

# History of Perceptions of Jurisdiction Boundaries and the Tsilhqot'in Land Claim in Canada

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## SUMMARY

This paper informs the debate on the contrasting views of boundaries and territories in negotiations between aboriginal groups and the nation state. It describes the historical evolution of how maps and political boundaries have been viewed by Western nation states and contrasts this with how boundaries are viewed by select African customary groups. It then provides a brief description of the different world views concerning territorial claims and boundaries in the recently decided *Tsilhqot'in* case where the Supreme Court of Canada first grants Aboriginal title. *Tsilhqot'in* is compared with African customary systems and contrasted against contemporary Western nation state views of boundaries and territory that are rooted in Ptolemy's atlas, *Cartographia*. It also informs the international literature on boundary determination between Aboriginal groups and the contemporary Western nation state. It is also instructive for boundary dispute resolution between customary groups.

The article starts with a description about how political boundaries were understood and managed by ancient Western societies and the major influence exerted by *Cartographia* in changing this view to its contemporary form where straight lines drawn on a map dominates the way adjoining jurisdictions define their boundaries and is consistent with the way the Canadian state views boundaries.

This is followed by examination of Bohannan's description of three African customary societies. It contrasts the linear cartographic view of the world with views of boundaries and territories that emphasize the notion of topology in physical space and the constellation of interests in the way people relate to land and territory.

The *Tsilhqot'in* view of boundaries and territory is compared with the evolution of boundaries in Western nations and with Bohannan's view of boundary and territory in African customary societies. The comparison then applies principles from UNCLOS as an analogue for structuring influence beyond Aboriginal title boundaries in a banded spectrum of diminishing frontier rights.

*Tsilhqot'in* shows that First Nations people occupied all the territory that they claimed, not in an intensive way, but to the exclusion of other bands. Outside the claim area they shared the use of lands with other bands, but claimed a superior interest.

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## 1. INTRODUCTION

In North America, the British Crown provided some legal protections and rights to Aboriginal people with the Royal Proclamation of 1763. It attempted to allocate vast land reserves west of the Mississippi River for Aboriginal use. This angered European colonists who wanted to expand westward and contributed to the 1775 American revolt (Calloway, 1995, p. 21). It also attempted to establish and protect Aboriginal land rights by restricting disposition to the British Crown. Contrary to its good intentions, its implementation deprived Aboriginal people of most of their land and rights (The Truth and Reconciliation Commission of Canada, 2015).

However, section 25 of the Canadian Charter of Rights and Freedoms has been a catalyst for renewed assertion of Aboriginal land claims through the Canadian courts. The most recent advance is the first grant of Aboriginal title to the Tsilhqot'in First Nation by the Supreme Court of Canada (SCC) in November 2014 (Eyford, 2015). Notwithstanding this progress, persistent differences between the Canadian federal government, or Crown, and First Nation's interpretation of what rights extend beyond title boundaries have created legal and communication barriers that impede the resolution of outstanding Aboriginal land claims.

The *Tsilhqot'in* case is seminal because it is the first time that Canada has granted Aboriginal title. It offers an opportunity to analyze the title granting requirements and its delimitation process. Unfortunately, analysis of rights extending beyond the title border is limited. The courts found that the Tsilhqot'in retain rights to hunt, trap, and harvest in a traditional use area, but neglected to demarcate this territory (*Tsilhqot'in*, para 8). However, this result suggests the novel concept that Aboriginal title is associated with rights that extend beyond title borders.

This paper decomposes *Tsilhqot'in* to examine how Aboriginal land claims extend rights beyond title borders and to respond to the SCC's silence about how this territory is delimited with a banded spectrum of diminishing rights. This analysis is informed by the tensions between the Aboriginal and the European relationships to land. Bohannan's "man-man" and "man-thing" model and its application in different African customary societies provides the framework for the analysis. This paper recognizes Bohannan's "man-man" relationship as a reference to Aboriginal interpretation of land stewardship through social structures and uses the term interpersonal relationship instead of "man-man". Similarly, Bohannan's "man-thing" relationship refers to the European view that land is a commodity that can be individually owned. This paper refers to this as a commodity relationship in place of "man-thing".

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Aspects of the 1994 United Nations Convention on the Law of the Sea (UNCLOS) are used as an analogy to support the model for a banded spectrum of diminishing rights. Two UNCLOS propositions are relied on: (i) that determination of sovereign lands is a function of historic economic control, and (ii) sovereignty rights extend beyond a set of baselines in bands of differing rights and powers. This set of rights diminishes as bands are located further away from the baselines. This spectrum is consistent with the diminishing rights established by treaty in 1975 the James Bay and Northern Quebec Agreement (JBNQA). It set out a spectrum of diminishing Aboriginal rights in three categories: (i) exclusive use lands; (ii) land with exclusive rights to hunt, fish, and trap; and (iii) provincial lands that reserved specific hunting rights.

The article is presented in five sections: (i) a history of the European land title; (ii) Canadian government perspective on land title; (iii) Bohannon's interpretation of boundary and territory; (iv) the Canadian aboriginal perspective on land title that emerges from *Tsilhqot'in*; and (v) a spectrum of aboriginal rights based on UNCLOS and JBNQA. The historical review contrasts the European and First Nations perspectives on land title and the relationship of people to land. It informs the differences and commonalities about the two points of view and why they have been irreconcilable for so long. It validates both perspectives as emerging from a divergent response to incursions at political frontiers. First Nations developed a social and cultural framework to manage relationships to land. The European framework moved to an objective, cartographic interpretation of land on rediscovery of Ptolemy's atlas, *Cartographia*, in the early fifteenth century (Branch, 2014, p. 51).

This European cartographic revolution underlies Crown reliance on antecedent boundaries. These are delimited prior to establishing cultural landscapes (Hartshorne, 1936). Boundary lines are mapped before they are demarcated. Both the geometry and the topology are clearly defined. The result is an absolute boundary where adjacent sets of land rights terminate.

This is inconsistent with the Crown's ratification of UNCLOS where maritime boundary delimitation creates numerous overlaps such as in the Gulf of Maine case (Calderbank, *et al.*, 2006, p. 147). However, UNCLOS provides a practical example of how a spectrum of diminishing sovereign rights can be defined as one moves away from an absolute boundary. This may be a useful analogue for defining a spectrum of diminishing rights extending beyond the border of Aboriginal title lands.

In the fourth section, *Tsilhqot'in* shows how Bohannon's model may be consistent with the SCC's *Tsilhqot'in* decision and ties together the historical, Crown, and legal interpretation of boundaries.

The fifth section uses principles from UNCLOS and the JBNQA to provide a framework for structuring frontier influence beyond Aboriginal title borders in a banded spectrum of diminishing rights.

## 2. HISTORY OF THE EUROPEAN PERSPECTIVE

This section describes the historical development of European jurisdictional boundaries that dominates the international landscape. It begins by looking at the political frontier that defines the separation of early polities. It then discusses the fortification of political frontiers in response to resource scarcity. This is followed by review of three cartographic boundary types: (i) subsequent; (ii) antecedent; and (iii) superimposed. Finally, it examines modern frontier management in UNCLOS and JBNQA.

### 2.1 Political Frontiers

The history of the Western nation state begins with neighbouring polities. These were separated by the economic and cultural influence that the sovereign authority could exert over a territory (East, 1937). Politically isolated populations developed distinctive cultures while less isolated populations shared cultural similarities. For example, it is a reasonable inference that despite a cultural commonality as Roman provinces, the United Kingdom's island isolation and early Roman withdrawal allowed its polity to develop a common law system distinct from civil law legal systems shared by nations on the European mainland.

The populated territory of a polity is defined by its intensity of use. High intensity means more direct sovereign control. The political frontier sees less development than the populated territories that they separate. Prescott and Triggs (2008, p. 31) give three potential explanations for this outcome: (i) the unfavourable nature of the environment; (ii) the needs of the territory bounded by the political frontier were satisfied and frontier development was not valued; or (iii) deliberate neglect to maintain a formidable security barrier. This informs our proposition that the intensity of use defines the extent of absolute sovereignty.

As polities expanded to take advantage of resources, frontiers overlapped and cultures mingled. Cornish (1936) suggests that poly-lingual languages developed in frontier borderlands when there was no divisive physical barrier such as rivers, mountains, or seas. Cornish (1936) tracked this language evolution in Europe as a manifestation of the geographic progression of national groups. He traced it in Flanders, Lorraine, Friuli, Istria, and Macedonia and described the overlap between national frontiers as link-lands to distinguish them from the other state territories as areas of trade and migration.

The reduction of frontiers to these link-lands also resulted in conflict. For example, the Stele of Vultures (Diener, 2012, p. 23). It describes a Mesopotamian conflict in the twenty-fifth century BCE between the city states, Umma and Lagash, in constant conflict over fertile lands. In response, Mesalim, King of Kish, surveyed the border erecting stele as monuments to demarcate his decision. Still, the cities quarrelled and the ruler of Umma removed the stele. Lagash retaliated, defeated Umma, and restored the original boundary stele. It also added an irrigation canal to act as a natural, absolute boundary to end conflict (Diener, 2012, p. 23). This shows that absolute boundaries could

be effective in managing conflict over link-lands and that they existed before the mathematically and geometrically accurate maps associated with the rediscovery of *Cartographia*.

## 2.2 Cartographic Influences

The stability provided by the absolute boundary between Umma and Lagash is consistent with the later European use of absolute boundaries as its link-lands reduced with population growth. This pattern is consistent with polities being aware of boundaries and frontiers but, the overlapping claims lead to fuzzy definition until *Cartographia* (Branch, 2014, p. 51). Branch argues that fifteenth century map making facilitated the emergence of geometrically defined sovereign boundaries that unified disparate national populations (Branch, 2014, p. 114). This mathematical mapping and boundary delineation lead to the modern interpretation of political borders. Hartshorne (1936) classifies this as: (i) subsequent; (ii) antecedent; and (iii) superimposed.

### 2.2.1 Subsequent Boundaries

Subsequent boundaries are constructed on existing cultural landscapes (Hartshorne, 1936). For example, Germany was a fragmented region of 500 independent states that culminated with the proclamation of the German Empire at Versailles in 1871 (Prescott & Triggs, 2008, p. 7). This evolution from frontier to boundary reached its conclusion with the defeat of Napoleon and the 1814 Treaties of Vienna and the 1815 Vienna Congress. This was the first attempt at linear division of Europe. It has remained relatively stable despite some border location disputes, conflicts, and wars (Branch, 2014, p. 135). This progression and rapid agreement resulted from accurate knowledge of the Western Europe cultural landscape. This created subsequent European boundaries that generally fit geographical features with existing cultural landscapes.

### 2.2.2 Antecedent Boundaries

Antecedent boundaries are delimited before the cultural landscape exists (Hartshorne, 1936). European colonization of the New World tended to assume colonized territory was *terra-nullius* and imposed antecedent boundaries without considering indigenous populations. This supports stable national borders because they are created before the territory is settled (Hartshorne, 1936). By preceding settlement, antecedent boundaries provide a framework for the growth of national populations by constraining regional settlement. For example, the antecedent border between Canada and the United States is the world's longest; most stable; and economically porous border (Prescott & Triggs, 2008, p. 235). However, its application in the New World was an abstract delimitation dependent on new cartographic technology.

It was a practical way to divide territory as the New World separated from centres of European political power. Cartographic technology easily lent itself to the use of straight boundaries because it could neglect precision in anticipating irregularities in unexplored territory. An example is the anomalous Northwest Angle, Lake of the Woods at the east end of the Canada-US border along the

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49th parallel (International Boundary Commission, 1931). Consequently, New World boundaries tended to define borders as straight lines delineated on a map prior to settlement. In contrast, European borders tend to follow frontiers and natural barriers. This is evident in the political map of the US and Canada where a substantial part of the boundary is the 49th parallel westward from the Great Lakes to the Pacific Ocean; the 45th parallel between Quebec and Vermont; and the 141st meridian between Alaska and Yukon. European borders tend to trace river systems and mountain ranges.

### 2.2.3 Superimposed Boundaries

Superimposed boundaries are drawn over existing cultural landscapes without being informed by cultural features (Hartshorne, 1936). It tends to be less stable than the antecedent boundaries because it often divides national populations and family groups. Separation creates social tension that disrespects the boundary and often leads to conflict. Boundary making experience in a number of African states provides a recognizable example (Prescott & Triggs, 2008, p. 53).

“The scramble for Africa,” at the 1884-1885 Berlin Conference, saw European colonial powers create a system of superimposed boundaries (Prescott & Triggs, 2008, p. 291). This outcome is inconsistent with Bismark’s remark that the boundary makers, “had... shown much careful solicitude for the moral and physical welfare of the native races” in bringing “civilization” to the African continent (Pakenham, 1991). Bismark’s view suggests that the conference intended to use a subsequent boundary method. However, delegates’ limited knowledge resulted in a system of borders that achieved poor alignment with African cultural context. Many borders divided social groups. The intervening years of military strife and economic failure between African states is testimony to the risks in this culturally insensitive application of the superimposed boundary method (Pakenham, 1991).

## 2.3 United Nations Convention on the Law of the Sea

The European view is based on the concept of absolute sovereignty over a surface described by modern mapping. However, the political frontier has not entirely vanished. Remaining frontiers exist in areas, such as oceans, that polities cannot settle. These frontiers are recognized by UNCLOS as zones of decreasing sovereignty in a spectrum of rights that diminish with distance from the coastal state baselines: (i) internal waters; (ii) territorial sea; (iii) contiguous zone; (iv) exclusive economic zone (EEZ); (v) continental shelf; and (v) high seas. Baselines track state coastlines and define the division between internal waters and oceans.

The first UNCLOS zone, internal waters, is defined under Article 8 as sovereign territory of the nation state. These waters are on the landward side of baselines. There is no right of innocent passage and it is under the dominion of the polity.

The second zone, territorial sea, is defined under Part II Section 1 as an area of restricted state sovereignty up to 12 nautical miles from the polity coastal baseline. It grants the right of innocent passage to other polities traveling to and from ports and the right to traverse without stopping or showing signs of aggression to the coastal state. It grants full sovereignty over air space and undersea beds.

The third area, contiguous zone, is defined under Part II Section 4 as an area of more restricted state sovereignty extending 24 nautical miles beyond the baselines or 12 nautical miles beyond the territorial sea. It empowers coastal states to enforce control of customs, immigration, and sanitation laws. It is an area inside the frontier where the coastal state may deploy military forces such as a coast guard or navy.

The fourth zone is the exclusive economic zone, or EEZ. It is described under UNCLOS Part V. The EEZ extends 200 nautical miles beyond coastal state baselines or 176 nautical miles beyond the contiguous zone. This zone includes rights to explore and exploit, conserve and manage resources.

Frontiers are often a source of resources, but are not exploited when the needs of the polity are satisfied in other territory that is more accessible and less expensive to exploit. The offshore EEZ is a frontier because it is an inhospitable environment that is expensive to settle and colonize. The result is that EEZ exploitation tends to be limited to fishing.

The fifth UNCLOS zone is the continental shelf. It is an extension of the EEZ's exploration and exploitation rights to include mineral and non-living resources and sedentary species. The continental shelf is a lower level of control and a zone of uncertainty and requires delimitation to define the physical extent of the polity's authority.

UNCLOS Part VII sets out the final zone; the high seas. In this zone all states share equal freedom. This is analogous to *terra-nullius* in a terrestrial context. It is a region that is not controlled by any state. All nations have a vested interest in it and it is only subject to international law.

### **3. CROWN PERSPECTIVE**

The European view of boundaries dominates the Crown perspective. Canada's Aboriginal population was sparse when French and British colonists arrived. The colonizing countries applied antecedent boundaries to the new territory as if it were *terra-nullius*. Europeans interpreted the expanse between Aboriginal groups as meaning that consultation was unnecessary. This interpretation simplified the division of territory. Sparse indigenous populations were unable to coordinate presentation of their claims or mount an effective opposition. European boundary makers partitioned the land as if the indigenous nations did not exist, except to the extent that some lands were reserved for Aboriginal groups by treaty.

This use of the antecedent boundaries is consistent with the mathematically straight borders found in the western provinces. These are absolute and strictly enforced by the Crown. The Crown extends this concept to its expectation for definition of Aboriginal territorial borders and rejects models that could tolerate overlapping Aboriginal land claims. The result is that the Crown refuses to negotiate treaties or grant Aboriginal land title until the competing claims are settled (Eyford, 2015). This may be inconsistent with the Crown's management of its own overlapping international maritime claims.

Canada encounters several areas where its international maritime claims overlap with those of other states. If Canada was unable to negotiate these overlaps its resolution of international maritime boundary disputes would be paralyzed. Fortunately, it has recourse to adjudication. However, the Crown denies similar recourse to Aboriginal groups.

There are several examples of this inconsistency between domestic policy toward overlapping Aboriginal claims and international maritime claims including: (i) Strait of Juan de Fuca; (ii) Dixon Entrance; (iii) Gulf of Maine; (iv) Beaufort Sea; (v) Lincoln Sea; (vi) Hans Island; and (vii) Shelf Delimitation in the Arctic (Calderbank, et al., 2006, p. 147). The majority of these disputes concern overlapping boundary claims. For example, the dispute in the Beaufort Sea is a difference in treaty interpretation about the definition of the equidistance principle in maritime law. This creates a 6250 NM<sup>2</sup> territorial overlap between Canada and the United States (Calderbank, et al., 2006, p. 162). Another dispute is the Arctic continental shelf delimitation where both Canada and Russia claim the North Pole.

Canada responded to an Aboriginal and commercial fishermen's concerns about international salmon fishing rights off the British Columbia coast. However, this was not a dispute between domestic Aboriginal claims. It concerned negotiation and implementation of the 1985 Canada-U.S. Pacific Salmon Treaty (Brown, 2005).

This suggests that Canada has inconsistent policy for resolving its international maritime disputes and domestic Aboriginal disputes. Internationally Canada expects the ICJ to arbitrate overlaps but, domestically it does not recognize that First Nations also need arbitration to resolve overlaps.

#### **4. BOUNDARY AND TERRITORY: BOHANNAN INTERPRETATION**

Bohannan (1973) describes the difference between the western boundary perspective and a number of different perspectives in African customary societies. This section examines these differences and extends Bohannan's customary perspective to the Canadian context.

This model suggests that people tend to conceptualize land tenure as: (i) a representational map of how they relate to other people; and (ii) a view of land as a thing that can be owned; or (iii) a spatial manifestation of culture. Bohannan defines land tenure as people's association between these three concepts. He suggests that all cultures have a representational map about how they relate to other

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people. However, there is divergence in how people relate to land because Western societies focus on ownership while others focus on a spatial manifestation of culture.

Bohannon terms the Western view as a man-thing relationship. We term this a commodity relationship. It is based on: (i) social needs to create maps; (ii) concepts of property ownership; and (iii) contracts and succession laws (Bohannon, 1973). It empowers people to hold or own land parcels. Maps respond to a need to define the area that is under the control of the polity. Alternatively, Bohannon terms the other view as a man-man relationship. We term this an interpersonal relationship. It is about how social relationships are managed in the spatial context and lacks dependency on land ownership (Bohannon, 1973).

An example of the interpersonal relationship is the Tiv of Nigeria and Cameroon, whose land tenure map reflects social organization. The Tiv are grouped according to a lineage system reflecting familial relationships. Their genealogical map tracks a system of shifting agriculture field allocations is determined by social status. The location of individual land interests constantly change as families grow, shrink, and high status members move their farms. In response, lower status members must reallocate their farmland. Bohannon (1973) observed that their genealogical map also moves around within a greater territory and that farm rights are time sensitive and return to the collective when cultivation ends. Tiv members always hold rights in the genealogical map even though they may not have rights to a specific parcel. Spatial aspects of Tiv social organization are dynamic. Land use interests in specific locations change, but the aerial extent of greater Tiv territory remains consistent. Bohannon describes this as “farm-tenure.” The difference between the European and the Tiv maps concerns coordinate systems. The European map uses fixed coordinates. However, Bohannon observes that the Tiv map is like a “rubber sheet” that floats over the surface and constantly changes “its correlation with the Earth” (Bohannon, 1973).

Bohannon (1973) observed that the semi-nomadic Tiv culture resulted from their farm-tenure system. They moved as new lands are assigned and old lands are surrendered back to the group. Although the Tiv no longer maintain this lifestyle their historic farm-tenure system is analogous to that of the Tsilhqot’in in western Canada. Both semi-nomadic groups move across the land in similar ways as it reflects their cultural dependency on how they use the land. Although the Tiv are farmers and the Tsilhqot’in are hunters, both are semi-nomadic and their territorial map floats over the surface (Bohannon 1973). Nowadays, the Tiv are creating absolute boundaries between lineage territories due to conflicts over land use rights in the buffer zones (Barry, 2008).

The Tiv are not an isolated example. Bohannon (1973) describes the Plateau Tonga of Northern Rhodesia who have a form of “farm-tenure” but their map is a series of points (rain shrines). This is analogous to the Iroquois in central Canada who organized themselves into a similar series of points as bounded villages (Ballantyne, et al., 2014). Bohannon (1973) also describes complex Kikuyu land tenure system that depicts both an individual map and a political unit map. It is an example on the spectrum between the interpersonal and commodity relationships. This model is similar to the

Montagnais in eastern Canada who blaze trees to depict both an individual map of family hunting districts and a representational map of their social organization (Ballantyne, 2014).

These three analogues between African and Canadian Aboriginal people supports the suggestion that Bohannon's African centric land tenure system based on interpersonal relationships can be generalized and applied to the Canadian Aboriginal context. This reasonably leads to the proposition that the tensions that exist in the African context between the interpersonal and commodity land tenure relationships are similar to land tenure tensions in the Canadian context.

## 5. CANADIAN ABORIGINAL PERSPECTIVE FROM TSILHQOT'IN

Tensions between commodity and interpersonal land relationships is at the core of the difference between Aboriginal and Crown perspectives in Canada. The Crown's land tenure perspective is based on commodity relationships where jurisdictional boundaries define land ownership and land rights. In contrast, Canadian Aboriginal people use interpersonal relationships for land tenure where, ideally, it is not necessary to define boundaries in absolute terms. Border delineation and demarcation is not valued unless their lands overlap in much the same way political frontiers overlapped in Europe prior to the application cartographic technology.

However, this does not suggest that Aboriginal people are unaware of borders. Ballantyne (2014) describes how the Eastern Canadian Montagnais people blazed trees to define hunting parcels and the Iroquois of Southern Ontario organized into bounded villages around longhouses. Brody (1988) also describes how Aboriginal people are situationally aware of their territory and neighbouring territories. He visited a reserve where the elder described territory through stories. Presented with a map he drew the edge of his group's territory as set out different hunting grounds and areas that his group had not visited since he was a child. Although the elder had not traveled to all areas, he felt a sense of permanence. For example, he said, "here they camped with as much sense of permanence... [they] were at the edge of their family's old hunting territory... but what was for them a periphery was for other Beaver Indian families the centre" (Brody, 1988, p. 8).

The European perception that Aboriginal people neglected boundary delimitation and demarcation tended to be a barrier to the granting of Aboriginal title as the Crown operationalized the European concept that title requires mathematically prescribed definition. This view was reflected in the SCC decisions in *R v Marshall*; *R v Bernard* 2005 SCC 43 (*Marshall*) where the court found that exclusive occupation of the *Mi'kmaq* was insufficient. It required direct Aboriginal occupation for title to be granted. Canadian courts upheld this requirement until there was a paradigm shift with the *Tsilhqot'in* case in 2014 recognizing that title can be granted on oral history evidence of exclusive occupation.

Exclusive occupation requires that Aboriginal people defend territory against trespassers including sections of the territory they may not frequently or directly occupy. The *Tsilhqot'in* patrolled parts of their territory when they were not occupying it. This was not direct control. Trespassers could

enter for a short time but, the Tsilhqot'in would forcefully remove them once detected. In *Tsilhqot'in* the SCC found that this was sufficient to establish exclusive occupation and granted Aboriginal title.

The SCC described Aboriginal title as conferring similar ownership rights as fee simple (*Tsilhqot'in*, para 73) including: (i) the right to decide how the land will be used; (ii) the right of enjoyment and occupancy of the land; (iii) the right to possess the land; (iv) the right to the economic benefits of the land; and (v) the right to proactively use and manage the land. In this title the Crown has the strongest form of consultation, consent. However, due to the collective nature of the title, it is "held not only for the present generation but for all succeeding generations" (*Tsilhqot'in*, para 74), it can only be surrendered to the Crown.

The earlier British Columbia Court of Appeal (BCCA) *Tsilhqot'in* decision found that Tsilhqot'in land claims beyond its title borders include rights to hunt, trap, and harvest (*Tsilhqot'in*, para 8). The SCC overturned the BCCA, but did not specifically address this finding. Consequently, it remains *obiter*, but it suggests that the Crown is under a duty to consult before encroaching on this territory. In *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 (*Haida*) the SCC described consultation as a spectrum based on the levels of infringement ranging from a "mere duty to notify" to a "requirement of Aboriginal consent" (para. 30). It may be reasonable to infer that lands adjacent to Aboriginal title is subject to the consent requirement while more distant lands only require notification.

The *Tsilhqot'in* decision is a milestone because it is Canada's first grant of Aboriginal title. However, it is incomplete because it does not resolve the territorial extent of Aboriginal rights to hunt, trap, and harvest in the traditional use area and is silent about inclusion of mineral rights. However, the SCC's reference to a spectrum of rights may provide an opportunity to consider solutions that inform a novel extension to the Canadian land tenure system.

## **6. SPECTRUM OF ABORIGINAL RIGHTS BASED ON UNCLOS AND JBNQA**

The SCC provides limited insight into what it means by a spectrum of rights except that it is based on levels of infringement. Years of future litigation can allow Canadian courts to define this spectrum in greater detail. However, it may be reasonable to suggest that UNCLOS and JBNQA are established systems reflecting an analogous spectrum of infringement rights as shown at Figure 1.

Title		Consent	
Occupied Site			
<i>occupation</i>	Stewardship		
	<i>exclusive use</i>	Traditional Use Area	
		<i>consultation with consent</i>	
		Ecozone	
		<i>consultation with accommodation</i>	Regional Zone
			<i>consultaion with notification</i>

Figure 1: Spectrum of Aboriginal Rights

The JBNQA created a spectrum with diminishing rights in the Canadian context. The defines three categories: (i) exclusive use lands; (ii) land with exclusive rights to hunt, fish, and trap; and (iii) provincial lands with reserved specific hunting rights. Category I includes all the lands in and around Aboriginal communities. JBNQA is a treaty, but these lands provide rights that are analogous to those granted by Aboriginal title. Category II is the exclusive right to harvest, but not the right of occupancy. Any use or development must not, “interfere unreasonably with... hunting, fishing, and trapping activities” (JBNQA, 1975). Category III lands are subject to the laws and regulations of provincial public lands. Aboriginal people have the right to hunt, fish, and trap certain reserved species, but the public also has access.

Consistent with the earlier SCC decision in *Marshall*, we suggest that Aboriginal occupation is analogous to UNCLOS internal waters and JBNQA Category I where Aboriginal people directly occupy lands.

The territorial defense against trespassers is required for Aboriginal title. This is analogous to control of UNCLOS territorial seas against maritime intrusion where authority is exerted by patrolling. The three JBNQA categories do not provide a direct analogue, but Category I remains consistent with exclusionary rights in this zone.

UNCLOS internal waters and territorial seas are consistent with the authority, rights, and powers of sovereignty recognized by the United Nations (United Nations, 1996). This is also consistent with many of the rights granted by Aboriginal title including exclusive possession, the right to patrol the land and exclude trespassers, and to manage land (*Tsilhqot'in*, para. 74). The right to exclusive use in this zone is consistent with JBNQA Category I.

Stepping out to the traditional use area, the UNCLOS contiguous zone provides that a state has exclusionary control to prevent infringement of customs, sanitary laws, and regulations (United Nations, 1998). This zone is adjacent to sovereign waters. The BCCA described lands adjacent to Aboriginal title as areas with exclusive rights to hunt, trap, and harvest. JBNQA Category II is also a zone providing exclusive rights to harvest. These rights are analogous to those of the contiguous zone as each provides limited exclusionary control. To support these exclusive rights *Haida* may suggest there is a duty to consent because this zone is adjacent to title lands where sensitivity to hunting, trapping, and harvesting rights infringement is greatest.

Beyond the traditional use area, the spectrum concerns a set of rights that includes consultation and accommodation. This is consistent with impacts in this zone having a “potentially adverse effect” (*Haida*, para 39) on hunting and trapping, but as a mere potentiality it may not require direct Aboriginal management of the sustainable hunting ecosystem. In this ecozone, the set of rights provides influence over resource management analogous to those of the EEZ under UNCLOS. This includes the opportunity to influence conservation practices and resource management. This band is informed by JBNQA Category III where lands are public and available to all citizens with some reservation of rights to Aboriginal title holders.

The continental shelf is the last UNCLOS zone. It lies beyond the EEZ and grants the lowest level of sovereignty based on the topography of the sea bed. The continental shelf is not always present, but we assume it is part of the spectrum of rights. However, it is beyond the scope of this paper to define cultural, geographical, and environmental rights in this area without input from Aboriginal and other stakeholders. However, this regional zone is the limit for our proposed spectrum of Aboriginal rights. It may concern expansive Aboriginal claims, but is beyond JBNQA land categories and is expected to have limited rights. By analogy, it is the area where holders of Aboriginal title get the lowest level of consultation; mere notification.

Beyond the regional zone are lands that are too remote for any reasonable expectation of negative impact on Aboriginal title lands. Similarly, a coastal state may be affected by high seas events, but it is too remote and the state has no authority or rights. The area is analogous to the UNCLOS high seas where all states share equal freedom. The Crown does not have a duty to consult in this area.

The UNCLOS and JBNQA analogy is not complete. UNCLOS manages an environment with characteristic uniformity where measurement of surface distances, bathymetrics, and underwater features define sovereign boundaries. Land presents a more complex topography where boundaries are influenced by both distances and terrain. In some ways, the delimitation of banded rights in a land context is similar to the UNCLOS delimitation of the continental shelf, but adds a layer of analysis that reflects traditional use. Also, territorial sea, contiguous zone, and EEZ are present under UNCLOS unless they meet opposite or adjacent claims. However, land topography and traditional use may not support all banded rights. For example, a mountain range may reduce distance from a center point because it is difficult to traverse. Aboriginal title lands that abut a mountain range that its people never traversed may have no rights over the mountains even though the distances are small. A river may extend distance because it provides a method of travel. In *Tsilhqot'in* there is a linear parcel along the Chilko River that was affirmed as title, but only included the banks. JBNQA attempts to respond to with categorical delimitation of areas and rights. This has limited generalizability, but suggests that case by case analysis may be necessary. However, UNCLOS and JBNQA support this paper's proposition that sovereignty rights extend beyond a set of baselines in a spectrum of banded rights that may be limited by topography and traditional use. The magnitude of the set of rights diminishes as bands are located further away from baselines.

## 7. CONCLUSION

Political tension between the interpersonal Aboriginal relationship and the European commodity relationship remains a persistent barrier to the legal resolution of Aboriginal land claims.

This paper responds to that tension with a proposition that relies on UNCLOS and JBNQA as analogues for development of sovereignty rights extending beyond a set of baselines in a spectrum of bands. In an Aboriginal context, this supports a system of graduated legal rights for Aboriginal influence beyond First Nation's title lands.

JBNQA provides a reasonable expectation that this model will resonate positively with the Aboriginal belief that an interpersonal relationship with land is not be limited by borders. It is also reasonable to anticipate that it will resonate positively with the Canadian government because it is consistent with the recognized legal framework provided by JBNQA and UNCLOS.

Research is required to validate these expectations. Interviews with First Nations people that explain the model and invite candid feedback will provide relevant data. A political response from the Canadian government is less useful as the relationship between the Crown and First Nations is mediated by the courts. Therefore, a meaningful government response may need to wait on judicial interpretation of legalisation that operationalizes the model. However, JBNQA suggests that other mechanisms may be available.

Research is also required to resolve the nonconformities between the uniform environment in which UNCLOS is framed and the idiosyncrasies of land topology. It will need to be informed by trade-offs between uniform standards of the UNCLOS analogy and standards that are responsive to terrain and traditional use, but are subject to reasonable limits that accommodate other populations and socio-economic priorities in nation building. JBNQA may provide some useful insights.

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