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The History of the Jay Treaty, and its Significance to Cross-Border Mobility and Security for Indigenous Peoples in the North American Northern Borderlands and Beyond

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3.1. Introduction

US and Canadian border security measures all too often ignore the concerns of North American indigenous peoples. In borderlands regions, and especially for affected native populations, border security without cross-border stability and cultural continuity can mean no security at all. A broad observance of the letter and spirit of a little known, yet significant, treaty negotiated between the United States and Great Britain in 1794 could change this paradigm.

American Indians born in Canada[2] (ABCs) enjoy access to the United States unrestricted by the Immigration and Nationality Act (INA), a right stemming from the Jay Treaty (1794).[3] An examination of this right, now codified at § 289 of the INA, reveals qualifying ABCs are entitled to privileges unparalleled by all but United States citizens to enter and remain in the US 'for the purpose of employment, study, retirement, investing, and/or immigration'[4] or any other reason.

This chapter outlines the history and development of the Jay Treaty, the rights of ABCs today and the scope of ABC status. It analyses the lack of reciprocity in Canada and explores the issues of cross-border mobility and commerce. It provides illustrations of these issues through case law,

and as applied in the Arctic region. It concludes by submitting that active engagement of indigenous communities on cross-border mobility issues is crucial to the ongoing development of sound border security and policy.

3.2. History

Long before European contact, travel across what is now the US/Canada border was an element of daily life for the people of numerous North American indigenous nations. The international boundary was established by Great Britain and the US in the Peace of Paris, which divided North America without regard for its indigenous nations.[5] The indigenous peoples resented a boundary passing through territory that had been theirs since time immemorial and viewed the newly established border as an infringement on their sovereign rights.

In 1794, to address issues unresolved by the Peace of Paris or arising thereafter, Great Britain and the US negotiated the Jay Treaty. As part of this treaty, the parties sought to relieve tribal tensions arising from the imposition of the new boundary.[6] In relevant part, Article III of the Treaty provides:

> 'It is agreed that it shall at all Times be free to His Majesty's Subjects, and to the Citizens of the United States, and also to the Indians dwelling on either side of the said Boundary Line freely to pass and repass by land or inland navigation, into the respective Territories and Countries of the Two Parties on the Continent of America (the Country within the Limits of the Hudson Bay Company only excepted)…'

The Jay Treaty did not create a new right for the continent's indigenous people; rather, it recognised their pre-existing right to move freely across the land.[7] In 1796, an explanatory provision was added to the treaty providing that no further treaties should derogate from the rights guaranteed by Article III.[8] During the War of 1812, Jay Treaty rights were suspended. The Supreme Court of the United States has held that the War of 1812 abrogated the Jay Treaty and that, following the war, the Treaty of Ghent revived the rights of native tribes predating that conflict.[9,10]

The US continued to recognise the right of indigenous people to pass across the border freely until enactment of the Immigration Act of 1924 (Act of 1924), which provided for only those eligible for citizenship to enter the US.[11] Because indigenous people were ineligible

for citizenship as a result of race-restricted naturalisation laws dating to 1790,[12] the Act of 1924 barred their entry to the US.[13] Shortly thereafter, the US government used this as a basis to deport ABCs who had not registered as aliens or obtained immigrant visas.[14]

In the 1927 *McCandless* case, an ABC named Paul Diabo was arrested and ordered deported for entering the US in violation of US immigration laws. He challenged his deportation, based on the Jay Treaty.[15] In defence of its position, the government argued that the War of 1812 abrogated the Jay Treaty, relying on the general principle that war between nations ends all prior treaty rights, and those rights are only reborn if a new treaty provides them.[16,17] On appeal, the Court found in favour of Diabo.[18] It reasoned that treaties stipulating permanent rights, professing to aim at perpetuity, do not end upon occurrence of war, but are merely suspended until the war ends and revived when peace returns.[19] Because Article III of the Jay Treaty grants the right to freely cross the border in perpetuity, the right is permanent in character; thus, the War of 1812 did not abrogate the Jay Treaty.[20] Further, in 1815, the US and Great Britain signed the Treaty of Ghent, which again recognised the Indians' prerogative to move freely across the border, removing any doubt as to the existence of that right.[21]

3.3. Scope: A Determination based on Racial Considerations

Congress codified the Indians' right of free passage across the border with the Act of 2 April 1928 (Act of 1928):

> '[T]he Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States: Provided, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption.'[22]

This provision remained in effect until 1952, when Congress enacted the INA. INA § 289 modified the language of the Act of 1928 by replacing the adoption provision with a bloodline requirement – the only racial metric in US immigration law:

> 'Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United

States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.'[23]

With no legislative history on point, the basis for bloodline requirement is unclear, but it is reasonable to assume it stemmed from then recent case law and statutory definitions of 'Indian' outside of the immigration context. In the 1947 opinion *US ex rel. Goodwin v. Karnuth*, a federal district court analysed the term 'Indian'.[24] After noting the term was not defined in United States Code (USC) sections dealing with immigration, the Court looked to other sections of the Code defining the term. It noted the definition of 'Indian' used in 25 USC Chapter 14, which governs an array of issues pertaining to Indian peoples and land: 'The term "Indian" as used in [this Act] shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction… and *shall further include all other persons of one-half or more Indian blood*.'[25]

The Court then cited the canon of statutory interpretation that 'Congress may well be supposed to have used language in accordance with the common understanding',[26] and that '[t]he popular or received import of words furnishes the general rule for the interpretation of public laws'.[27]

Applying this canon, the court determined that 'the words "American Indians born in Canada", found in [the Act of 1928] must be given a racial [rather than political] connotation.'[28] It then addressed the second clause, which read: 'Provided, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption.'[29] The court reasoned that inclusion of the second clause 'means that such adoption does not make the adoptee an American Indian by "blood", entitling him to free entry under the first clause. One whom nature has not made an American Indian cannot be made one by adoption in some Indian tribe or family.'[30]

This opinion and the statutory definition of 'Indian' interpreted in *Goodwin* were published after the Act of 1928 (which did not contain a blood quantum requirement) and prior to the 1952 enactment of the INA (which did). Although there is no definitive legislative history on the matter, the drafters of INA § 289 likely knew of this reasoning when they removed the adoption language from the Act of 1928 and expressly replaced it with the blood quantum requirement. Beyond this, Congressional reasoning for retaining the racial basis for ABC classification remains unclear.[31]

3.4. Canada

3.4.1. Indigenous Groups in Canada: Indian, Inuit, Métis and métis

Section 35(1) of the Canadian Constitution names three separate indigenous cultural groups under the umbrella term 'Aboriginal' for the purposes of Canada's constitution:[32] Indian,[33] Inuit and Métis.[34] In this context, the term 'Indian' is therefore used in a distinct way from Inuit and Métis. The question then remains whether the Inuit and Métis peoples are eligible for ABC status.

While the Inuit do not self-identify as Indians, and Canada expressly distinguishes Inuit from Indians, as far as the US is concerned, Canadian-born Inuit are eligible for rights under INA § 289 upon establishment of the requisite blood quantum.[35,36] The US does not rely on Canadian definitions in determining which groups qualify for the benefits of INA § 289,[37] and US courts have held that the term 'Indian' includes Inuit.[38] An examination of the statutory language introduced both prior to and in the INA indicates a clear intent to broaden the applicability of Jay Treaty rights beyond only those individuals who are members of Indian tribes.[39] Because Inuit are Indians as far as the US government is concerned, Inuit peoples born in Canada who possess the bloodline requirement may qualify for ABC status.

Like the Inuit, Métis do not self-identify as Indians and are distinguished as a separate indigenous group from Indians in Section 35 of Canada's Constitution.[40] The term 'métis' originates from a French word meaning 'mixed' and was historically used in Canadian French for persons of mixed ancestry.[41] While 'métis' generically denotes mixed indigenous ancestry,[42] when capitalised, the term refers to a specific population of indigenous and French-Canadian origin which emerged from the marriages which took place in the early 19th century between French-Canadian fur traders and local indigenous people.[43] The Métis maintain a strong and unique identity, with specific criteria dictating membership within the community.[44]

Meanwhile, the question of whether Métis and non-status Indians[45] are 'Indians' under Section 91(24) of the Constitution Act, 1867, has long been the subject of legal debate. Section 91(24) is the provision of Canada's Constitution through which the federal government of Canada derives jurisdiction over the subject matter of 'Indians, and Lands reserved for the Indians'.[46] In 2013, a Federal Court ruled in *Daniels v. Canada*

that both Métis and non-status Indians are included as Indians 'within the meaning of the expression "Indians and Lands reserved for the Indians" contained in s. 91(24) of the Constitution Act, 1867.'[47] On 17 April 2014, the Federal Court of Appeal upheld that decision in part: it ruled that only Métis, and not non-status Indians, are included as Indians within the meaning of the Canadian Constitution.[48] But on 14 April 2016, the Supreme Court of Canada (SCC) unanimously restored the ruling of the Federal trial court, which held both Métis *and* non-status Indians are 'Indians' for the purpose of section 91(24) of the Constitution Act, 1867.[49] In its decision, the Court clarified that the term 'Indian' or 'Indians' in Canada's constitutional context has two meanings: 'a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term "aboriginal peoples of Canada" used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples.'[50]

The definition of ABC is contingent only on birth as a Canadian citizen and satisfaction of the requisite blood quantum. Métis identification alone is insufficient to qualify for ABC status; an individual must satisfy the bloodline requirement, a matter independent from Métis identity. The same rule applies to métis. For this reason, while the recent ruling of the SCC has significant implications for the rights of Métis and non-status Indians in Canada, it has no bearing on their qualifications for ABC status. Ultimately, for INA § 289, whether individuals are Indian, Inuit, Métis or métis, they will qualify for ABC status if they were born in Canada and can satisfy the bloodline requirement.

3.4.2. No Reciprocal Right to Enter Canada

The SCC decisions regarding the validity of Jay Treaty rights have been informed by the fact that the Canadian Parliament has never enacted enabling legislation required for the Jay Treaty to have force of law in Canada.[51,52] Thus, the Canadian government holds that the Jay Treaty does not affect the admissibility of US-born indigenous persons to Canada.[53] Admissibility of all non-citizens to Canada is governed by the Immigration and Refugee Protection Act,[54] which does not incorporate Jay Treaty rights. The Canadian Immigration Act states that 'every person registered as an Indian under the *Indian Act* has the right to enter and remain in Canada in accordance with this act, and an officer shall allow the person to enter Canada if satisfied following an examination on their entry that the person is a... registered Indian'. However, the registration requirements of the Indian Act have proven difficult, and

Canadian courts have declined to broaden its applicability; thus, US-born indigenous persons are not extended a reciprocal right of entry to Canada under the Jay Treaty.

In 1956, the SCC in *Francis v. The Queen*[55] unanimously held that a treaty such as the Jay Treaty is not enforceable in Canada without enabling legislation.[56] While Canada does not recognise a reciprocal right of entry for US-born indigenous persons, Canadian courts have recognised and protected an *aboriginal* right to freely pass the border.[57] This right is protected by Canada's Constitution in Part II of the Constitution Act, 1982 (Constitution Act).[58] Section 35(1) of the Constitution Act recognises and affirms 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada'.[59] Section 35(2) defines 'aboriginal peoples of Canada' to include the Indian, Inuit and Métis peoples of Canada.[60] While Canadian courts have declined to recognise Jay Treaty rights as existing treaty rights under Section 35, it is within Section 35 that Canadian courts find authority to recognise existing aboriginal rights.

In 1990, the SCC decided *R. v. Sparrow*, analysing the rights of aboriginal peoples in light of Section 35.[61] The Court held that Section 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples, that the government cannot extinguish an aboriginal right without a clear intention to do so, and that the government may regulate or infringe on such rights only if the interference meets the test for justification laid out by the Court.[62] It established four factors to analysing a claim under Section 35(1): (1) 'whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right'; (2) 'whether that right was extinguished prior to the enactment of s. 35(1)'; (3) 'whether that right has been infringed'; and (4) 'whether that infringement was justified'.[63] This test continues to be employed by the SCC when analysing 35(1) claims.

In the 1996 case of *R. v. Van der Peet,* the SCC analysed the substantive rights recognised and affirmed by Section 35(1).[64] The Court described Section 35(1) as 'the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown.'[65] The *Van der Peet* Court articulated a test for identifying aboriginal rights – the 'integral to a distinctive culture test'. It directs that 'in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right'.[66] To qualify, the 'practice, custom or tradition must be of central

significance to the aboriginal society in question – one of the things which made the culture of the society distinctive'.[67] The Court concluded that aboriginal rights must be based on those that existed prior to contact with European society.[68]

Watt v. Liebelt[69] raised the question of whether 'it could be contrary to an existing Aboriginal right of an Aboriginal people of Canada, as guaranteed in the Constitution, for an Aboriginal person who is [an American citizen], and neither a Canadian citizen nor registered under the Indian Act of Canada, to be ordered to depart from Canada for a crime committed [in Canada]'.[70] While the Court of Appeal did not ultimately reach a decision on the issue, it quashed the order of deportation and remanded the case for further fact-finding on the tests previously established in *Sparrow* and *Van der Peet*.

Recently, the case of *R. v. Desautel*[71] again raised the issue of whether a US-born indigenous person not resident in Canada may assert an aboriginal right to enter Canada, and the court found they could. The appellant was Richard 'Rick' Desautel, a member of the US-based Lakes Tribe of the Colville Confederated Tribes ('Lakes Tribe') and a resident and citizen of the United States. The Lakes Tribe is a successor group of the Sinixt people, whose traditional territory extends both north and south of what is now the US-Canada border. In 2016, Desautel asserted an aboriginal right to hunt for ceremonial purposes by shooting and killing an elk in traditional Sinixt territory in Canada. He was charged with hunting without a licence, and hunting big game while not being a resident of British Columbia, contrary to the Province's Wildlife Act.[72]

In his defence before the British Columbia Provincial Court, Desautel asserted his actions were protected by Section 35. In opposition to Desautel's claim, the Province argued 1) an aboriginal group must reside in Canada to be considered an aboriginal people protected by Section 35 in Canada, and 2) Desautel's claimed hunting right is incompatible with Canadian sovereignty.[73] The court acquitted Desautel of the charges. It found he was exercising an aboriginal right of the Sinixt/Lake People to which Section 35 protections applied, and that the relevant sections of the Wildlife Act unjustifiably infringe this right.[74] The Province appealed to the British Columbia Supreme Court,[75] which again found for Desautel.[76] The Province's subsequent request to appeal the matter to the British Columbia Court of Appeal (BCCA) was granted, and after considering the arguments of the parties, the court again sided with Desautel.[77] At the deadline for finalising this chapter and forwarding it to its publisher, it is unknown whether the Province will seek leave to appeal the BCCA decision to the Supreme Court of Canada.

Another recent case has drawn much-needed public attention to the issue of cross-border mobility for US-born indigenous persons seeking access to their traditional lands in what is now Canada. Dr Mique'l Dangeli is a US-born member of Tsimshian Nation. Her people's traditional territory spans the border between Alaska (US) and northern British Columbia (Canada). As one of the few remaining fluent speakers of Sm'algya̲x, the Tsimshian language, she moved to Canada to teach Sm'algya̲x in her community's traditional territory, but after ongoing complications with Canadian immigration, she was forced to leave Canada after her post-graduate work visa expired.[78] While she was later able to secure the right to work in Canada through an employment visa based on her status as a professor, she continues her fight for her right to live and work in her traditional territory as an indigenous person. She has started a petition calling on the Canadian government to reciprocate the Jay Treaty, which eloquently states the issue:

> 'The colonial border between the US and Canada dissects Indigenous territories in ways that sever the lifelines between First Nation families, communities, languages and ceremonies. Every year thousands of US-born First Nations people who are Indigenous to Canada are denied the ability to live and work in Canada because the government refuses to recognize their ancestral rights to do so. Yet through the Jay Treaty, the relatives of these same people who are born in Canada and have Indian Status can live and work in the US. How is it possible that the US, with its extreme policies against immigration, honours the rights of Indigenous peoples regardless of citizenship and Canada does not?'[79]

The rights of ABCs are firmly settled in the US under INA § 289, rooted in the Jay Treaty. As the foregoing discussion suggests, there is no reciprocal Jay Treaty right for US-born indigenous persons to enter Canada, and the rights of US-born indigenous persons under Canadian law are still evolving. The conclusion of this chapter includes a discussion of continuing developments in this regard.

3.5. An Exploration of the Jay Treaty in the Northern Borderlands

The Jay Treaty provisions drafted to relieve tribal tensions originally arose from the establishment of an international boundary along what is

now the mainland US-Canada border. As security measures have moved to the forefront of modern concern, the Jay Treaty has become diminished. In the 21st century, native populations face a variety of cross-border mobility challenges:

> '[S]ecurity has meant increased difficulty in pursuing intertribal trade and exchange, greater obstacles to delivery of social and health services to tribal members who live across national borders and the attenuation of social and kinship networks… [B]arriers to border mobility undercut efforts to keep alive or re-create cultural traditions and practices that native leaders claim are critically important to the identities and well-being of their members.'[80]

These concerns transcend the 49th Parallel – they extend across the Northern Borderlands: along the Alaska (US)/Canada border and across the Arctic region.[81]

3.5.1. The Arctic

The Arctic region is home to over 500,000 indigenous peoples[82] spanning 40 ethnic groups.[83] The Arctic settlement area is divided between eight countries: Canada, the United States, Russia, Finland, Sweden, Norway, Iceland and Denmark.[84] In 1996, the Arctic Council was created 'with the purpose of advancing circumpolar cooperation. The mandate of the Council is to protect the Arctic environment and promote the economies and the social and cultural well-being of northern peoples'.[85] The Council consists of the eight above-mentioned Arctic States, along with six Indigenous Peoples Organisations representing indigenous interests, the intent being 'to engage Arctic indigenous peoples in the cooperation in recognition of their right to be consulted in any issues concerning the stewardship of their ancestral homelands'.[86]

Although those ancestral homelands are now divided by international boundaries, 'the indigenous peoples of the Arctic view themselves as having a historical existence and identity that is separate and independent of the states now enveloping them'[87] – a claim to sovereignty at the heart of the Jay Treaty's intent. While each distinctive cultural group in the Arctic has its own unique issues and experiences, one major common challenge faced across these communities is cross-border mobility and the Jay Treaty.

It is noted that a *Desautel* fact pattern could easily arise in the Arctic, where subsistence hunting remains a reality of daily life for many

communities. In the most remote areas, the border is still unmarked and a hunting trip across an unmonitored boundary line may only become known to the hunter upon review of their GPS coordinates at the end of the day. A US-born indigenous person engaged in hunting of migratory species such as caribou, whose migration routes crisscross the border, could easily trigger charges like those currently faced by Desautel should their hunting cross into Canada. Regardless of who prevails should the *Desautel* case reach the Supreme Court of Canada, as development in the Arctic continues to impact natural resources and animal populations, it is only a matter of time before both the US and Canada begin to monitor hunting and fishing in this region with heightened scrutiny.

For brevity, this chapter will focus on exploring the issue of cross-border mobility in the Arctic as applied to the Inuit, the most northerly of the Arctic peoples.

3.5.2. A Case Study: The Inuit

> 'We Eskimo are an international community sharing common language, culture, and a common land along the Arctic coast of Siberia, Alaska, Canada and Greenland. Although not a nation-state, as a people, we do constitute a nation.'[88]

As introduced in Section 3.4.1., the Inuit are not Indians; however, they may qualify for ABC status upon establishment of the requisite bloodline. There are nearly 60,000 individuals who identify as Inuit in Canada,[89] and approximately 15,700 Inuit living in Alaska.[90] A discussion regarding the right of free passage for Inuit is not confined by the borders of the US and Canada. Inuit traditional lands span across the circumpolar region in the US, Canada, Denmark, Greenland and Russia.[91] In 1977, the Inuit Circumpolar Council (ICC) was founded to 'speak with a united voice on issues of common concern and combine their energies and talents towards protecting and promoting their way of life'.[92]

In its first conference that same year, Inuit from Canada, Greenland and the US (Alaska) discussed this common vision,[93] proposing the right of free travel across traditional Inuit lands of the circumpolar region. The conference presented Resolution 77–13, which 'call[ed] upon Canada, the United States and Denmark to provide for free and unrestricted movement for all Inuit across their Arctic homeland'.[94] Resolution 77–13 was rooted in the rights bestowed by the Jay Treaty,

and also referenced the concept of aboriginal rights, then yet to be recognised by the Supreme Court of Canada:

> WHEREAS, *a treaty negotiated between the United States and England provides intercourse and commerce across the U.S./Canadian border*; and
>
> WHEREAS, we Inuit are the indigenous people of the Arctic and have freely visited and traded back and forth across our homeland for thousands of years, thus establishing *our aboriginal rights to free and unrestricted travel and trading* all across the Arctic; and
>
> WHEREAS, *the Jay Treaty between the United States and England clearly recognizes and protects our rights to unrestricted intercourse and trade across the U.S./Canadian border*; and
>
> WHEREAS, these guarantees have never been negotiated with Denmark, and have not been properly established in Canada, resulting in the fact that our circumpolar Inuit community does not enjoy the right of free travel and trade across the Canadian/Greenlandic border; and
>
> WHEREAS, *our aboriginal rights to travel and trade freely along the Arctic coast* will be an important factor in the economic growth of our circumpolar community;
>
> NOW, THEREFORE, BE IT RESOLVED that the delegates assembled at the first Inuit Circumpolar Conference call upon the Governments of Canada, the United States and Denmark to negotiate an agreement that will protect for all Inuit *the right to unrestricted trade and travel as envisaged between Canada and the United States by the Jay Treaty*.[95]

While the Jay Treaty originally envisaged unrestricted trade and travel across the border, the provision relating to trade was never codified in § 289 – an array of customs and environmental laws govern the transport of goods across the border. The regulations and restrictions imposed by these laws often provide exceptions for the traditions of indigenous communities; however, these exceptions rarely contemplate cross-border cultures, and may only be asserted by communities on one side of the border. Without Jay Treaty protection in this regard, cross-border

indigenous cultures would be well-served with a strong proponent in international policy and legislative development. The ICC is not only a Permanent Participant of the Arctic Council, but it also holds Special Consultative Status with the United Nations, and has been involved with the World Summit on Sustainable Development, the Convention on the Trade of Endangered Species, the World Intellectual Property Organization, the Organization of American States, the International Whaling Commission, the Convention on Biological Diversity and the International Union for the Conservation of Nature (IUCN).[96] These global connections make the organisation a strong player in developing the Arctic. As the Arctic continues to develop, the ICC is an ideal advocate for cross-border policies that recognise and respect the traditional practices of cross-border cultures.

3.6. Cross-Border Culture and Commerce

Article III of the Jay Treaty states in part '[n]o duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any import or duty whatever'.[97] However, the US government does not recognise the continued validity of this provision in the way it has Jay Treaty rights regarding free passage.[98]

In *US v. Garrow*, a 1937 US Court of Customs and Patent Appeals case, the court opined that the Jay Treaty, including its duties provision, was abrogated by the War of 1812.[99] The court maintained the Treaty of Ghent was not self-executing and was not enacted by legislation; therefore, no treaty right remained for the duties provision.[100] Although statutory exemptions from customs duties had been maintained in various iterations of the Tariff Act, the exemption was deleted in 1897.[101] No legal basis remained for the Treaty's duties provision.

Nearly 30 years later, the federal district court in *Akins v. Saxbe* noted that language granting Indians the right to pass with their goods duty free 'was not included in the Tariff Act of 1897,[102] and it has not been included in any subsequent tariff act'.[103] It maintained questions of customs duties and importation to be within the exclusive jurisdiction of the customs courts.[104] Meanwhile, in 2001, the SCC held that there exists no aboriginal right to transport goods duty free across the US-Canada border.[105]

Despite restrictive policies in force today, traditional indigenous cross-border commerce and culture is well-documented: '[a]boriginal

economies were vibrant – they produced and traded, often over long distances and through elaborate trade coalitions. Trading relations evolved over millennia... It is a mistake to assume that Aboriginal peoples and their economies were local, static, subsistence-oriented or unresponsive to opportunities for wealth generation.'[106]

Even if the communities cannot access one another to the extent they once did, their long-standing traditions of cross-border commerce and culture continue to survive despite the US-Canada border; a boundary line aptly described as a 'figment of someone else's imagination'.[107] Indeed, '[f]rom the Indian viewpoint, he crosses no boundary line. For him this does not exist.'[108]

The Blackfeet (US) and Kainai (also known as the Blood or Kainaiwa) (Canada) provide an illustration of the many tribes whose lands were bifurcated by the drawing of this boundary line, and whose traditional practices are affected by its imposition.[109] 'Today there is considerable intermarriage and contact [between the Blackfeet and Kainai] through social, recreational and religious events... These gatherings form the center of tribal cultural and religious life. Tribal members often trade animals, meat, berries, roots, herbs, handmade goods and medicine bundles at these events.'[110] However, both 'Canadian and American customs laws... forbid the import and export of certain plants and animals that are significant in ceremonial life. In addition, these laws require a search of all goods, thereby inhibiting the exercise of tribal culture and religion.'[111] While a customs search may seem a benign inconvenience to a non-indigenous person, it can be devastating to the integrity of certain sacred items.[112]

The current debate over eagle feathers, which carry religious significance for many indigenous cultures, provides an illustration of the competing interests and policies at play. Under the Bald and Golden Eagle Protection Act (BGEPA), possession of eagles or eagle parts carries civil and criminal penalties.[113] However, a religious exception to BGEPA allows enrolled members of federally-recognised Indian tribes to apply for a permit allowing them to possess or take bald or golden eagles or their parts.[114] Policies exist to allow members of federally-recognised tribes to travel with eagle parts between the US and Canada or Mexico without a permit in certain circumstances,[115] and Canadians presenting a Certificate of Indian Status may travel in and out of the US with eagle parts under similar circumstances.[116] All items are still subject to customs declarations.[117] Because the policy for Canadians is restricted to those carrying a Certificate of Indian Status, it necessarily excludes non-status Indians.

Outside of ceremonial implications, well-intentioned and important legislation aimed at protecting endangered or threatened wildlife has also created unanticipated economic difficulties for indigenous Canadian populations, the Marine Mammal Protection Act (MMPA) being one example.[118] The MMPA bans the import of marine mammals and marine mammal products into the US.[119] The practical effect is '[a]n American Indian or Eskimo living one mile west of the Alaskan-Yukon border can sell traditional handicrafts made from seal skin into the "lower 48", while a Canadian Aboriginal person living one mile east of the same border, cannot do so'.[120]

Another challenge to cross-border mobility for ABCs is the Western Hemisphere Travel Initiative (WHTI) – a result of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)[121] – which requires US and Canadian travellers to present a passport or other approved document denoting identity and citizenship when entering the US.[122] While WHTI-compliant tribal documents do exist, they are not common, and in their absence, the issue of passports serves as a barrier – particularly because ABC status is not dependent on tribal membership.[123] Significant numbers of indigenous people do not carry US or Canadian passports, either as a matter of sovereignty (they consider themselves to be members of their own indigenous nation, and may choose to carry a tribal passport rather than a US or Canadian passport) or for practical purposes (it may not be reasonable for a tribal elder living in a remote region to travel to a passport application centre).

If WHTI requirements are not modified for ABCs, their Jay Treaty right of free passage will remain limited. A non-expiring WHTI-compliant Jay Treaty Card would remedy this situation. The Jay Treaty Card could be issued by the Department of Homeland Security upon the applicant evidencing their identity and qualification for the status. The process of documenting as an ABC is outside the scope of this chapter, but in short, it involves presenting the Department of Homeland Security a host of documentation including long form birth certificates for the applicant, their parents and possibly their grandparents, as well as tribal records that indicate blood quantum.

Border security and species protection are the realities of the world we live in, and they will continue to impact indigenous cross-border commerce and culture. However, it is possible to mitigate adverse effects through recognition of Jay Treaty principles, encouragement of cross-border relationships and, most importantly, consulting with indigenous peoples in the development of laws and policies that affect their traditional ways of life.

3.7. Conclusion

The Jay Treaty's provision guarding indigenous cross-border mobility remains in effect in the US. Meanwhile, Canada has failed at implementing a workable solution to cross-border mobility for US-born indigenous peoples. Canada has not developed a workable Jay Treaty alternative, with the only possible option being the very narrow 'integral to a distinctive culture test' set out by the *Van der Peet* Court – which the government of British Columbia has been contesting relative to its applicability to US-born indigenous peoples residing in the US, in *Desautel*.

Canada's position puts it squarely at odds with Article 36 of the United Nations Declaration on the Rights of Indigenous Peoples, which reads:

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.[124]

A recent development in Canada may suggest positive progress toward softening resistance to border crossing rights for indigenous peoples. In 2016, the Canadian Senate's Committee on Aboriginal Peoples heard from Canadian governmental and indigenous organisations regarding impediments to the maintenance of cultural and family ties between cross-border indigenous communities. The Committee recommended that the Minister of Indigenous and Northern Affairs Canada appoint a special representative to explore solutions to border crossing challenges faced by indigenous communities across Canada.[125] The Minister appointed Fred Caron to this position.[126] He was directed to engage with indigenous communities on border crossing issues and file a fact-finding report on the outcome of his engagement.

Caron filed his report, titled *Report on First Nation border crossing issues,* on 31 August 2017.[127] The report documents myriad cross-border issues experienced by indigenous communities across Canada and addresses potential solutions. Out of all the potential solutions raised in the report, Canadian ratification of the Jay Treaty constitutes the broadest and most thorough:

> '[W]hile there was a belief on the part of some of the First Nation representatives I met with that the current issues would not exist

had Canada implemented the Jay Treaty, there was also a view that, in order to set the path forward, what is required is a mechanism to recognize inherent and Jay Treaty rights in a modern context. All who expressed themselves on the subject were of the view that recognition of these rights should be an integral part of the federal government's commitment to reconciliation and the recognition of a nation-to-nation relationship. Such recognition, in their view, would honour and respect their identity as North American Indians having long-standing historical relationships with Canada and the US based on historical alliances and treaties.'

Whether the report results in government action remains to be seen. Ultimately, until Jay Treaty rights receive significant rehabilitation in the US and recognition in Canada, the Treaty's intent will be met in only a lukewarm fashion, if at all. Further incursions will rapidly diminish its usefulness to the indigenous peoples it was designed to serve. Ultimately, it is clear that active engagement of indigenous communities on this issue, by both the US and Canadian governments, is crucial.


20

Great, and good, Friend

Being desirous of confirming between your Majesty and the United States of America perfect harmony and a good correspondence, and of removing all grounds of dissatisfaction by a friendly discussion, I have made choice of John Jay, Chief Justice of the United States to repair to your Majesty in the quality of their Envoy Extraordinary. From a knowledge of his fidelity, probity, and good conduct, I have entire confidence, that he will render himself acceptable to your Majesty, and will contribute to the utmost of his power to preserve and enhance on all occasions the interest and happiness of the two Nations. I beseech your Majesty therefore, to give full credence to whatever he shall say to you on the part of the United States, and most of all when he shall assure you of their friendship and wishes for your prosperity. And I pray God to have your Majesty in his safe and holy keeping. Written at Philadelphia the fifth day of May, in the year of our Lord 1794.

Your great and good Friend
His Britannic Majesty.

By the President of the
Edm. Randolph
Secretary of State.

Fig. 3.1 A reproduction of John Jay's diplomatic credential for presentation to British authorities. Source: The National Archives, Kew, 'Correspondence relating to negotiation of Treaty of Amity, Commerce and Navigation (1794)', Reference FO 95/512, *available at* http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details.

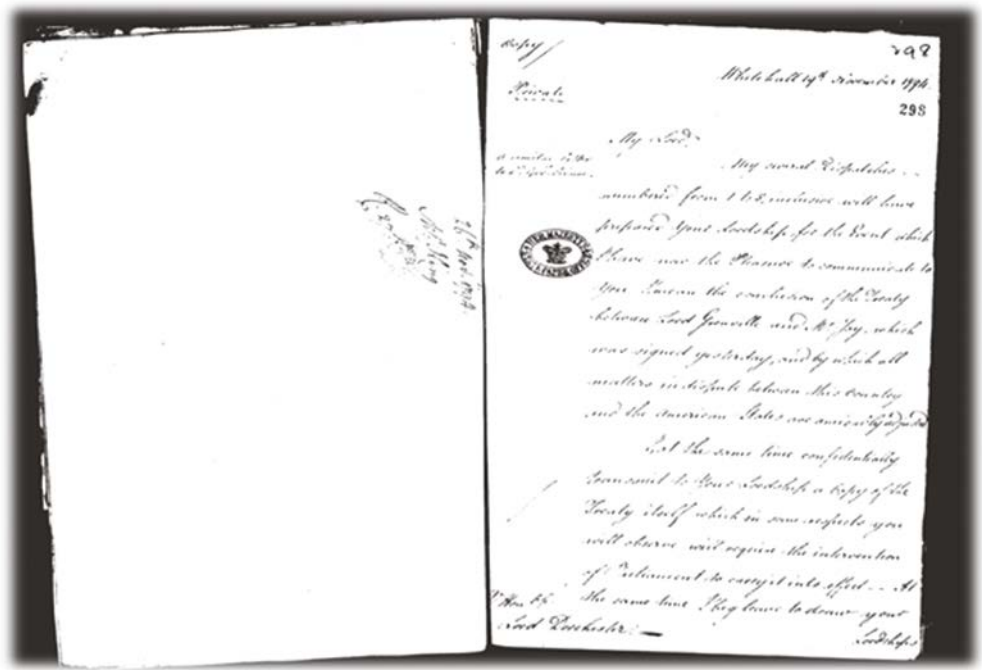

Fig. 3.2 A reproduction of an announcement summarising the conclusion of the Jay Treaty (1 of 4). Source: The National Archives, Kew, 'Correspondence Relating to Negotiation of Treaty of Amity, Commerce and Navigation (1794)', Reference FO 95/512, *available at* http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details.

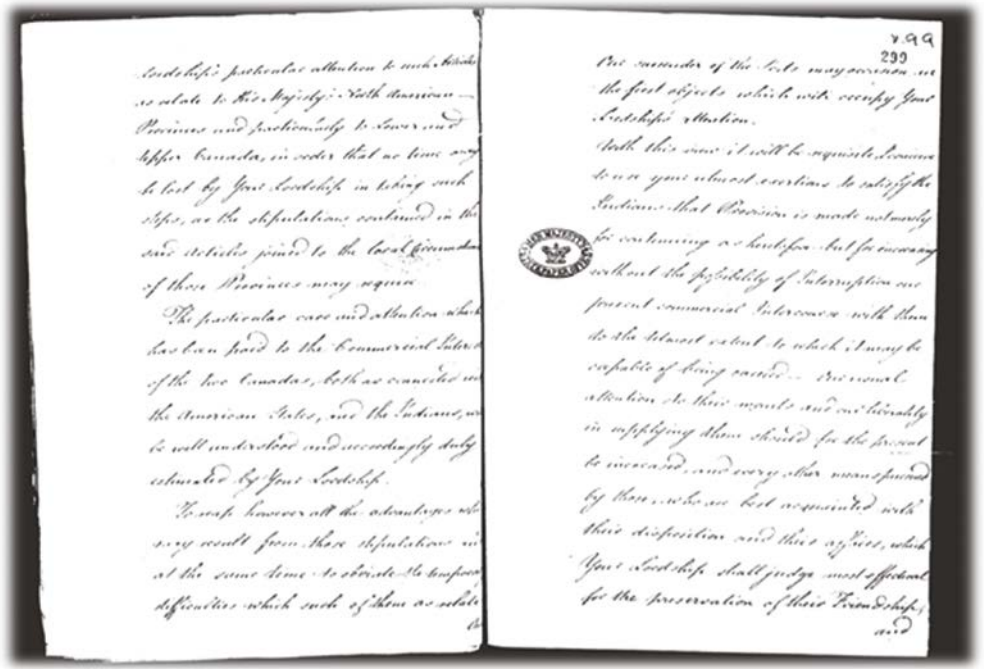

Fig. 3.3 A reproduction of an announcement summarising the conclusion of the Jay Treaty (2 of 4). Source: The National Archives, Kew, 'Correspondence Relating to Negotiation of Treaty of Amity, Commerce and Navigation (1794)', Reference FO 95/512, *available at* http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details.

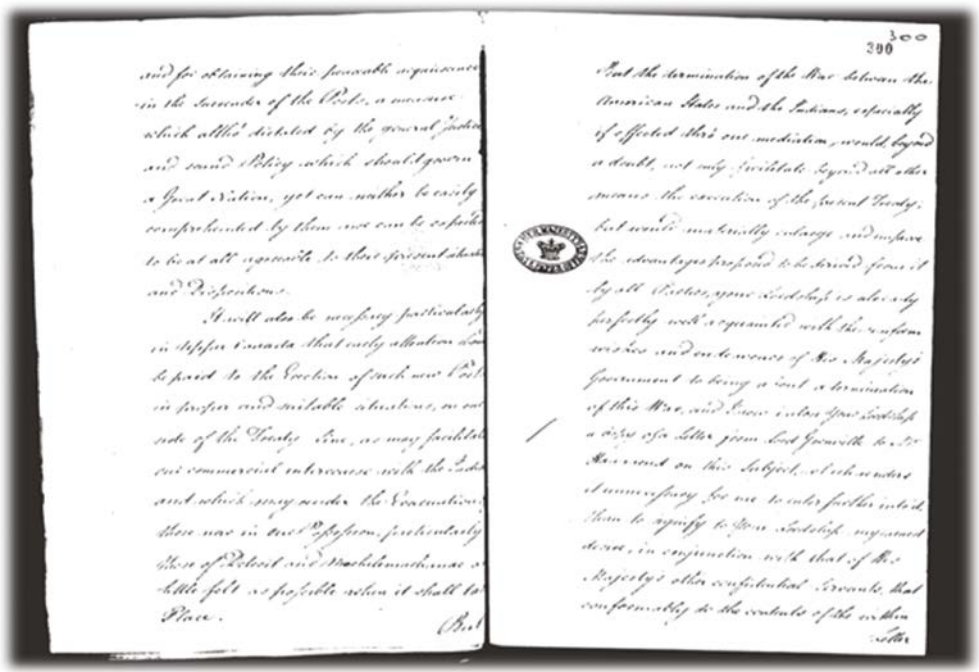

Fig. 3.4 A reproduction of an announcement summarising the conclusion of the Jay Treaty (3 of 4). Source: The National Archives, Kew, 'Correspondence Relating to Negotiation of Treaty of Amity, Commerce and Navigation (1794)', Reference FO 95/512, *available at* http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details.

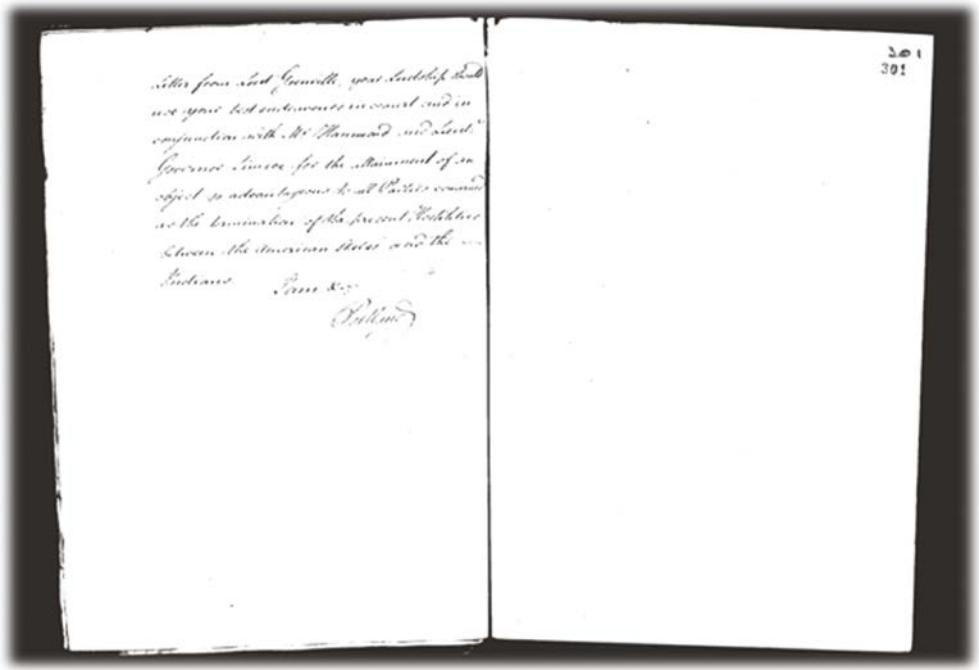

Fig. 3.5 A reproduction of an announcement summarising the conclusion of the Jay Treaty (4 of 4). Source: The National Archives, Kew, 'Correspondence Relating to Negotiation of Treaty of Amity, Commerce and Navigation (1794)', Reference FO 95/512, *available at* http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details.

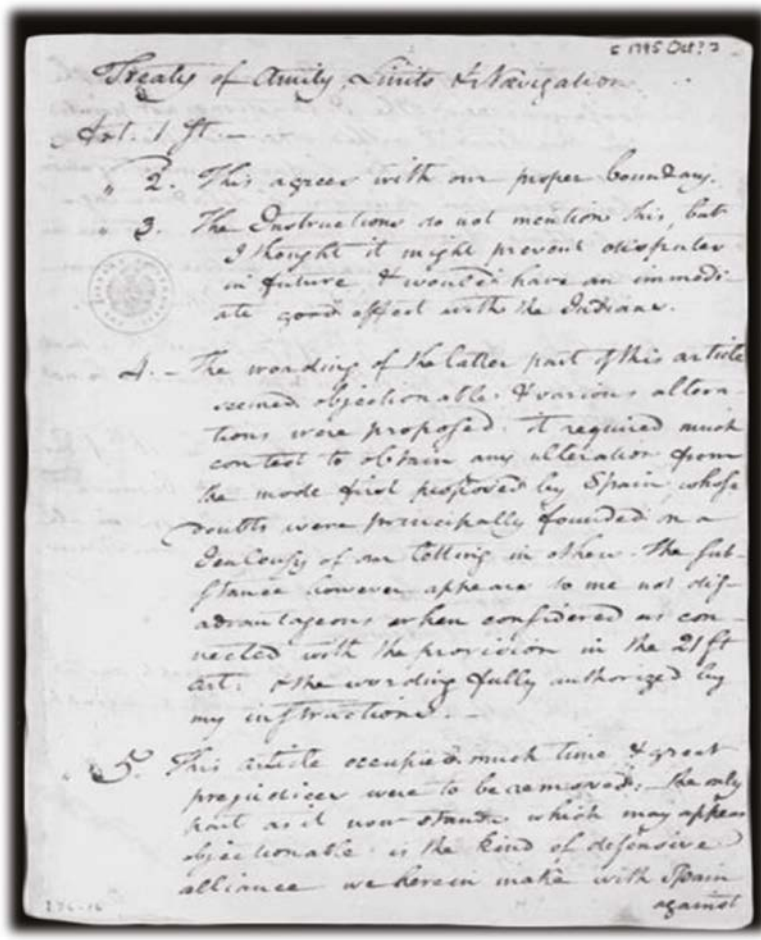

Fig. 3.6 A reproduction of George Washington's analysis of Article III of the Jay Treaty. Source: Library of Congress, 'George Washington Papers, Series 4, General Correspondence: 1697–1799, Treaty of Amity and Commerce with Great Britain, October 1795, Analysis of Articles', *available at* https://www.loc.gov/item/mgw439735/.

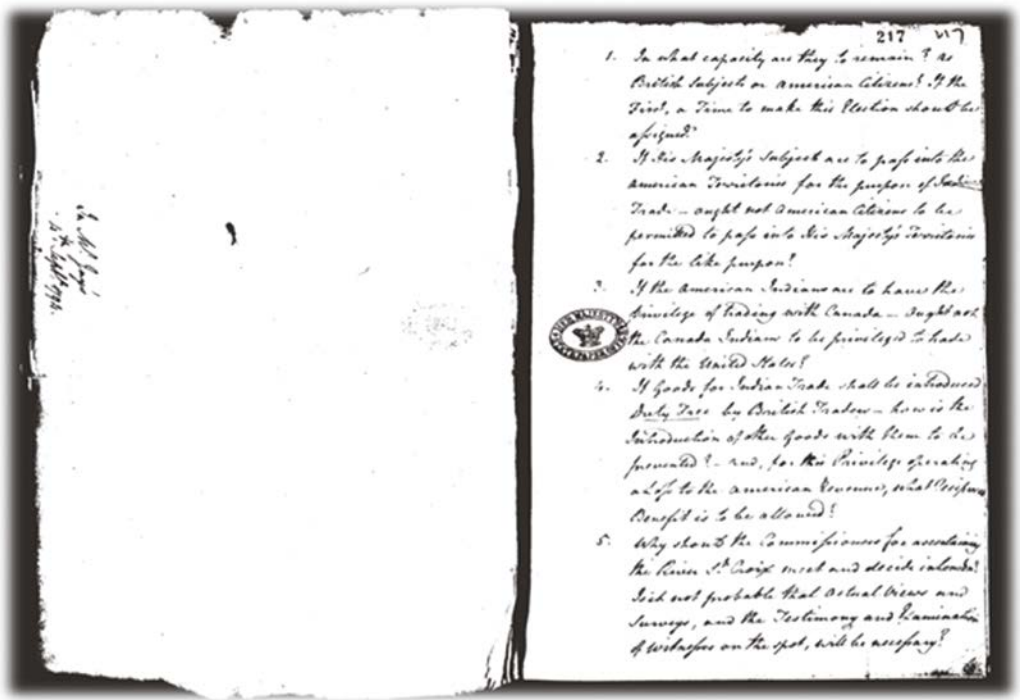

Fig. 3.7 A reproduction of a Jay Treaty negotiator's notes related to Indian trade. Source: The National Archives, Kew, 'Correspondence Relating to Negotiation of Treaty of Amity, Commerce and Navigation (1794)', Reference FO 95/512, *available at* http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details.

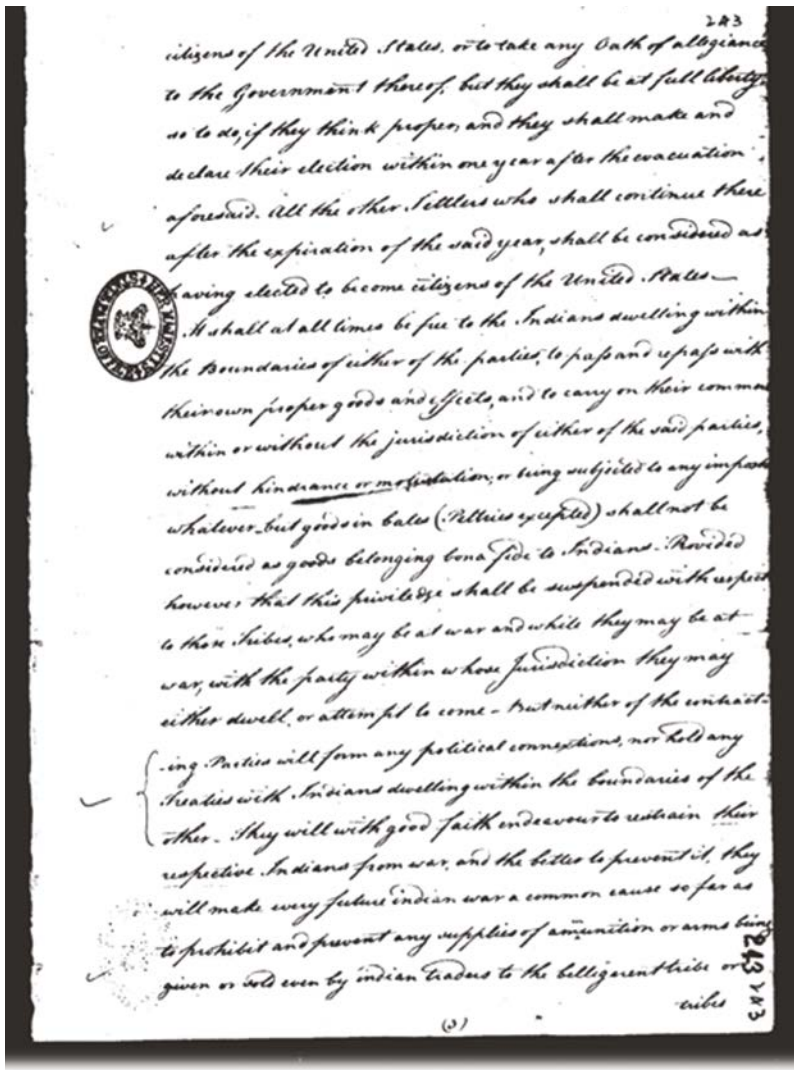

Fig. 3.8 A reproduction of a portion of an early draft of treaty provisions with particular reference to commerce between Indians, settlers and British subjects. Source: The National Archives, Kew, 'Correspondence Relating to Negotiation of Treaty of Amity, Commerce and Navigation (1794)', Reference FO 95/512, *available at* http://discovery.nationalarchives.gov.uk/SearchUI/details/C3300313-details.

Notes

1 This chapter is updated and expanded from: Greg Boos, Greg McLawsen, and Heather Fathali, 'Canadian Indians, Inuit, Métis, and métis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States', *Seattle Journal of Environmental Law* 4, no. 1(2014), 342–407; and Greg Boos and Greg McLawsen, *American Indians Born in Canada and the Right of Free Access to the United States* (1 October 2013), concurrently published: (1) 18 *Bender's Immigration Bulletin* 1 (1 October 2013); and (2) 20 *Border Policy Research Institute* (2013). Copyright 2018 Greg Boos, Greg McLawsen, and Heather Fathali. All rights reserved.

2 'American Indians born in Canada' (ABC) is a term of art arising from US statute. This chapter will occasionally use the term 'Indian' to refer generally to indigenous peoples of North America, with the acknowledgment that certain indigenous groups who do not self-identify as Indian may still qualify for ABC status. See Section 3.4.1. This is done as needed for consistency with the statute or with historical narrative. However, this chapter will use the term 'indigenous' where possible to refer generally to the native peoples of North America. It is further noted that in Canada, the term 'Aboriginal' is a specific legal term used in the Canadian constitution and other legal contexts to refer to indigenous peoples. This chapter will only use the term 'Aboriginal' within direct quotes or when making reference to the specific legal meaning under Canada's Constitution. Other common terms such as 'American Indian', 'Native American', 'Native', 'Alaskan Native', 'First Nations' or other alternatives will also only be used within the context of direct quotes or where otherwise indicated.

3 Treaty of Amity, Commerce, and Navigation, Great Britain-United States, 19 November 1794, 8 Stat. 116, 130 [hereinafter 'Jay Treaty' after John Jay, its chief US negotiator]. A reproduction of John Jay's diplomatic credential as presented to British authorities is included as Figure 3.1.

4 US Embassy and Consulates in Canada, 'First Nations and Native Americans', accessed 7 August 2018, https://ca.usembassy.gov/visas/first-nations-and-native-americans/.

5 The Definitive Treaty Between Great Britain and the United States of America (Treaty of Paris), Great Britain-United States, 3 September 1783, accessed 7 August 2018, https://www.loc.gov/resource/rbpe.14601800. A reproduction of an announcement summarising the conclusion of the Jay Treaty is attached as Figures 3.2–3.5.

6 In his analysis of Article III of the Jay Treaty, George Washington noted, 'The instructions do not mention this, but I thought it might prevent disputes in future & would have an immediate good effect with the Indians.' Library of Congress, 'George Washington Papers, 1741–1799: Series 4, General Correspondence: 1697–1799, Treaty of Amity and Commerce with Great Britain, October 1795, Analysis of Articles', accessed 7 August 2018, https://www.loc.gov/item/mgw439735/. A reproduction of Washington's analysis is attached as Figure 3.6.

7 McCandless v. United States *ex rel*. Diabo, 25 F.2d 71, 72 (3d Cir. 1928) *aff'd* 25 F.2d 71 (3d Cir. 1928); Akins v. Saxbe, 380 F. Supp. 1210, 1219 (D. Me. 1974).

8 McCandless v. United States at 74; Jay Treaty at 130–31 (Explanatory Article added 4 May 1796).

9 Treaty of Peace and Amity between His Britannic Majesty and the United States of America (Treaty of Ghent), Great Britain-United States, Art. 9, 24 December 1814, 8 Stat. 218, 22–23, accessed 7 August 2018, http://avalon.law.yale.edu/19th_century/ghent.asp.

10 Karnuth v. United States *ex rel*. Albro, 279 US 231 (1929) (holding the War of 1812 abrogated the Jay Treaty passage right).

11 Immigration Act of 1924 ch. 190, § 13(c), Pub. L. 68–139, 43 Stat. 153 [hereinafter Act of 1924]. The Immigration Act of 1917 had exempted Indians from tariffs applicable to 'aliens', but had not provided for free passage. 39 Stat. 874.

12 Act of March 26, 1790, ch. III, § 1, Stat.103 (restricting citizenship to 'free white person[s]'); Act of 1924, ('No alien ineligible to citizenship shall be admitted to the United States…'). Although the

Act of 1790 was repealed by subsequent naturalisation acts in 1795 and 1798, no relevant change was made regarding this restriction until the Fourteenth Amendment in 1868. See United States Constitution, amendment XIV, § 1 ('All persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States and of the state wherein they reside') (emphasis added). However, '[t]he specific meaning of the language of the clause was not immediately obvious. In 1884 the United States Supreme Court in *Elk v. Wilkins* held that children born to members of Indian tribes governed by tribal legal systems were not US citizens.' 112 US 94, 102 (1884) ('Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indiana tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof", within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations'.). It was not until '1924 [that] Congress extended citizenship to all Indians by passing the Indian Citizenship Act, 43 Stat. 253, ch. 233.' See Library of Congress, 'Fourteenth Amendment and Citizenship', accessed 7 August 2018, http://www.loc.gov/law/help/citizenship/fourteenth_amendment_citizenship.php.

13 Act of 1924, ch. 190, § 13(c) ('No alien ineligible to citizenship shall be admitted to the United States…').

14 Akins v. Saxbe,1214.

15 United States *ex rel.* Diabo v. McCandless, 18 F.2d 282, 283 (E.D. Pa. 1927); McCandless v. United States, 72.

16 United States *ex rel.* Diabo v. McCandless, 18 F.2d 282, 283 (E.D. Pa. 1927); McCandless v. United States, 72.

17 McCandless v. United States, 72.

18 McCandless v. United States, 73.

19 McCandless v. United States, 73.

20 McCandless v. United States, 73.

21 McCandless v. United States, 72–3.

22 Act of 2 April 1928, ch. 308, 45 Stat. 401, 8 U.S.C. § 226a (2006) [hereinafter Act of 1928].

23 Immigration and Nationality Act of 1952, ch. 477, § 289, 66 Stat. 234, 8 U.S.C. § 1359 (2006) [hereinafter INA].

24 Goodwin v. Karnuth, 661.

25 Goodwin v. Karnuth, 661 (emphasis added) (citing 25 U.S.C. § 479). The court further quoted the definition: 'For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.' The court also looked to 48 U.S.C. § 206, dealing with territories and insular possessions, which provided a short and simple definition: 'Indians: Natives with one-half or more Indian blood.' Although there is no definitive legislative or regulatory history on the matter, it is reasonable to assume that the drafters of § 289 relied on this definition.

26 Goodwin v. Karnuth, 663 (quoting Union Pacific Railroad Company v. Hall, 91 US 343, 347 (1875), citing United States v. Wurts, 303 US 414, 417 (1938)).

27 Goodwin v. Karnuth, 663 (quoting Maillard v. Lawrence, 57 US 251 (1853), citing Woolford Realty Company v. Rose, 286 US 319, 327 (1932), and Old Colony Railroad Company v. Commissioner, 284 US 552, 560 (1932)).

28 Goodwin v. Karnuth, 663.

29 Goodwin v. Karnuth, 663.

30 Goodwin v. Karnuth, 663.

31 Spruhan, 'Canadian Indian Free Passage Right', 314–15. One possibility for retention of the bloodline requirement may be the then national policy of Indian termination, which began in the 1940s and was embraced by the Eisenhower administration from 1953–60. See Ralph W. Johnson, 'Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians', *Washington Law Review* 66 (1991): 643, 662. 'The United States identified assimilation and integration as the official rationale for the termination policy, but there is evidence that the desire to reduce federal expenditures for Indian nations was a major motivation for the termination acts'. Robert T. Coulter, Termination, Native Land Law § 8:2 (2012 ed.). The bloodline requirement serves to disqualify many from status as ABCs.

32 Generally, the Canadian constitution is understood to comprise two statutes: The Constitution Act, 1867 (British North America Act or BNAA) and the Constitution Act, 1982. Part II of the Constitution Act, 1982 sets out the rights of Aboriginal peoples. *The Third Schedule:*

Provincial Public Works and Property to be the Property of Canada, Government of Canada: Justice Laws Website (last modified Aug. 30, 2013), accessed 7 August 2018, http://lois.justice.gc.ca/eng/const/page-11.html#docCont.

33 While 'Indian' is used in the Canadian constitution, it is now wide practice in Canada when referring to the specific 'Indian' cultural group to use the term 'First Nation(s)'. Inuit Tapiriit Kanatami, 'A Note on Terminology: Inuit, Métis, First Nations, and Aboriginal', accessed 7 August 2018, https://www.bowmanvillerotaryclub.org/sitepage/a-note-on-terminology-for-indigenous-peoples. For consistency with the statutory term of art 'American Indians born in Canada', this chapter will continue to use the term 'Indian' or 'indigenous' except within the context of direct quotes. See also discussion at note 2.

34 Rights of the Aboriginal Peoples of Canada, § 35(2); see Government of Canada Aboriginal Affairs and Northern Development, 'Frequently Asked Questions About Inuit Relations', accessed 7 August 2018, https://www.aadnc-aandc.gc.ca/eng/1303147522487/1303147669999.

35 Inuulitsivik, 'Who Are the Inuit?', accessed 7 August 2018, http://www.inuulitsivik.ca/northern-life-and-inuit-culture/who-are-the-inuits. ('Inuit are a distinct Aboriginal group… The confusion about Inuit being Indians and Aboriginal peoples being all the same continues to reign among many members of the general public. For Inuit, to be recognised as an Indian rather than an Inuk is frustrating as it denies the unique culture of Inuit.').

36 See e.g. Pence v. Kleppe, 529 F.2d 135, 138 n.5 (9th Cir. 1976) (noting that 'Indian' includes Aleut and Eskimos); Goodwin v. Karnuth, 662 ('For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians'); Goodwin v. Karnuth, 662 (distinguishing the earlier treaty language of 'tribes or nations of Indians' from the later-in-time and broader statutory language 'American Indians born in Canada'); Jack Utter, *American Indians: Answers to Today's Questions* (Oklahoma: University of Oklahoma Press, 1993), 105–106 ('[t]he Alaskan people who are still commonly referred to by Natives and non-Natives as "Eskimos" are now also called "Inuit". In 1977, at the Inuit Circumpolar Conference held in Barrow, Alaska, the term Inuit ("the people") was officially adopted as a preferred designation when collectively referring to Eskimos… "Eskimo" has long been considered to have come from an eastern Canadian Algonquian term which means "raw meat eaters". Some, but not all, Inuit would rather it not be used.') (internal citation omitted).

37 US Embassy, 'First Nations and Native Americans.' ('The only relevant factor is whether the individual has at least 50% American Indian blood.').

38 See discussion at note 36.

39 See Goodwin v. Karnuth, 662 (distinguishing the earlier treaty language of 'tribes or nations of Indians' from the later-in-time statutory language 'American Indians born in Canada').

40 Mitchell v. Minister of National Revenue.

41 Gerlad Hallowell, ed., *The Oxford Companion to Canadian History* (Oxford: Oxford Univ. Press, 2004), 401.

42 Oxford Companion to Canadian History, 401.

43 Oxford Companion to Canadian History, 401.

44 The two major organisations representing Métis maintain different criteria for qualification: The Congress of Aboriginal Peoples [http://www.abo-peoples.org] defines Métis as 'individuals who have Aboriginal and non-Aboriginal ancestry, self-identify themselves as Métis and are accepted by a Métis community as Métis.' The Métis National Council [http://www.metisnation.ca] defines Métis as 'a person who self-identifies as Métis, is of historic Métis Nation ancestry, is distinct from other Aboriginal peoples and is accepted by the Métis Nation.' Library and Archives Canada, 'Métis Genealogy', accessed 7 August 2018, https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/metis/Pages/metis-genealogy.aspx.

45 'The definitional contours of 'non-status Indian' are also imprecise. Status Indians are those who are recognised by the federal government as registered under the Indian Act, R.S.C. 1985, c. I-5. Non-status Indians, on the other hand, can refer to Indians who no longer have status under the Indian Act, or to members of mixed communities who have never been recognised as Indians by the federal government.' Daniels v. Canada, 2016 SCC 12, [2016] 1 S.C.R. 99.

46 Daniels v. Canada, 2016 SCC 12, [2016] 1 S.C.R. 99.

47 Daniels v. Canada, 2013 FC 6, [2013] F.C.R. 268 (Can.).
48 R. v. Daniels, 2014 FCA 101 (Can.).
49 Daniels v. Canada, 2016 SCC 12, [2016] 1 S.C.R. 99.
50 Daniels v. Canada, 2016 SCC 12, [2016] 1 S.C.R. 99.
51 See e.g., Francis v. The Queen, [1956] S.C.R. 618 (Can.).
52 In order for a treaty to have force in Canada, implementing legislation is required. Canada's status as a dualist state and the effect that status has on the Jay Treaty was made clear in Francis v. The Queen. The terms 'monism' and 'dualism' have been used to describe different types of domestic legal systems. Oxford University, *The Oxford Guide to Treaties*, 368 (Duncan B. Hollis ed., Oxford University Press, 2012). In dualist States, which include Canada and almost all other British Commonwealth States, 'no treaties have the status of law in the domestic legal system;... all treaties require implementing legislation to have domestic legal force'. By contrast '[In] [m]onist States... some treaties have the status of law in the domestic legal system, even in the absence of implementing legislation.' *Oxford Guide to Treaties*, 369. The Supremacy Clause of the US Constitution establishes the Constitution, federal statutes, and US Treaties as 'the supreme law of the land'. United States Constitution article VI, clause 2.
53 See Mitchell v. Minister of National Revenue, 2001 SCC 33, [2001] 1 S.C.R. 911 (Can.).
54 Immigration and Refugee Protection Act, 2001 S.C. ch. 27, (Division 3, *Entering and Remaining*, § 19(1) (Can.)).
55 Francis v. The Queen. While the case involved customs issues rather than the right of US-born Indians to cross in to Canada, both issues fall under the Jay Treaty; therefore, its language is important and relevant to the admissibility of US-born Indians into Canada.
56 In an interesting side-note, the US/Canada border itself was created by treaty but never codified by legislation in Canada. See Phil Bellfy, 'The Anishnaabeg of Bawating: Indigenous People Look at the Canada-US Border', in *Beyond the Border: Tensions Across the Forty-Ninth Parallel in the Great Plains and Prairies* 7, ed. Kyle Conway and Timothy Pasch (McGill-Queens University Press, 2013) (internal citation omitted).
57 See e.g., R. v. Sparrow, [1990] 1 S.C.R. 1075 (Can.); R. v. Van der Peet, [1996] 2 S.C.R. 507 (Can.).
58 Rights of the Aboriginal Peoples of Canada, Part II of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c. 11 (UK).
59 Rights of the Aboriginal Peoples of Canada.
60 Rights of the Aboriginal Peoples of Canada.
61 R. v. Sparrow.
62 R. v. Sparrow, 1106.
63 R. v. Gladstone, [1996] 2 S.C.R. 723, 742 (Can.) (providing a summary of the 4-part *Sparrow* analysis).
64 R. v. Van der Peet, [1996] 2 S.C.R. 507.
65 R. v. Van der Peet, 508.
66 R. v. Van der Peet, 527. The Court employed this test as the starting point for the tests laid out by the Court in *Sparrow*.
67 R. v. Van der Peet, 509 ('A court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) or at those aspects of the aboriginal society that are only incidental or occasional to that society').
68 R. v. Van der Peet, 550–62. The Court outlined ten factors to consider when applying the integral to a distinctive culture test:

> Courts must take into account the perspective of aboriginal peoples themselves... Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right... In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question [it was one of the things that truly made the society what it was]... The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact [prior to the arrival of Europeans in North America]... Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims... Claims to aboriginal rights must be adjudicated on a specific rather than general basis [must be specific to the particular aboriginal community claiming the right]... For a practice, custom or tradition to constitute an aboriginal right it must be of

independent significance to the aboriginal culture in which it exists... The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct... The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence... Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.

69 Watt v. Liebelt, [1999] 2 F.C. 455 (Can.).
70 Watt v. Liebelt.
71 R. v. Desautel, 2017 BCPC 84, Nelson Registry No. 23646.
72 R. v. Desautel, 2017 BCPC 84, Nelson Registry No. 23646.
73 R. v. Desautel, 2017 BCPC 84, Nelson Registry No. 23646.
74 R. v. Desautel, 2017 BCPC 84, Nelson Registry No. 23646.
75 The British Columbia Supreme Court is a trial-level court that hears civil and criminal cases, as well as appeals from the British Columbia Provincial Court.
76 R. v. Desautel, 2017 BCSC 2389, Nelson Registry No. 23646.
77 R. v. Desautel, 2019 BCCA 151.
78 Chantelle Bellrichard, 'U.S.-born Tsimshian Woman Fighting to Stay in her First Nation's Traditional Territory in Canada', *CBC News*, 13 June 2018, accessed 31 August 2018, https://www.cbc.ca/news/indigenous/u-s-born-tsimshian-woman-fighting-to-stay-in-her-first-nation-s-traditional-territory-in-canada-1.4704477.
79 Mique'l Dangeli, 'Demand that the Canadian government reciprocate the Jay Treaty!', *Care2 Petitions*, accessed 31 August 2018, https://www.thepetitionsite.com/takeaction/340/032/152/. It is noted that while Canada's Immigration and Refugee Protection Act provides a right to enter, remain in, and work in Canada for individuals who are registered Indians under the Indian Act, this right only serves a small subset of US-born indigenous persons. As developed at Sections 3.3. and 3.4. of this chapter, the Jay Treaty is not contingent on registration or membership in any federally-recognised tribe or band. See e.g. 'Regulations Amending the Immigration and Refugee Protection Regulations (Work Permit Exemption): SOR/2018-249', accessed 10 June 2019, http://www.gazette.gc.ca/rp-pr/p2/2018/2018-12-12/html/sor-dors249-eng.html; 'International Mobility Program: Authorization to work without a work permit', accessed 10 June 2019, https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/work-without-permit.html.
80 Sara Singleton, 'Not Our Borders: Indigenous People and the Struggle to Maintain Shared Lives and Cultures in Post 9/11 North America', Border Policy Research Institute 1 (2004), accessed 7 August 2018, https://cedar.wwu.edu/bpri_publications/106/.
81 The term '49th Parallel' is a common synonym for the border between the mainland US and Canada. The authors are cognisant of the fact that the border between the mainland US and Canada deviates from the 49th parallel east of Lake of the Woods. A&E Television Networks, 'This Day in History: June 15', History.com, accessed 7 August 2018, https://www.history.com/this-day-in-history/u-s-canadian-border-established. Moreover, the United States and Great Britain did not sign a treaty specifically establishing the 49th Parallel as the boundary between their lands west of the Rocky Mountains until 1846.
82 Arctic Council, 'Permanent Participants' (27 April 2011), accessed 7 August 2018, https://www.arctic-council.org/index.php/en/about-us/permanent-participants.
83 Arctic Centre, 'Arctic Indigenous Peoples', accessed 7 August 2018, https://www.arcticcentre.org/EN/communications/arcticregion/Arctic-Indigenous-Peoples.
84 Arctic Centre, 'Arctic Indigenous Peoples'.
85 Gwich'in Council International, 'Board of Directors', accessed 7 August 2018, https://gwichincouncil.com/board-directors.
86 Arctic Council, 'History of the Arctic Council Permanent Participants', last modified 28 August 2015, accessed 7 August 2018, https://www.arctic-council.org/index.php/en/our-work2/8-news-and-events/313-history-of-the-arctic-council-permanent-participants.
87 Arctic Centre, 'Definition of Indigenous Peoples', accessed 7 August 2018, https://www.arcticcentre.org/EN/communications/arcticregion/Arctic-Indigenous-Peoples/Definitions.

88 Eben Hopson: An American Story, 'Request for Lilly Endowment Grant Support (Sept. 9, 1975)', http://ebenhopson.com/request-for-lilly-endowment-grant-support-first-international-inuit-conference/ (accessed 7 August 2018).
89 Statistics Canada, 'Aboriginal Peoples in Canada: First Nations People, Métis and Inuit', last modified 25 July 2018, accessed 7 August 2018, https://www.history.com/this-day-in-history/u-s-canadian-border-established .
90 Louis-Jacques Dorais, *Language of the Inuit: Syntax, Semantics, and Society in the Arctic* (McGill-Queen's University Press, 2010), 235–36.
91 Arctic Council, 'Inuit Circumpolar Council', last modified 30 September 2015, accessed 7 August 2018, https://www.arctic-council.org/index.php/en/about-us/permanent-participants.
92 Arctic Council, 'Inuit Circumpolar Council'.
93 Inuit Circumpolar Council (Canada), 'About ICC', accessed 7 August 2018, http://www.inuitcircumpolar.com/.
94 Eben Hopson: An American Story, 'Inuit Circumpolar Conference (June 1977)', accessed 7 August 2018, http://ebenhopson.com/586-2/. Presumably USSR-born Inuit could not participate for political reasons; and Greenland is not mentioned because Denmark controls its foreign affairs.
95 Hopson, 'Inuit Circumpolar Conference' (emphasis added).
96 Inuit Circumpolar Council (Canada), 'Activities and Initiatives', accessed 7 August 2018, https://www.inuitcircumpolar.com/icc-activities/.
97 Article III of the Jay Treaty, 8 Stat. 116 (excepting that 'goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians'.). See Exhibit IV (in part, 'If the American Indians are to have the privilege of trading with Canada – ought not the Canada Indians to be privileged to trade with the United States?'), and Exhibit V (in part, 'It shall at all times be free to the Indians dwelling within the boundaries of either of the parties to pass and repass with their own proper goods and effects, and to carry on their commerce within or without the jurisdiction of either of the same parties.').
98 Akins v. Saxbe.
99 United States v. Garrow, 88 F.2d 318, 323 (Court of Customs and Patent Appeals 1937).
100 United States v. Garrow, 320–21.
101 United States v. Garrow, 321.
102 30 Stat. 151.
103 Akins v. Saxbe.
104 Atkins v. Saxbe, 1215.
105 Mitchell v. Minister of National Revenue. As with the Supreme Court of Canada's other decisions regarding aboriginal rights, *Mitchell* was restricted to the specific facts of the case.
106 National Chief Dwight Dorey of the Congress of Aboriginal Peoples, *Development Unreserved: Aboriginal Economic Development for the 21st Century*, in *Legal Aspects of Aboriginal Business Development*, ed. Joseph Eliot Magnet and Dwight Dorey (Markham: Butterworths, 2005), 9, 10. Cited in Charles M. Gastle, Bennett Gastle Prof'l Corp., *The Importance of Sustainable Aboriginal Cultures: Defining Aboriginal Trade Issues in the Context of International Trade Relation* (27 November 2006), 6.
107 Miner, 'Transgression and Sovereignty'.
108 United States *ex rel.* Diabo.
109 Sharon O'Brien, 'The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families', *Fordham Law Review* 53 (1984): 315, 322 (citations omitted).
110 O'Brien, 'The Medicine Line'.
111 O'Brien, 'The Medicine Line'; 'Native American Reservations are Subject to Customs and Duties Regulations', United States Department Of Homeland Security Customs And Border Protection, https://help.cbp.gov/app/answers/detail/a_id/756/kw/%22American%20Indians%20Born%20in%20Canada%22. ('goods imported into reservations are subject to all US laws concerning admissibility and payment of duty').
112 Homeland Security, 'Native American Reservations' ('[F]or many tribes, the medicine bundle is the most sacred of all articles. Its search and mishandling by outsiders destroys its spiritual and ceremonial use.'). In a distressing twist, smugglers intending to transport drugs across the border have begun 'to hide drugs in objects that are then claimed to be materials associated with religious practices', knowing that some customs inspectors, in a bid to become more culturally-sensitive, have 'become more respectful (and perhaps less rigorous) in

their inspection of sacred objects'. See Singleton, 'Not Our Borders', 10.

113 16 U.S.C. § 668 (2006).

114 Jessica L. Fjerstad, 'The First Amendment and Eagle Feathers: An Analysis of RFRA, BGEPA, and the Regulation of Indian Religious Practices', *South Dakota Law Review* 55 (2010): 528, 529. The regulations state that the permit allows transport of dead eagles and their parts into and out of the United States, but such transportation is restricted to Indians 'authorized to participate in bona fide tribal religious ceremonies'. 50 C.F.R. § 22.22 (2012). While the religious exception might initially appear a good compromise, many have claimed that the permitting requirement and process burdens their free exercise rights. 'The majority of claimants rely on the Religious Freedom Restoration Act (RFRA) for relief. These cases often reach the federal courts of appeals, but the United States Supreme Court has not yet determined whether the religious exception to BGEPA and its permit system violates RFRA'. Fjerstad, 'First Amendment', 529.

115 These circumstances include that the parts were lawfully acquired, are personally owned, and that the same person travels in and out of the country with the same parts. United States Fish and Wildlife Service, 'Notice to the Wildlife Import/Export Community re: Transport of Eagle Items Within North America', last updated 14 February 2013, accessed 7 August 2018, https://www.fws.gov/le/public-bulletin-transport-eagle-items.html. Mexican law requires permits for all wildlife items entering or leaving the country.

116 United States Department of Justice, Office of the Attorney General, 'Memorandum on Possession or Use of the Feathers or Other Parts of Federally Protected Birds for Tribal Cultural or Religious Purposes' (12 October 2012), accessed 7 August 2018, https://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf.; United States Fish and Wildlife Service, 'Notice to the Wildlife Import/Export Community'.

117 United States Fish and Wildlife Service, 'Notice to the Wildlife Import/Export Community'.

118 Gastle, 'Marine Mammal Protection Act' in *Sustainable Aboriginal Cultures*, 16 U.S.C. §§ 1361–1421h (1972).

119 Gastle, *Sustainable Aboriginal Cultures*, 19.

120 Gastle, *Sustainable Aboriginal Cultures*, 21 (further noting that 'Alaskan Inuit are also allowed to kill fifty bowhead whales a year, but Canadian Inuit are prohibited from trading in whale products of any kind. If the objective of the legislation is to protect marine mammals, there is no logical basis to distinguish exemptions given to US and Canadian Aboriginals with respect to personal consumption, subsistence and traditional handicrafts.'). Gastle goes on to assert that '[w]ith respect to this kind of legislation, there should be a general presumption that Canadian and American Aboriginal peoples should be treated equally'.

121 Pub. L. 108–488, 118 Stat. 3638 (2004).

122 United States Department of Homeland Security Customs and Border Protection, 'Western Hemisphere Travel Initiative, Document Requirements for Land and Sea Travel', accessed 7 August 2018, https://www.cbp.gov/travel/us-citizens/western-hemisphere-travel-initiative.

123 The Department of Homeland Security took the view the ABC right of free passage was not denigrated by WHTI's documentation requirements. Department of Homeland Security, *Final Rule and Notice*, Vol. 73 No. 65 Fed. Reg. 18384, 18397 (Apr. 3, 2008) ('[INA] Section 289… benefits individuals who establish their identity, their Canadian citizenship, and that they are "American Indians"').

124 'United Nations Declaration on the Rights of Indigenous People' (March 2008), accessed on 29 August 2018, https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

125 Indigenous and Northern Affairs Canada was the department of the government of Canada with responsibility for policies relating to Aboriginal peoples in Canada. In August 2017, the Prime Minister announced the dissolution of Indigenous and Northern Affairs Canada and the creation of two new departments: Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada. This transformation will take time and includes engagement with indigenous peoples and others.

See 'Crown-Indigenous Relations and Northern Affairs Canada', accessed 29 August 2018, https://www.canada.ca/en/crown-indigenous-relations-northern-affairs.html.

126 Indigenous and Northern Affairs Canada, 'Government of Canada appoints new Chief Federal Negotiator for Nunavut Devolution', *Newswire*, 9 July 2016, https://www.newswire.ca/news-releases/government-of-canada-appoints-new-chief-federal-negotiator-for-nunavut-devolution-586146271.html.

127 Fred Caron, *Report on First Nation border crossing issues*, last modified 20 October 2017, accessed 29 August 2018, http://www.aadnc-aandc.gc.ca/eng/1506622719017/1506622893512.