筑波大学　地域研究23：97－117，2004　　Area Studies Tsukuba 23：97－117，2004

Court Rulings, Aboriginal Title and Treaty Negotiation Challenges in British Columbia[1]

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Abstract

The year 2003 marks the tenth year since the provincial government of British Columbia, the federal government of Canada, and the First Nations in the province formally started the current treaty negotiations.[2] However, no treaty has been singed by the three parties during the last decade. This fact shows how the colonization process of British Columbia was different from other part of Canada. This paper describes how the solutions in the James Bay Agreement and the Nisga'a Treaty have not worked for the negotiation process in British Columbia as a whole. It examines how the governments are reluctant to recognize aboriginal law even though the federal Supreme Court recognized the its effectiveness in the *Delgamuukw* ruling. For example, the current geographical boundaries in the treaty negotiation are still based on the European idea, which challenges First Nations' concept of territory. As a conclusion, this paper argues that the system, itself, is delaying the negotiation process in the province.

Introduction

Today, the entire Western Hemisphere faces the issue of the determination of aboriginal rights and land title. In Latin America, for example, several indigenous groups demanded political and economic control over territory in order to preserve their traditional way of life.[3] In North America, many Native groups have sought to define *aboriginal rights and title* through

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[1] This paper was a part of the master's thesis handed in for the completion of the Master's Program in Area Studies in January, 2002.

[2] I have used the terms First Nations, Aboriginal peoples, Native peoples, and indigenous peoples to describe the people who have resided since pro-European sovereignty. All are terms used widely in academic works, and none of these terms is intended to be used in an impolite manner.

[3] The concept of territory combines geographic space with political control, or sovereignty, over that space (McGillivray, 2000).

resource to the courts. This is particularly true in Canada, where the federal Supreme Court's *Calder* decision of 1973 marked the first tentative recognition of aboriginal land right, broadening and refining the definition of the term in subsequent decisions. This process received additional impetus from the affirmation of the legitimacy of *aboriginal and treaty rights* in the Charter of Rights and Freedoms included in the 1982 revision of the Canadian Constitution.

The *Calder* decision also changed the Canadian federal government's native policy from "ignoring aboriginal rights and title", to "negotiate and discuss the rights and title".[4] Therefore in 1973, Canadian federal government started negotiation with the First Nations in three of Canadian provinces, Newfoundland, Quebec, and British Columbia [BC], and two territories, the Yukon Territory and the Northwest Territory. Since the Europeans' arrival to North America, aboriginal peoples and Europeans took several approaches to establish their relationship, and treaty-making became one of the major methods to affirm this native/non-native relationship. Yet, no treaty covers most of the areas in these provinces and territories. Even though several treaty negotiations have made significant achievements so far, the recent treaty negotiation in BC is recently facing unique challenge. Practically, treaty negotiation in BC started in 1993, when First Nations, the federal government, and the provincial government established provincial wide tripartite negotiation system. No treaty has been signed in this tripartite negotiation in BC during the last ten years.

The purpose of this paper is to show that the delay of the treaty negotiation in BC has not only provided new frameworks to the treaty negotiation itself, but also to the treaty negotiation system in entire Canada. More specifically, 1) the geographical existence of "aboriginal rights and title" in Canada became much clearer, 2) the structure of negotiation has legally changed, however, the federal and provincial governments are reluctant to accept this fact. These case studies will be analyzed by examining how the solutions in the James Bay Agreement and the Nisga'a Treaty do not work for the negotiation in British Columbia as a whole. And finally, 3) it is proved that governments are still reluctant to recognize aboriginal concepts even though the federal Supreme Court recognized the effectiveness of aboriginal law in the *Delgamuukw* ruling. Basically, this negotiation system will not allow successful treaty to come up in the province.

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[4] Department of Indian Affairs and Northern Development, *Federal Land Claim Policy*, 1973. Also, Department of Indian Affairs and Northern Development, *In all fairness: a native claims policy: comprehensive claims/En toute justice: une politique des revendications*, (1982), and *Outstanding business: a Native Claims Policy: specific claims/ Dossier en souffrance: une politique des revendications des autochtones: revendications particulieres*. (1982)

British Columbia and Aboriginal Land Claims

During the establishment of the colony in the Vancouver Island in 1849 to BC's unification to the Confederation in 1871, the aboriginal policy in the province changed significantly. In 1850's, Governor James Douglas signed fourteen treaties to acquire lands from the native groups in the Vancouver Island before the settlement and economic activities of Europeans came into the Pacific Northwest.[5] However, the colonial government's approach to their aboriginal affair changed drastically after Douglas retired from his position. The government of BC denied the existence of aboriginal title in the colony, assuming that First Nations were too primitive to understand the concept of land ownership. Therefore, the government of BC did not sign any treaties or take other legal means to extinguish the status of aboriginal rights or title.[6] Rather, the colonial government considered BC as empty land with attractive resources.

This aboriginal policy of BC clearly contradicted with the ones of Britain and the Dominion. The colonial government intended to secure lands for European settlement, and their agricultural activities for new settlers. Even though the government in the 1860's recognized the effectiveness of 1763 Royal Proclamation in the colony, Joseph W. Trutch, the governor of the Colony, assumed that "the rights of Indians to hold lands were totally undefined" even in the Proclamation.[7] Therefore, when BC united to the Confederation in 1871, the land title issue became much more complicated than it had been. Since 1871, when the British North America Act came into effect in BC, which defined *"Indians, and lands reserved for Indians"*, the Indian issue in the province legally became Dominion's responsibility. Yet, at the same time, the Terms of Union with Canada also pronounced that the Dominion should carry out a policy *"as liberal as that hitherto pursued by the British Columbia government"*.[8] This phrase, *"as liberal as"*, in the BC Terms of Union called controversy, because BC's native policy had been quite different from the one of the Dominion. First of all, the Crown recognized the existence of aboriginal title

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[5] Hamer Foster, *Law, History, and Aboriginal Title: Calder v. the Attorney General of British Columbia*, p.p. 1-4. However, the author, Foster, mentions in the article that this treaty negotiation process violated the Proclamation of 1763, because, unlike the negotiations for Numbered Treaties, the colony did not have any negotiator from Britain when they signed these treaties.

[6] Wilson Duff, *The Impact of the White Man*, "Indian rights to soil in British Columbia have never been extinguished. Should any difficulty occur, steps will be taken to maintain the Indian claims to all the country where rights have not been extinguished by treaty. Don't desire to raise the question at present..."

[7] Joseph W. Trutch, "Lower Fraser River Indian Reserves", *Papers Relating to Indian Land Question*, p.41. "The rights of Indians to hold lands were totally undefined, and the whole matter seems to have been kept in abeyance, although the Land Proclamations specially withheld from pre-emption all Indian reserves or settlements."

[8] British Columbia Terms of Union 1871.

in British North America since 1763, but in the 19th century, the Crown started to consider that it was a burden on its sovereignty.[9] Thus, the Crown had consecutive negotiations with the First Nations to establish treaties that was aimed to extinguish aboriginal title. British Columbian government did not take this strategy even after its unification to the Confederation, but they rather disagreed the Dominion's policy.

Since unlike other part of Canada, BC did not legally extinguish aboriginal title in the province, the Indian reserves in the province distinctly differed from the reserves in other part of Canada. In the Prairies, the size and condition of reserve and non-reserve area and the amount of gift and annual payment from the Dominion to First Nations had usually been bargained in treaty negotiations.[10] Instead, the system in BC was that *the province gave out* small reserves to each First Nations up to twenty acres per family. Even though the Dominion demanded that at least 80 acres per family of five was required, BC government insisted that this system was suitable for the coastal Indians' lifestyle which was perceived as the course of migratory activities [Table 1]. In 1875, the Dominion of Canada temporarily disallowed BC's new *Crown Lands Act* that would legalize all land in the province as the Crown Land. This Federal-BC conflict finally came to an end when they agreed to set up joint reserve commission, under which the size and conditions of Indian reserves were negotiated on case-by-case basis. However, the legal status of aboriginal title in BC still remained uncertain.

Treaty documents provide essential information on how and where "aboriginal rights and title" exists in Canada. However, not all of the lands in Canada have covered by treaties. In 1973, Canadian federal government introduced the comprehensive claim policy to settle the land claims in the areas where aboriginal rights and title have not addressed by treaty or other legal means. Since most of the province of BC has never covered by any treaties, the aboriginal title in the province remained uncertain. Hence, to clarify the condition of aboriginal title, the comprehensive claim policy was also introduced to BC.

Table 1 Reserve Size Comparison in the 19th Century

Canada	80 acres per family of five/plus gift and annual payment (negotiations are required)
BC	20 acres per family (Province gives land to First Nations)

British Columbia Papers Connected with the Indian Land Question 1850-1875.

[9] Wilson Duff, *The Indian History of British Columbia*, p.p. 87-98

[10] Ibid. p.93. "Elsewhere in Canada, it was the policy to allot each tribe either 160 acres or one square mile per family, on which they were expected to settle and establish farms."

The Legal Characteristics of Aboriginal Rights and Title until 1982

Since the 1950s, native groups took several kinds of movements to affirm their aboriginal title such as petition, negotiation, court actions, and sometimes road barricade. Especially during the last thirty years, the Supreme Court of Canada made several milestone decisions, which gave legal legitimacy to the native land claim movements in Canada. Specifically, the First Nations in BC played major roles in recent three rulings of the Federal Supreme Court, which provided the clearer meaning of *aboriginal rights and title by Calder, Sparrow, and Delgamuukw*. Such topics in the comprehensive treaty negotiation in BC, as self-government, jurisdiction, and economic activities, fundamentally relate to the question of land title. Most recent Supreme Court ruling, Delgamuukw of 1997 finally defined the meaning of *aboriginal title* for the first time in Canada. Also, the Constitution of 1982 changed the approach of the federal and provincial governments towards modern treaty negotiation. The Constitution changed not only the public's attention by introducing the phrase, *aboriginal and treaty right* by its ambiguous word *existing*, but also the treaty negotiation in Canada.[11]

Even though aboriginal title has been widely mentioned in most of land claim activities in Canada, the meaning of the term had been unclear. However, land claims cannot avoid questioning the meaning of aboriginal title. Several court appeals took place to challenge how and where aboriginal rights and title exist since the 1950s.[12] Particularly, the First Nations in BC have played major role in milestone court actions on this matter. The latest Court ruling in 1997, *Delgamuukw*, was appealed by the Gitxsan and Wet'swuet'en Nations, the *Sparrow* in 1990 by the Musqueam Nation, and the *Calder* in 1973 was appealed by Frank Calder of the Nisga'a Nation. The reason was obvious: the condition of aboriginal rights and title in the province has remained legally uncertain, even though the provincial government insisted that the land title of the First Nations in the province had been extinguished when British authority established its sovereignty in 1858.

Ultimately, this question draws another question: which area of North America does Royal Proclamation of 1763 cover? The Proclamation of 1763 was the first legal form in Canadian history, which mentioned aboriginal title.[13] Nevertheless at the time of the Proclamation, the British Government did not have control over the lands in the west of Ontario. Prior to the *Delgamuukw*

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[11] Section 35 (1) of Canadian Constitution (1982) states, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[12] Native land claim movement started right after the Indian Act was amended in 1951.

[13] In the Royal Proclamation of 1763, "We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them."

decision, another milestone court case was held by the First Nations in BC, which answered the question on *aboriginal title* – the *Calder* decision of 1973. Following the 1963's court decision that conformed the effectiveness of Royal Proclamation on the Vancouver Island, the former Nisga'a Chief, Frank Calder, and his lawyer took a court action to ask Nisga'a's aboriginal rights and title on their traditional territory in 1967.[14] The Supreme Court of Canada ruled that Nisga'a had owned the territory prior to the European sovereignty, but they could not find whether Nisga'a's title had been extinguished or not. Therefore, the Supreme Court could not make any judgment on whether the colonial policy in the Pacific Canada had to follow the 1763 Proclamation doctrine. Yet, the *Calder* case became the first court ruling, which acknowledged the existence of aboriginal title in the land without treaty.

Contrary, the significance of the Delgamuukw ruling was that it did not only declare the current existence of aboriginal title in BC, but it also stated detailed outline to claim the title.[15] This court action began in 1984 when the members of Gitxsan and Wet'suwet'en Nations went to the Supreme Court of British Columbia claiming the ownership of their traditional territory, right of self-government, and the compensation for their loss of lands and resources.[16]

Delgamuukw defined in 1997 that aboriginal title is "land title with a collective right." [17] One of the questions during this court action was how the term, aboriginal title, should be recognized. The Supreme Court decision of 1997 addressed that aboriginal title as a collective right based on land, and when the title was proven in anywhere in BC, it meant that the Crown was not the ultimate titleholder over the place.[18] Basically, First Nations can use any resources which are on/in the land with their aboriginal title. However, if certain economic activities are brought up as an evidence of land occupation, such as hunting or fishing activities on the claimed land, the use of the land will be restricted.[19] First Nations cannot operate another economic activity which would harm their traditional economic activity in that case.

The Supreme Court also addressed three factors by which land claim appeal has to follow. Firstly, claimed land has to be occupied prior to European sovereignty. This notion has to meet with both of the common law of Europeans and First Nations' tradition. First Nations also have to present such scientific proof as dwellings, forms of cultivation, and exploitation of natural resources to prove their occupation of the lands. Secondly, there have to be continuous land

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[14] Hamer Foster, *Law, History, and Aboriginal Title: Calder v. the Attorney General of British Columbia*, p.10.

[15] "Delgamuukw v. British Columbia [1997]", *Delgamuukw – The Supreme Court of Canada Decision on Aboriginal Title*, paragraph 128, 154, 156.

[16] Federal Treaty Negotiation Office, *Delgamuukw: The Supreme Court of Canada decision*, 1998

[17] "Delgamuukw v. British Columbia [1997]", *Delgamuukw – The Supreme Court of Canada Decision on Aboriginal Title*, paragraph 68.

[18] Ibid., paragraph 15.

[19] Ibid., paragraph 131.

occupation from the pre-sovereignty to present. However, it does not require "strict continuity", because the Supreme Court recognizes the interruption of land use of First Nations by the European authority in history. Therefore, strictly imposing the second category would contradict with the section 35 of Canadian Constitution. Final factor is total exclusive or shared exclusive occupation of claimed territory. These detailed three factors of the Delgamuukw ruling in 1997 shocked native land claim and treaty negotiations in Canada, because the framework of most of ongoing treaty negotiations were practically challenged by these factors.[20]

The 1982 Constitution changed not only the public's attention to the term, *aboriginal and treaty right* by the ambiguous word existing, but it practically changed the native land claim movements in Canada.[21] Even though treaty-making has been on of the major methods for Europeans to acquire lands in Canada, not all of the lands in Canada are covered by treaties. Therefore, the aboriginal rights and title of the areas, where any treaty has not covered, remained uncertain. Subsequently, the *Calder* decision in 1973 changed the chemistry around the land claim movement entirely. It showed that governments could no longer ignore the legal existence of aboriginal rights and title, and marked the beginning of the modern treaty policy of the federal government, which is currently undergoing in several places in Canada.[22] Thirteen treaties have been signed under this modern treaty formula by 1997, but each treaty was negotiated by case-by-case bases, and like other treaties in Canadian history, modern treaty negotiations has resulted in addressing different kinds of agreement.[23] For example, while the James Bay Agreement focused much more on economic and social development of the James Bay Area, the Nisga'a Treaty focused on the property right and governance of the Nisga'a.[24] Even though the basic negotiating structure of the modern treaty policy has not changed during the last thirty years, there has been a crucial difference in treaty negotiation before and after 1982. In short, the 1982 Constitution gave legal protection for aboriginal and treaty rights.

Typical native/non-native negotiation formula, which was initiated by the British government and the federal government of Canada since the declaration of Royal Proclamation in 1763,

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[20] "Delgamuukw v. British Columbia [1997]", *Delgamuukw – The Supreme Court of Canada Decision on Aboriginal Title*, paragraph 128, 154, 156.

[21] Section 35 (1) of Canadian Constitution (1982).

[22] Department of Indian Affairs and Northern Development, *In all fairness: a native claims policy: comprehensive claims/En toute justice: une politique des revendications*, (1982), and *Outstanding business: a Native Claims Policy: specific claims/ Dossier en souffrance: une politique des revendications des autochtones: revendications particulieres.* (1982)

[23] James S. Frideres ed., "Contesting Title and Ownership: The Modern Claims and Treaty Process", *Aboriginal Peoples in Canada – Contemporary Conflicts*, p.p.187-229

[24] The James Bay and Northern Quebec Agreement (1975), and Northeastern Quebec Agreement (1978) were signed to carry out the infrastructure and hydro project in the area. In return, the aboriginal groups in the area gained compensation which lead to economic development of the communities. Unlike the James Bay Agreement, the Nisga'a Treaty established Nisga'a self-government similar to municipal-style governments.

was that while First Nations give up certain conditions of aboriginal rights and title, the federal government (or British Crown) would pay kinds of benefits to the First Nations in return. In fact, the modern treaty policy of Canadian federal government after the *Calder* decision still had this nature of extinguishing aboriginal rights, because no law protected the aboriginal rights of First Nations before 1982.

Even after the declaration of the 1982 Constitution, the federal government merely changed the "cash for land" approach, because, technically, it was not sure where aboriginal treaty rights existed, especially in the area without any treaties.[25] Therefore, the federal government's approach was still to affirm the extinguishments of aboriginal rights by signing treaties, so the government thought that they would be able to reduce the potential of future confrontation. The 1982 Constitution also changed another aspect of the modern treaty policy: it was not required for First Nations to give up the aboriginal and treaty right when they would sign a treaty. Consequently, the Constitution of 1982 ensured First Nations' litigation movements to ask the status of their aboriginal rights, when governments and First Nations could not find any solution on this matter through negotiation. (E.g. the *Sparrow* case in 1990, and the *Delgamuukw* case in1997).

The *Calder* ruling in 1973 indirectly changed the development policy of the federal and provincial governments. Consequently, the ruling made the governments in Canada would no longer be able to ignore aboriginal rights and title when they would operate development plans on disputed areas. Then, the assertion of the Charter of Rights in 1982 secured the aboriginal and treaty rights of First Nations, and provided a new dimension to the modern treaty policy; legally the governments could no longer buy or extinguish aboriginal rights of First Nations without their content. However, even after 1982, the approach of the governments towards treaty negotiation was still similar to "cash for land" of the 19th century: extinguishing aboriginal rights of First Nations.

Problems in the Treaty Negotiation in British Columbia

The Calder decision of the Supreme Court of Canada surely changed the federal government's aboriginal policy from "ignoring aboriginal rights and title", to "negotiate and discuss the rights and title". Especially after the decision, the comprehensive claim policy started in three of Canadian provinces, Newfoundland, Quebec, and British Columbia, and two territories, the Yukon Territory and the Northwest Territory. However, only two comprehensive claims have settled in Canadian provinces, the James Bay Agreement and the Nisga'a Treaty. In Canadian

[25] Murray Angus, "Comprehensive Claims: One Step Forward, Two Steps Back", *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, 69.

provinces, provincial governments' involvement is necessary to achieve the modern treaty negotiation, because the Canadian Federalism gives land jurisdiction to provincial governments.

As the provincial government of Quebec negotiated with the federal and the First Nations in the area of the James Bay Project, the BC government rejected to participate in the comprehensive treaty negotiations with the federal government and the First Nations in BC. BC government's rationalization was that the aboriginal rights and title of the First Nations in the province were extinguished when the British government established its sovereignty in the 19th century. However, 1990 became the turning point for the comprehensive treaty negotiation in the province, because BC government finally joined the treaty negotiation respecting the Constitution of 1982.[26] Since then, the government of Canada, the government of British Columbia, and the First Nations in the province formed organized treaty negotiation system. While it took only two years for Canada, Quebec and the First Nations in Quebec to sign the James Bay agreement, no treaty has been signed so far in the treaty negotiation system in BC.

- James Bay Project

The James Bay Agreement (the James Bay and Northern Quebec Agreement of 1975 and the Northeastern Quebec Agreement of 1978) was the first settled comprehensive claim in the Canadian history. The original intention of this treaty negotiation was to reduce the tension between native and non-native communities, which was caused by the hydro-electric project in the James Bay area. The proposed project included the blocking and diversion of several rivers in the James Bay area which meant that the First Nations in the region would lose their traditional hunting or trapping area. No treaty had been signed, nor any legal land surrender had been negotiated in the northern part of Quebec since the extension of the province in 1912. Therefore in 1972, the Cree, Inuit, and Naskapi who resided in the proposed region took a court action claiming that the James Bay project violated their traditional rights. In November 1973, right after the *Calder* decision of the Supreme Court of Canada, the Quebec Superior Court ruled that the culture of the Cree and Inuit were potentially threatened by the project.

The negotiation for the agreement started in 1973 and took two years to sign the agreement. The negotiation followed the treaty-making formula in history, "cash for land" approach. The "cash for land" approach means that in exchange for aboriginal rights on lands, governments will provide financial compensation and other ways of social support to Natives.

The approach of Canadian and Quebec government, the "cash for land" approach, basically

[26] The former BC premier, Bill Vander Zalm of the Social Credit Party, announced his government's commitment to the negotiation in the fall of 1990, after his visit to Oka, Quebec.

recognized Native's property rights, and the governments asked the title surrender of the First Nations in the James Bay area. However, until 1975, the condition of land title, federal government's responsibility, and Quebec's responsibility in this area remained uncertain, because Quebec did not have negotiation with the First Nations in this area. Since the province of Quebec acquired northern part of the province from the Northwest Territories in 1921, the land jurisdiction became the province's responsibility (the Quebec Boundaries Extension Act).[27] This Extension Act also recognized the rights of the First Nations in northern Quebec.[28] Thus, since its expansion in 1912, the province of Quebec legally could not ignore the aboriginal rights of the First Nations in its extended area. Yet, due to its remoteness from the political centre of the province, the government of Quebec did not hold negotiation with the First Nations in this newly acquired area.[29] Therefore, when the Supreme Court of Canada addressed the *Calder* decision in 1973, neither Canada or Quebec was not in the strong position to claim the land title of James Bay area, and they considered the "cash for land" approach was much suitable approach to secure the proposed hydro-electric project. In addition, Canadian legal system did not protect aboriginal rights or title when Canada, Quebec, and the First Nations in the James Bay area were negotiating in the 1970's. Instead, surrendering or extinguishing aboriginal rights or title was one of the methods for the governments. Hence, the "cash for land" approach had been common throughout the early comprehensive claims. Even though the Cree and Inuit have several kinds of initiative on treaty land, they practically surrendered all of their land title to the crown in the James Bay Agreement.

- BC Treaty Negotiation

Currently in BC, 49 First Nation groups are participating in the organized treaty negotiation system, which is initiated by the BC Treaty Commission.[30] The federal government's modern treaty negotiation also started in the province in 1974, even though the *Calder* decision could not find the condition current of aboriginal title in the province. Although more than ten claims were accepted by the federal government by the end of 1989, "federal government-First Nations"

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[27] Before 1912, the federal government did not sign any treaty with the First Nations in Northeastern Canada. Therefore, the land title of the area had remained uncertain. Cited at: http://www-2.cs.cmu.edu/afs/cs.cmu.edu/user/clamen/misc/politics/Canada/statutes/Quebec-Boundaries-Extensions.html

[28] "The Quebec Boundaries Extension Act [1912]" - *Indian rights of new territory, Surrenders*, paragraph 2 (c)(d).

[29] Ibid.

[30] This tripartite negotiation (Canada, British Columbia, and First Nations) started in 1993 following the establishment of the B.C. Treaty Commission, which has been supported by federal and provincial legislation, and the First Nations Summit. Moreover, the Nisga'a Treaty, which was signed in 1998 by Canada, BC, and the Nisga'a Nations, was negotiated out side of the BC Treaty process.

negotiation formula had critical difficulty. In Canadian federal system, the land jurisdiction is provincial government's responsibility, so provincial government's involvement was necessary to achieve land claim negotiation. Due to its legal uncertainty of aboriginal title in the province, the BC government rejected to participate in the negotiation. The government of BC finally joined the negotiation 1990 with the federal government and First Nations. Unlike the James Bay Agreement in 1975, throughout the treaty negotiation in BC, aboriginal and treaty rights have been protected by the Constitution of 1982. Finally, the *Delgamuukw* decision in 1997 gave legal legitimacy to the aboriginal title in British Columbia.

While Canada and Quebec took "cash for land" negotiation strategy in the James Bay agreement recognizing aboriginal title, Canada and BC negotiate with First Nations to seek "co-existence" of Native and non-Native communities when they established the negotiation system in 1993.[31] While non-Native settlement was still rare in northern Quebec after the Extension Act of 1912, the non-Native settlement in BC already started before the establishment of the colony in 1858.[32]

The colonial government of BC intended to secure the land for European settlement, and their agricultural activities. Even though the government in the 1860's recognized that the Royal Proclamation of 1763 applied to BC, Joseph W. Trutch assumed that "the rights of Indians to hold lands were totally undefined" even in the Proclamation. Thus in 1867, he stated, "the Indians [of the Lower Fraser River] have really no right to the lands they claim".[33] As more non-Native peoples settled in BC, large tract of land were surveyed and distributed to these new settlers without First Nations' legal land surrender.

Even after the involvement of BC government in the treaty negotiation in 1993, the government insisted that the aboriginal title of the First Nations in the province had been extinguished. Hence, the BC Treaty Commission designed a formula to avoid a dispute over aboriginal title by introducing the term, "land ownership." [34] The definition of "land ownership" by the Treaty Commission is less clear. It allowed governments to consider the ultimate titleholder was the Crown without mentioning it. The original intention of the Commission was to avoid the conflict on land title issue, and to make governments and First Nations to discuss other issues at the bargaining table.

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[31] British Columbia Treaty Commission, *Report of the Suspension of Gitxsan Treaty Negotiations*, 1996, p 11.

[32] Brett McGillivray, "First Nations and Their Territories: Reclaiming the Land", *Geography of British Columbia*, Vancouver; UBCPress, 2000, p.p. 66-79.

[33] Joseph W. Trutch, "Lower Fraser River Indian Reserves", *Papers Relating to Indian Land Question*, p.41. "The rights of Indians to hold lands were totally undefined, and the whole matter seems to have been kept in abeyance, although the Land Proclamations specially withheld from pre-emption all Indian reserves or settlements."

[34] BC Treaty Commission, *Annual Report* 1997.

Constitutional protection for aboriginal rights has been effective throughout the treaty negotiation in BC. Thus, treaty negotiation technically cannot extinguish the aboriginal rights of the First Nations, unless they voluntary surrender their aboriginal rights. Another approach that First Nation groups could make was the court actions to ask the status of their aboriginal title. Also, cash settlement could still be one of choices for the governments when First Nations voluntarily surrender their rights. For example, Canada, BC, and the Nisga'a Nation negotiated under this uncertain legal condition of aboriginal title since 1990. Thus, the approach of Canada and BC resembled to the James Bay agreement, but the Nisga'a Final agreement partially affirmed the aboriginal title of Nisga'a. The Final agreement defined the treaty land as "fee simple", and the Nisga'a Nation had their collective title on the Treaty land.[35]

Another issue of the BC treaty negotiation system is the examination of traditional territories of First Nations, because the reserves in the province usually do not correspond to each First Nations' territory claims.[36] The BC Treaty Commission considers it is necessary before negotiating such issues as political administration, jurisdiction, or economic development, native land claim movements usually include Crown land, which BC government claimed their title in the late 19th century. The federal and provincial governments intention was to take "land selection" approach examining the geographical areas of aboriginal claims, by which the government tried to minimize the loss of the Crown lands. Contrary, the intention of the First Nations was to make sure that their land title on the traditional territory would be recognized. The territory disputes has been one of the major obstacles during last ten years in BC, and the *Delgamuukw* decision consequently initialized a new starting point for treaty negotiation, providing an outline to the territory claim issue; "territory proofing" became "title proofing" not only of First Nations, but also of the Crown.

The treaty negotiation in BC has six negotiating stages, and each First Nations have negotiation with two levels of government individually in case-by-case bases [Table 2].[37] Moreover, this case-by-case style negotiation is considered to be suitable solution in BC, because any law does not mention where and how *aboriginal and treaty right* exists in the province. Most of the First Nations in the negotiation are currently in the Stage 4 which is the most critical stage of the treaty negotiation, because in this stage, Canada, BC, and First Nations negotiate in detail. The outcome of the Stage 4 will be the blueprint of treaty called "Agreement-in-Principle". Therefore, this Stage 4 has several reasons why no treaty has been singed in the treaty negotiation in

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[35] Nisga'a Final Agreement section 2.22-2.27.

[36] In the Stage 1, First Nations have to describe their traditional territory. In Stage 4, three parties negotiate land issue in depth. (BC Treaty Commission)

[37] By 2003, there are two groups at the Stage 5 process, the Lheidli T'enneh Band and the Sechelt Indian Band. (BC Treaty Commission, 2003)

Table 2 The Six Stages System of BC Treaty Negotiation

Stages	Issues to be discussed
Stage 1: Filing a Statement of Intent to Negotiate a Treaty	To be accepted into the treaty process, a First Nation's governing body must submit a Statement of Intent that meets the Commission's criteria for Stage 1.
Stage 2: Preparing for negotiations and assessing readiness (Two First Nation Groups)	The purpose of Stage 2 is: A. to bring the parties together for an initial meeting B. for the parties to do the necessary preparation and for each party to file readiness submissions; C. for the Commission to assess each party's readiness submissions and to declare each party and the table ready to proceed to Stage 3.
Stage 3: Framework Agreement Negotiations (Four First Nation Groups)	The purpose of Stage 3 is for the parties to negotiate a Framework Agreement. A Framework Agreement is a negotiated agenda for Stage 4 Agreement in Principle negotiations. It should identify the subjects for and objectives of the negotiations, and establish a timetable and the procedural arrangements for the negotiations.
Stage 4: Agreement in Principle Negotiations (41 First Nation Groups)	The purpose of Stage 4 is for the parties to negotiate an Agreement in Principle. This is the agreement that will form the basis of the treaty. It should be the product of a thorough examination of the subjects set out in the Framework Agreement.
Stage 5: Negotiation to finalize a Treaty (Two First Nation groups)	The treaty formalizes the new relationship among the parties and embodies the agreements reached in the agreement in principle. Technical and legal issues will be resolved. A treaty is a unique constitutional instrument to be signed and formally ratified at the conclusion of this stage.
Stage 6: Implementation of the treaty	Long-term implementation plans need to be tailored to specific agreements. Plans to implement the treaty will be carried out. All aspects of the treaty will be realized and with continuing goodwill, commitment and effort by all parties, the new relationship will come to maturity.

BC.

The initial propose of Stage 4 prior to the *Delgamuukw* ruling was to negotiate the co-existence and co-management by Native and non-Native communities, even if both parties still disagree on the legal scope of property right.[38] Yet, this negotiating style has not worked out as the BC Treaty Commission intended, because 1) the government of BC could not recognize the existence of aboriginal rights in the areas covered by Crown's activity, and 2) several First Nation

[38] British Columbia Treaty Commission, Report of the Suspension of Gitxsan Treaty Negotiations, 1996, p. 11.

groups could not accept the provincial government's "land selection" approach. Since the governments and First Nations cannot agree on the legal condition of negotiated areas, such issues as governance, jurisdiction, or economic development, which are the major topics in the treaty negotiation in BC, has not been negotiated as a result. For example, the province of BC does not stop their economic activities in several disputed areas because they still consider that the Crown owns the property rights of these areas. When the tripartite treaty negotiation was established in 1993, Canada, BC, and First Nations agreed to negotiate on interim measures whenever either parties' interests, such as economic activities on claimed lands or native's culture, would be affected by either parties activities.[39] However, Canada and BC have been unwilling to negotiate on interim measures, consequently, several treaty negotiations were suspended or withdrawn.[40]

Another challenge in the Stage 4 was tribal boundary overlaps. Of the 49 First Nations in the treaty negotiation, almost all of the claims overlap one another, except Queen Charlotte Island - Haida Gwaii -. Historically and anthropologically, the "boundary" concept of the First Nations in the Pacific Northwest region was not the same as the concept of the modern nation state in Europe. The First Nations had practiced a unique "hunting-gathering" social system, which relied on undomesticated animals and plants, and moved their habitation seasonally according to the games.[41] Therefore, hunting and residential spots of First Nation groups did overlap among themselves due to their semi-nomadic lifestyle. European traders in the early 19th century observed such social structures of First Nations. For example, James Teit and other researchers documented the history of territorial overlaps and co-existence in their journals (e.g. the seasonal movement of the First Nations of Lower Mainland BC such as Musqueam, Tsawwassen, and Squamish).[42]

The First Nations in the BC treaty negotiation had to resolve the disputes of border overlap among themselves.[43] The BC Treaty Commission's explanation for overlap disputes were that it is not only seen as an urgent issue to be settled before establishing a treaty, but it is also necessary to carry out the 49 treaty negotiations with their mutual trust.[44] Moreover, the Commission sees settling boundary disputes as a requirement to achieve certainty of jurisdictions, rights and responsibilities on future treaty land. Therefore under current negotiating system, until overlap

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[39] Interim Measures Agreements [1991], *The Report of the British Columbia Claims Task Force;* cited at http://www.aaf.gov.bc.ca/aaf/pubs/bcctf/toc.htm.

[40] In 1995, the Gitxsan Hereditary Chiefs and the province had a confrontation on the natural resource development in the Salmon River area and the Suskwa area. In 2000, the Ts'kw'aylaxw First Nations withdrew from the treaty negotiation from failure to attain an interim measure.

[41] *Hunting and gathering Societies,* Encyclopedia of Social and Cultural Anthropology, p.p. 288-291

[42] Cole Harris, "The Lower Mainland, 1820-81", *Vancouver and Its Region,* p.p. 38-44.

[43] "Resolving First Nation Overlaps", *B.C. Treaty Commission Annual Report 1997;* cited at http://www.bctreaty.net/annuals/97overlap.html.

[44] Ibid.

dispute would be officially solved, Canada and BC would not be able to conclude the Stage 4 of the treaty negotiation with any First Nations. Even though the First Nations Summit (organized body of the First Nations in BC) introduced three-step process to solve boundary overlap issue, it did not show much progress. It was because many First Nations had their traditional ways to solve overlaps, and the strong rivalries among the First Nations was the obstacle for boundary negotiation.[45] The Commission's "boundary" concept before Delgamuukw clearly reflected the border concept of non-Native communities, which needed the radical changes of the traditional border concept of First Nations.

Unlike this organized treaty negotiation system under the BC Treaty Commission, the treaty negotiation among Canada, BC, and the Nisga'a Nation was carried out outside of this outline. These three parties signed without the contents of other First Nations whose claims overlapped with Nisga'a (Gitanyow and Gitxsan). The outline to solve claim overlap of the BC Treaty Commission originally aimed to avoid another tribal conflict, but the Commission has not found any other effective ways to solve this matter.

Delgamuukw and BC Treaty Negotiation

The significance of the Delgamuukw ruling to the comprehensive treaty negotiation in Canada is that it declared the existence of aboriginal title in the province of BC.[46] Technically, there is no need to change the initial propose of Stage 4, which was designed to seek ways of co-existence of Native and non-Native communities, instead of the scope of legal right. Yet, Canada and BC have to change their approach on land issues after the Supreme Court decision, because the fact that the existence of aboriginal title is recognized in the province means that the condition of the Crown's land also has to be re-examined in the province. Legally, after 1997, Canada and BC could no longer take the hard-liner approach on land issue since the *Delgamuukw* verdict.

The BC government did not agree to recognize the existence of aboriginal rights in the areas covered by such Crown's activity as economic activities, licensing, and so forth. However, once First Nations' aboriginal title is entitled to the lands with current economic activities of the Crown, the "cash settlement" approach of the treaty negotiation will have different meaning. Canada and the provincial government will have to compensate to the First Nations for their economic and cultural loss made by the governments' activity. Moreover, the Supreme Court's

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[45] BC Treaty Commission, *Annual Report 1997*, "The first step is mediation by elders, then a formal mediation process, followed if necessary by arbitration."

[46] "Delgamuukw v. British Columbia [1997]", *Delgamuukw – The Supreme Court of Canada Decision on Aboriginal Title*.

decision, *Delgamuukw*, legally changed Canada and BC's "land selection" approach to "proofing Crown's title" approach. As First Nations have to proof their aboriginal title on claimed area following the *Delgamuukw* outline, BC also has to prove province's claimed area as "unoccupied land" before the European sovereignty. Thus, interim measures would be more efficient after *Delgamuukw* to avoid the conflict among three parties' interests on negotiated lands.

Delgamuukw also made a significant decision by introducing a new notion on "tribal border" to the comprehensive treaty negotiation in BC. *Delgamuukw* stated that land occupation does not need to be exclusive condition, but there is also the condition of shared exclusivity.[47] This notion not only respects the traditional land occupation system of the semi-nomadic aboriginal society in BC, but it also gives the prospective that several First Nations could co-exist in overlapped areas if they can make an agreement or consensus on the condition of land title or land management.

The BC Treaty Commission's approach is still to encourage First Nations to resolve the border overlap disputes among themselves.[48] The commission assumes that overlap disputes cannot be left unsettled to achieve certainty of jurisdictions, property rights and responsibilities in future treaties. Unlike governments' approach prior to 1997, which focused on achieving certainty of jurisdictions, rights and responsibilities on overlapped areas, the Commission's new approach to overlap issue recognizes shared territory, which *Delgamuukw* mentioned in the phrase "shared exclusiveness".[49] However, even after *Delgamuukw*, overlap issue has made little progress, and this affects treaty negotiations also showed little progress in the Sage 4.

Conclusion

While it took two years for Canada, Quebec and the First Nations (the Cree, Inuit, and Naskapi) to sign the James Bay Agreement, no treaty has been signed so far in the treaty negotiation in BC. There are four critical factors which make the James Bay case and the BC case sig-

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[47] Ibid., paragraph 158, 159.

[48] "Resolving First Nation Overlaps", *B.C. Treaty Commission Annual Report 1998;* cited at http://www.bctreaty.net/annuals/98overlaps.html. "The Treaty Commission realizes that overlap is a sensitive issue. However, it is one that cannot be left unaddressed. The increased obligation to consult arising out of the Supreme Court of Canada decision in Delgamuukw and the proposed acceleration of negotiations covering land, resources and cash heightens the need to address it. The court also suggests that all First Nations with an interest in an area should participate in those negotiations."

[49] Ibid., "Traditional territories can and do overlap. Overlaps may arise from many causes: a tradition of sharing territory for the use of specific resources; movements of families or tribes; or longstanding disputes. Where overlaps represent a tradition of sharing between First Nations, and that is acknowledged for treaty purposes, then everyone knows that the shared territory or resource can only be dealt with by consent of those First Nations." Also, "Delgamuukw v. British Columbia [1997]", *Delgamuukw – The Supreme Court of Canada Decision on Aboriginal Title*, paragraph 158, 159.

nificantly different. These factors are also the reasons of the current delay of the treaty negotiation in BC.

First of all, the provincial government of BC had been reluctant to negotiate with the First Nations and the federal government of Canada, because the province insisted that aboriginal titles were extinguished in the province. Contrary, the province of Quebec took the approach to recognize aboriginal titles of the First Nations in the James Bay Project area, and took "cash for land" strategy to avoid further confrontation. Theoretically, if the Crown would have had the land title of entire BC, as the province insisted, BC did not need to negotiate with the First Nations or Canada. However, BC did not follow the Royal Proclamation of 1763, and the province declared that First Nations did not have the right to obtain land title instead. Thus, until the *Delgamuukw* ruling of the Supreme Court of Canada pronounced the current existence of aboriginal title, it has been quite difficult to make consensus on land title in the province. Unlike the BC Treaty Commission's intention, such negotiated subjects as self-government, jurisdiction, and economic activities, all relates to the question of land title. The Nisga'a Treaty took "fee simple with collective rights" style, hence, Nisga'a granted (or regained) the land title from the Crown through provincial governments.[50] Yet, after the *Delgamuukw* ruling, it was not only the Crown who could declare the ultimate property rights of the land in BC, but also the First Nations could claim their land title. The structure of negotiation has legally changed after *Delgamuukw*, however, the federal and provincial governments are reluctant to accept this fact.

Secondly, the protection for aboriginal and treaty rights of the Constitution of 1982 affects the treaty negotiation in BC. Prior to the introduction of the 1982 Constitution, governments could extinguish aboriginal title through legislation. However, after the declaration of the 1982 Constitution, aboriginal and treaty rights are protected as long as its *existence* is proved. Canada and BC could still take its hard-liner approach at the negotiating table with the First Nations, but at the same time, they would no longer be able to take alternative action to extinguish First Nations' aboriginal and treaty rights other than negotiation. Since almost none of the First Nations is currently offering land surrender, the only solution to achieve comprehensive claims is to establish an agreement among three parties.

Moreover, *Delgamuukw* brought the land question back to the "title proofing" stage. Prior to the *Delgamuukw* verdict, the First Nations in the treaty negotiation present the proof of their traditional territories, then, they negotiated with Canada and BC on how to draw the boundary of "treaty land." Since the "treaty land" meant "fee simple land with First Nations' collective rights," BC's negotiation style was to avoid giving up the area with province's economic activities. Canada and BC had to change this "fee simple" style, after the announcement of the exis-

[50] Nisga'a Final Agreement, Chapter 3 and Chapter 4.

tence of aboriginal title in the province by the *Delgamuukw* verdict. The "title proofing outline" of *Delgamuukw* changed "proofing their traditional territories" to "proofing both natives' and non-natives' land title". The provincial government also has to present the proof as "unoccupied land" prior to the European sovereignty to keep their economic activities on the Crown land. However, if the violation of land title would be proved, either of the parties at the negotiating table could ask for negotiation on compensation issue. This is another aspect of the treaty negotiation in BC which governments are reluctant to change.

Finally, the large number of the First Nations in the treaty negotiation in BC makes the comprehensive claim different from such settled claims as the James Bay Agreement or the Nisga'a Treaty. Three First Nation groups (the Cree, Inuit, and Naskapi) together signed the James Bay Agreement with Canada and the government of Quebec, and they were the only First Nations who were negotiating with government in the 1970's.[51] In BC, territorial overlap is a critical issue in the treaty negotiation. Even though the Nisga'a Treaty became a law in 2001, overlapped claim with the Gitanyow Hereditary Chiefs was not solved when Canada, BC, and Nisga'a signed the Treaty. Currently, the Agreement-in-Principle of the BC Treaty Negotiation would be signed after First Nations solve the overlap disputes by themselves, and there had been little progress on this matter.

Realistically, border overlap issues have to be seen in long term negotiating framework, in which Canada, BC, and the First Nations to discuss on the this issue even after the three parties sign treaties. If a First Nation A and a First Nation B have overlapped claimed area X, and a First Nation C is not claiming their land title on overlapped Area X, it means that the claim on area X is exclusive to First Nations A and B. Even though the purpose of the BC treaty negotiation is to assure certainty, the comprehensive claim should not alter aboriginal concept without the consent of native peoples.[52] There are significant territorial overlaps in the world, and many of them have remained as "overlap claimed areas." [53] The certainty of land title is important, yet, there is a choice to establish a treaty on the area without overlapped claims, at first. Treaty signing does not need to be the total package of the whole negotiated issues, but it would rather be better and faster to make deals on which three parties can agree, then move to other issues, such

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[51] By the year 1997, there are eight claims have submitted in Quebec: Atikamekw-Montagnais, Hurons of Loretteville, Kanesatake Indians at Oka, Makivik Claim, Micmacs of Gesgapegiag, Micmacs of Restigouche, Mohawks of Kahnawake, Naskapi First Nation. (Elaine L. Simpson, *Aboriginal Claims In Quebec*, University of Alberta, 1997. cited at http://www.ualberta.ca/~esimpson/claims/quebec.htm)

[52] *"Certainty"* of the BC Treaty process originally "reflects that a need by the parties (Canada, British Columbia, First Nations, and general public) to know that their rights and interest are secure, and will not be interfered with by the rights of others". (A. C. Hamilton, *A New Partnership*, 1995)

[53] For example, the Takeshima Island issue between Japan and Korea has not been solved for centuries.

as territorial overlaps.

The treaty negotiation in BC has shown slow progress, due to the dispute on aboriginal rights and title, different strategies on land issue (e.g. land selection approach of Canada and BC, and title proofing approach of First Nations), and border overlap. The *Delgamuukw* decision of the Supreme Court of Canada addressed solutions for these matters. For example, by ruling that the aboriginal title exists in BC, negotiating strategies on land issue became "title proofing" style, and the verdict also provided the provision for land sharing on overlapped claim area. *Delgamuukw* did provide legal outlines to solve disputed issues of the comprehensive treaty negotiation in BC, but it did not mean the decision would instantly change the treaty negotiation. It voluntarily requires effort both of governments and the First Nations to solve the issues that the negotiation is currently having. The initial step of the negotiation, stall of the negotiation, the court action, and the verdict from the Supreme Court of Canada, all happened during the last ten years. Then the *Delgamuukw* introduced new perspectives on comprehensive treaty negotiation in British Columbia. Even though no treaty has been signed, ten years of negotiation produced much clearer outline not only for BC, but also for the comprehensive claim policy of Canada.

Basically, this negotiating system is not suitable to achieve successful treaty negotiation in the province. The organized treaty negotiation in British Columbia originally inherited the negotiating process of the Nisga'a Treaty, which respected the constitutional protection for *aboriginal and treaty rights* of the Nisga'a that the James Bay agreement did not have. However, the current land claim movements in British Columbia did change the legal status of *aboriginal title* in the province, which consequently would change the nature of the treaty negotiation. Governments' unwillingness to revise the treaty negotiation system and their "land selection" approach will not make 49 of treaty negotiations in British Columbia successful. It is urgently required for the three parties to realize and accept the legal and changes in the last ten years.

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