Affairs officials who have experience negotiating an IBA, and/or knowledge of IBA's and comprehensive land claims. As well, it will depend on interviews conducted in the Northwest Territories with government and First Nation representatives, who have knowledge of and/or experience with IBAs and comprehensive land claims. These interviews will be semi-structured elite interviews, of a duration of roughly an hour for each interviewee. The researcher would like to interview between 8 and 10 individuals in the Northwest Territories. Interviews will ideally be recorded using a tape recorder, but in the event that an interviewee does not feel comfortable with having it recorded, then detailed notes will be taken. A copy of the transcript will be sent to the interviewees immediately after the transcription. The researcher will give a period of 30 days for the interviewee to make any edits they wish to the transcripts, after which the transcripts will be finalized for my research.

This research seeks to understand the relationship between comprehensive land claims agreements and Impact and Benefit Agreements (IBAs) in securing access to Indigenous traditional territories. Through these two methods, the state and the private sector have been able to gain economic access to resources on First Nations territories. This research aims to establish a better understanding of the political context within which these state-sanctioned processes occur. This will hopefully provide some insights for some of the communities that are involved in the research. In working respectfully with these communities, they will hopefully benefit from the personal relationships that will be developed, as well.

A copy of the completed thesis will be sent to the interviewees if they are interested in receiving one. The researcher will also be presenting the conclusions of the research at conferences, and may decide to even publish an article in a journal based on this research. The researcher will also express an interest in

speaking to any of the interviewees, or any of the community members from their respective communities, about the conclusions of the research.

The fieldwork for this study will be conducted from September 8, 2011 to September 30, 2011.

Sincerely,

Jonathon Michel,
Manager, Scientific Services

DISTRIBUTION
Akaitcho Territory Government
North Slave Métis Alliance
Tlicho Government
Yellowknives Dene First Nation - Lands & Environment

Appendix C: Carleton University Ethics Clearance Form

Carleton University Research Office
Research Ethics Board
5th Floor Tory Building
1125 Colonel By Drive
Ottawa, ON K1S 5B6 Canada
Tel: 613-520-2517
Fax: 613-520-2521
ethics@carleton.ca

Ethics Clearance Form

This is to certify that the Carleton University Research Ethics Board has examined the application for ethical clearance. The REB found the research project to meet appropriate ethical standards as outlined in the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* and, the *Carleton University Policies and Procedures for the Ethical Conduct of Research*.

☒ **New clearance**

☐ **Renewal of original clearance**

Original date of clearance:

Date of clearance	13 July 2011
Researcher	Tyler Levitan
Status	M.A. student, Institute of Political Economy
Supervisor	Professor Emille Cameron, Geography & Environmental Studies & Professor Donna Patrick, Sociology & Anthropology
Funding status	Non-funded
Project number	12-0271
Title of project	Impact and Benefits Agreements in the Northwest Territories: Implications for the state (working title)

Clearance expires: **31 May 2012**

All researchers are governed by the following conditions:

Annual Status Report: You are required to submit an Annual Status Report to either renew clearance or close the file. Failure to submit the Annual Status Report will result in the immediate suspension of the project. Funded projects will have accounts suspended until the report is submitted and approved.

Changes to the project: Any changes to the project must be submitted to the Carleton University Research Ethics Board for approval. All changes must be approved prior to the continuance of the research.

Adverse events: Should any participant suffer adversely from their participation in the project you are required to report the matter to the Carleton University Research Ethics Board. You must submit a written record of the event and indicate what steps you have taken to resolve the situation.

Suspension or termination of clearance: Failure to conduct the research in accordance with the principles of the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* and the *Carleton University Policies and Procedures for the Ethical Conduct of Research* may result in the suspension or termination of the research project.

Antonio R. Gualtieri, Chair
Carleton University Research Ethics Board

Appendix D: Information and Consent Form

Carleton
UNIVERSITY

Canada's Capital University

Impact and Benefit Agreements in the Northwest Territories: Implications for the State

Date of Ethics Clearance: July 14, 2011

Ethics Clearance for data collection expires: May 31, 2012

Dear _____,

My name is Tyler Levitan, and I am a graduate student in the Institute of Political Economy at Carleton University. For my Master's thesis, I will be examining the predominance of Impact and Benefit Agreements (IBAs) in the Northwest Territories, and how these agreements are affecting the relationship between Indigenous communities and the state.

This research project will be supervised by two professors at Carleton University: Donna Patrick from the department of Sociology and Anthropology (and the Chair of Canadian Studies), and Emilie Cameron from the department of Geography and Environmental Studies.

I am contacting you because I think you would serve as an excellent participant in my research. Your experience and knowledge related to this field would provide me with insightful data to use in my thesis.

The interview will last roughly an hour, or will depend on the amount of time that you have available to answer my questions.

With your consent, I plan to use a tape recorder to record the interview. If you are uncomfortable with having the interview recorded, then I will take detailed notes of the interview.

Considering the confidential nature of many of these agreements, I understand that you may be limited in your capacity to disclose certain kinds of information regarding these agreements. Any information that is confidential is not to be disclosed by the participant in the interview. If there is confidential information disclosed, the participant is to notify the researcher so that this information can be destroyed.

You will remain anonymous within the research—I will try my best to ensure anonymity through making every participant in the research anonymous. That way your identity cannot be easily inferred through the identity of others. However, during the gathering of data, full anonymity cannot be guaranteed due to the small size of the community.

The data will be stored on an external hard drive, which only I will have access to. After the interview is transcribed, I will share the transcripts with my supervisors. The data will be stored for a period of up to 5 years, whereupon it will be deleted. The thesis will also be made available to all participants, if they wish to receive a copy. A copy can be obtained through requesting a copy of the thesis through e-mail or telephone, whereupon it will be mailed to the participant.

This project has been reviewed by the Research Ethics Board at Carleton University, as well as the Aurora Research Institute in the Northwest Territories. If you have any questions or concerns about your involvement in the study, I direct you to the chair of the Research Ethics Board at Carleton University:

Professor Antonio Gualtieri, Chair
Research Ethics Board
Carleton University Research Office
Carleton University
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Ottawa, Ontario K1S 5B6
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Emilie Cameron
Geography and Environmental Studies
Department: (613) 520-2561
Carleton University
Emilie_cameron@carleton.ca

Consent

I _____ have read the above letter and voluntarily consent to participate in the study as described above.

Signature of participant

Date

Signature of researcher

Date

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