



Severed Territory:

Mobility Rights of Indigenous People whose lands are divided by the Canadian-US border

There are different rules which pertain to crossing the border for some Indigenous Peoples. This infographic will explain what the rules are for which Indigenous people and from where these rules stem.

WHERE DOES LAW GET ITS AUTHORITY?

Canadian laws stem from many sources, like our Constitution ("the supreme law"), federal acts, or Provincial legislation. Sometimes laws are introduced or affirmed in Canadian case law. This is referred to as "judge-made law" or "common law." While this means that judges can interpret statutes (the written laws produced by Parliament), it also means that understanding Canadian laws can be tricky, as they may be embedded in convoluted decisions written by judges.



In 1992, there was a very important case decided at the Supreme Court of Canada called *Canada v Chiarelli*. Judges declared that "the fundamental principle of Canadian Immigration law is that non-citizens do not have an unqualified right to enter or remain in the country." This is a complicated statement because there was a time when people moved freely over the continent. Should a border, drawn 240 years ago, have the power to exclude Indigenous groups, who have historically occupied the land for thousands of years?

Before delving into the modern laws surrounding mobility rights, let's contextualize:

A QUICK LOOK AT SOME HISTORY:

Archeologists estimate that Indigenous populations have occupied North America for over 15,000 years. Many Indigenous Creation Stories state that people have existed on Turtle Island (North America) for time immemorial.



For thousands of years, there were no international borders as we know them today. Certain Peoples occupied certain territories, but these territories often overlapped and shifted.

It was not until 1783, when European powers wanted to distinguish "British North America" from the "American States," that a colonial border was drawn, severing Indigenous lands.

NATIONS FORCIBLY DIVIDED:

Communities worldwide have long suffered from the division imposed by powerful nations who draw lines on maps.



Above is a picture from the collective online mapping project called "Native Land Digital." It establishes the extent of overlap of Indigenous Territory on Turtle Island. It also demonstrates just how arbitrary the placement of the Canada-US border is with regards to preexisting nations.

SOME AFFECTED NATIONS:

The Gwich'in Nation was severed by colonial borders, as Gwich'in land covers area in the Yukon, the Northwest Territories and Alaska.

The Akwesasne Nation has territory in Ontario, Quebec, and New York State.

The Peoples of Upper Tanana and Northern Tutchone have lands in the Yukon and Alaska

Historical territory of the Sinixt Nation touches Revelstoke, British Columbia in the North, and Kettle Falls, Washington in the south.

When border negotiations began, the division of Indigenous Nations was discussed. Some rights were codified in an agreement which is incredibly pertinent to the modern mobility rights of Indigenous people. It is called:

THE JAY TREATY

Formally known as the "Treaty of Amity Commerce and Navigation, between His Britannic Majesty; and The United States of America," this treaty was signed by representatives in the United States and Britain. Article III codified the following rights of "Indians dwelling on either side of the [border]:"

- They can freely "pass and repass" the border
- They can freely "navigate all the lakes, rivers and waters" which span the border (with some exceptions regarding entering British seaports and harbours)
- They can carry on trade and commerce with each other
- No duty or taxes should be paid by Indians on their "own proper goods"

If the treaty was properly recognized, then Indigenous people whose land historically spanned the border would be able to freely move back and forth, trading and hunting, without being accused of smuggling goods or illegally crossing international borders.

HOWEVER...

CANADA HAS NOT RATIFIED THE JAY TREATY

Canada's argument is grounded in not being a party to the treaty. But there are many reasons why the lack of ratification is baseless:

- Canada was a colony of Great Britain in 1794, they did not need to be a party to the treaty because their head of state was involved in its negotiation.
- Canada's Constitution, the supreme law of the land, recognizes and affirms the existing treaty rights of Aboriginal Peoples of Canada.
- It was only in 1927 that Canada restricted entry for Indigenous Peoples dwelling on the south side of the border. Prior to this, Indigenous people in these divided territories were able to freely cross the border.
- The Canadian government continuously makes commitments to further reconciliation with Indigenous Peoples.
- In 2021, Canada brought the *United Nations Declaration on the Rights of Indigenous Peoples Act* into force. This Act means to ensure that Canadian laws are consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
- Article 37 of UNDRIP states that Indigenous people have the right to the recognition, observance, and enforcement of treaties. If Canada seeks to adjust laws so they are consistent with UNDRIP, Canada must recognize the Jay Treaty.

Beyond the legal reasons to recognize the Jay Treaty in Canada, there is a moral obligation to uphold the rights of sovereign nations whose existence predates this border by thousands of years.

THE DESAUTEL CASE: WHAT IT MEANS FOR INDIGENOUS PEOPLE SOUTH OF THE BORDER

In a Supreme Court of Canada case called *R v Desautel*, an Indigenous man (Richard Desautel) who was an American citizen, was charged with shooting an elk. Mr. Desautel is a descendant of the Sinixt Peoples, who historically hunted on both sides of what is now the Canadian-US border.

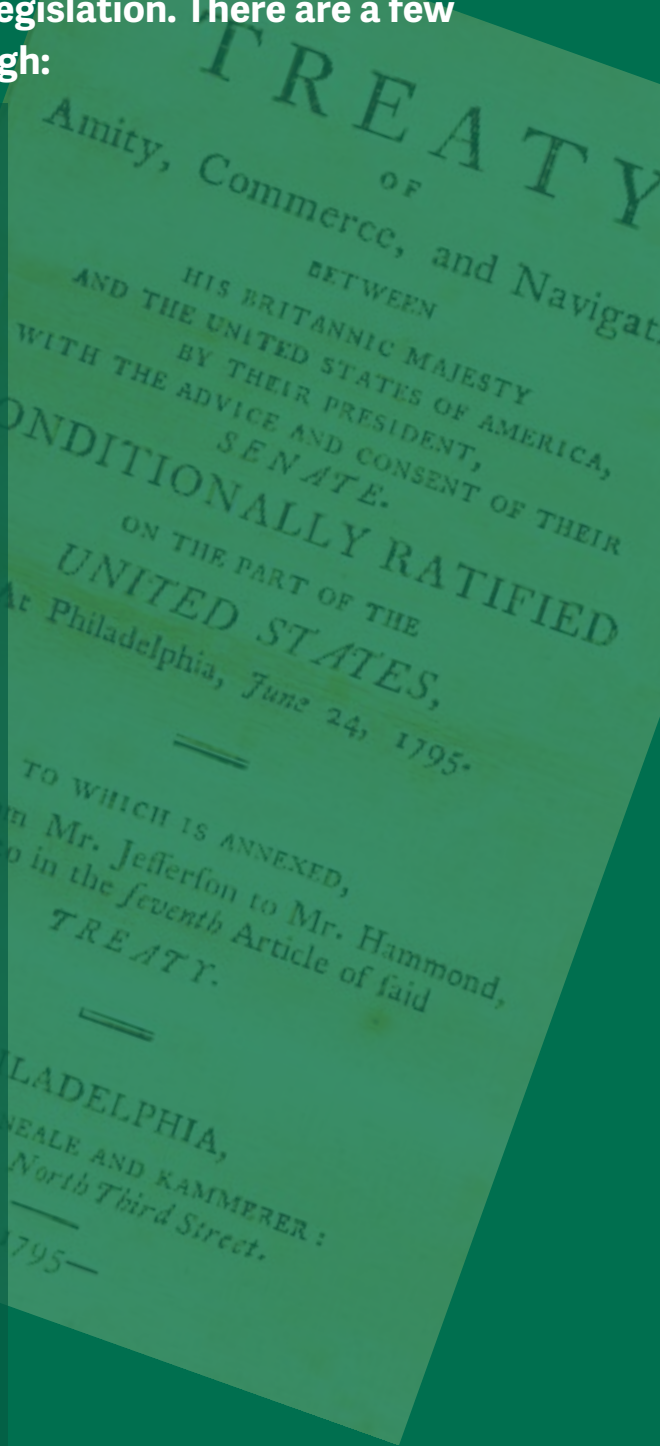
The court decided that Mr. Desautel was able to exercise his "section 35 right." Section 35 of the Canadian Constitution recognizes and affirms existing Aboriginal and treaty rights. In this case, that right was his right to hunt. Because Mr. Desautel was being charged under the *Wildlife Act*, and because he was not denied entry into Canada, the courts decided that his mobility right was not the central issue in this case.

The Supreme Court stated that Indigenous people who live in the US and have historically hunted in Canada have the right under section 35 to continue to hunt on traditional territory. The case skirted the question of whether crossing the border is a section 35 right. The *Desautel* case is a landmark case for those whose territories were severed, because it established that Indigenous non-citizens may still be able to claim a section 35 right. Although it did not codify a mobility right, the case will act as useful precedent when a case with facts more specific to border crossing arrives in front of the Supreme Court of Canada.

THE UNITED STATES HAS RATIFIED THE JAY TREATY

Indigenous people whose nations span the border have the right to live, work, and study in the United States. The rights established in the Jay Treaty have been codified in subsequent legislation. There are a few requirements though:

- The person seeking to travel into the US must be at least "half Indigenous," ie: 50% blood quantum
- Identification is necessary: a status card OR confirmation from a tribe official (backed by birth certificates and tribe records) would meet identification requirements. The confirmation "must contain the tribe's letterhead," and state "what percentage American Indian blood" a person or that person's parents has.
- Photographic identification is necessary, such as a driver's license or passport.
- The person entering the United States must be from a nation which spans the border. For example, a member of Akwesasne or Gwich'in Nation could enter with the requisite paperwork. A member of an Inuit Nation in Nunavut, or Dene First Nation in Northern Manitoba, would not be eligible to enter and live in the United States, because their territory historically did not extend into the United States.



IN CONCLUSION

For thousands of years, People of Turtle Island were not restricted by international borders.



Indigenous Canadians whose ancestors regularly crossed what is now the border and who meet the requirements set out by US customs have the right to live in the US. This is because that right was established in article III of the Jay Treaty.



Indigenous Americans do not have the same right, as Canada has opted not to honour the treaty. This is controversial because section 35 of the Canadian Constitution means to recognize treaty rights and Canada's head of state (the UK) was a party to the treaty.



In order to compel Parliament to ratify the Jay Treaty, we must continue to spread awareness. We must advocate for communities whose lands are severed. Case law, UNDRIP, and the American interpretation of the Jay Treaty are useful tools in the pursuit of mobility rights for Indigenous Peoples.

