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Superimposed Nations: The Jay Treaty and Aboriginal Rights

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SUPERIMPOSED NATIONS: THE JAY TREATY AND ABORIGINAL RIGHTS

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I. THE PRESENT SITUATION

The Blood reserve in Southern Alberta lies 22 kilometres north of the Canada–United States border. The Blackfeet reserve in northern Montana extends to the border. The Blood and Blackfeet were originally confederate nations when the United States and Canada imposed the division between them. The Bloods had allegedly been promised that the reserve would extend south to the border, but the Canadian government established it further north.[1]

Members of the bands are related to one another, socialize with one another, and participate in religious and cultural events together. "Indian Days" are celebrated by both bands, as are rodeos, sports events, and dances. Each event has a considerable number of participants and observers from the other side of the border in attendance. The nearest place for the Blood to obtain alcohol is in Babb, Montana, and the nearest place for the Blackfeet to obtain groceries is in Cardston, Alberta. In addition, crafts and religious items are often traded between the reserves. This interconnection between the two reserves means that the border is frequently crossed by the members of both bands, in both directions.

The presence of the border means that the Blood and Blackfeet nations are subject to Canadian and American customs and immigration laws. Blackfeet friends and relatives of Blood tribe members may be denied admission to Canada. Blood and Blackfeet persons may have their vehicles searched, their trade restricted, and their religious items handled disrespectfully. Certain religious items may be denied entry into Canada or the United States because they are

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[1] S. O'Brien, "The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families" (1984) 53 Fordham L. Rev. 315 at 322.

made of animal parts. People may only cross the border between 7:00 am and 11:00 pm when Carway, the port of entry between the reserves, is open.

The situations described in this paper[2] are not unique to the Blood and Blackfeet nations; they may occur anywhere that the Canada–United States border has divided allies and nations among Native peoples. For example, the Mohawk–St. Regis reserve is divided by the Canada–United States border and by the Ontario–Quebec border, which creates additional problems with tribal government and makes the members subject to three different legal systems. The Canada–United States border also divides the Okanagan band between British Columbia and Washington State.

Canada's *Immigration Act*[3] states: "No person, other than a person described in section 4, has a right to come into or remain in Canada."[4] Persons described in section 4 are Canadian citizens and permanent residents. Subsection 4(3) says:

> A person who is registered as an Indian pursuant to the Indian Act has, whether or not that person is a Canadian citizen, the same rights and obligations under this Act as a Canadian citizen.

First Nations people who live in the United States may be registered pursuant to the *Indian Act*[5] in Canada. All other United States resident First Nations people who do not have Canadian citizenship are considered to be visitors or immigrants. Most residents of the Blackfeet reserve who seek to come into Canada to attend an event on the Blood reserve are therefore admitted under subsection 5(3) of the *Immigration Act:*[6]

> A visitor may be granted entry and allowed to remain in Canada during the period for which he was granted entry or for which he is otherwise authorized to remain in Canada if he meets the requirements of this Act and the regulations.

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[2] These situations were witnessed during the course of the writer's employment as a Customs Officer (and Primary Examining Immigration Officer) at various ports of entry in Southern Alberta from 1990 to 1992.

[3] R.S.C. 1985, c. J-2.

[4] *Ibid.* s. 5(1).

[5] R.S.C. 1985, c. I-5.

[6] *Supra* note 3.

Section 10 (student and employment authorizations) and section 19 (inadmissible classes) of the Act are used to restrict the activities of Blackfeet people. It is a daily occurrence at the Carway office of Employment and Immigration Canada for a Blackfeet[7] person to be refused entry under paragraph 19(2)(a.1) of the *Immigration Act:* [8]

> No immigrant and, except as provided in subsection (3) [persons who can satisfy the officer that the purpose justifies admission], no visitor shall be granted admission if the immigrant or visitor is a member of any of the following classes:
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> (a.1) persons who there are reasonable grounds to believe
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> > (i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years, or
> >
> > (ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada [could be punished by less than ten years].
>
> [except if the person satisfies the Minister of his or her rehabilitation and for whom at least five years have passed since the sentence or the offence].

Paragraph 19(2)(b) bars entry by persons with two or more summary convictions, or the equivalent thereto within five years of the date of seeking entry. Paragraph 19(1)(c.1) bars entry to those with an indictable offence punishable with at least ten years. The Act also bars entry to those who have committed offences within Canada.

In practice, one or two impaired driving convictions in the distant past suffice to bar a person entry to Canada. Neither the actual punishment given for the offence, nor whether the prosecution proceeded by way of misdemeanor or felony, are relevant to the de-

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[7] The Blackfeet people are not the same as the Blackfoot people; thus, the singular form of "Blackfeet" is "Blackfeet."

[8] *Supra* note 3.

termination of admissibility. The criterion used is whether the offence *could* be an indictable offence in Canada without regard to whether the offence would in fact have been proceeded against by way of indictment. Many of those barred under paragraph 19(2)(a.1) who have committed the offence more than five years earlier do not take advantage of the exception in paragraph 19(2)(a.1), whereby they may convince the Minister of their rehabilitation, either through inability to understand it, or through lack of opportunity to exercise the option.

The sections of the Act regarding employment in Canada prove to be a barrier during haying season and branding season, when Blood farmers need the help of friends and relatives. "Employment" is defined in subsection 2(1) of the *Immigration Act*[9] as follows:

> "employment" means any activity for which a person receives or might reasonably be expected to receive valuable consideration.

Exchange of crafts also presents a problem with both Customs and Immigration. If the craftsperson brings the crafts into Canada to sell, a commercial customs entry form (B-3) must be completed, and duty and taxes on the goods must be paid. Because the craftsperson is considered employed in Canada, he or she must also obtain employment authorization.

The Canada–United States border presents a multitude of problems for the Blood and Blackfeet people. Many of their daily activities are regulated by the unwanted intervention into and regulation of their inter-band co-operative activities by the two foreign governments. This paper will explore the possibility of achieving, through the Canadian legal system, the right freely to cross the border without restriction by the *Immigration Act;* a right, it will be argued, that is inherent for aboriginal peoples.

II. THE HISTORICAL CONTEXT

For approximately ten years prior to 1794, the British and the Americans on the North American continent had had an uneasy truce. The British, at that time more powerful than the Americans,

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[9] *Supra* note 3.

had imposed high duties and other restrictions on American traders, and had removed slaves from the United States during the American Revolution of 1776.[10] These conflicts led to American John Jay's negotiations in London with British leaders, resulting in the *Treaty of Amity, Commerce, and Navigation*[11] (the Jay Treaty), signed on 19 November 1794. Article III of the Treaty states:

> 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 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 . . . and freely to carry on trade and commerce with each other . . . . [N]or shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.

Article XXVIII of the Treaty states, "the first ten articles of this treaty shall be permanent."

First Nations were included in the treaty because of fears that hostile reactions by the Native peoples would disrupt Anglo–American peace.[12] There are indications that the reference to First Nations people resulted from pressure by the British negotiators. For example, Albert J. Beveridge, in *The Life of John Marshall*, when referring to Article III wrote that

> the British secured from us . . . liberty of Indians and British subjects to pass our frontiers, trade on our soil. . . . an odious provision, which, formerly, had never occurred to anyone.[13]

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[10] M. Wilkin, *The Jay Treaty: Ratification and Response,* (M.A. Thesis, North Texas State University, 1980) (Ann Arbor: University Microfilms International, 1980) at 4.

[11] (U.S.–Gr. Brit.) 12 Bevans 13.

[12] *Supra* note 10 4. See also D. A. Booth, *The Constitutional and Political Aspects of the Jay Treaty 1794–1796* (Ph.D. Thesis, University of Virginia, 1957) (Ann Arbor: University Microfilms International, 1957) at 40 where an American speaker is quoted as saying that the British had "set the savages on our backs."

[13] Quoted in Booth, *ibid.* at 103.

Free passage of the border was essential for Anglo–First Nations relations. At that time, the British were signing treaties with the First Nations as nations in their own right. The imposition of border controls by Britain and the United States would have shown the First Nations that Britain was not prepared to consider them as independent political entities. The good will of the First Nations people was also important to Britain in keeping American encroachment on the border to a minimum. Prior to the signing of the Jay Treaty, it had been the hope of Britain that the First Nations would form a buffer zone between Canada and the United States, leaving the Great Lakes for Britain.[14] British officials offered to mediate a settlement between the American government and the First Nations for an "Indian Buffer State" between the two countries, where Britain and the U.S. would "withdraw all claims of possessions whatever . . . ."[15] Negotiations for this fell through, but the same motivation seems to be behind the inclusion of Article III.

One year after the Jay Treaty was signed, the Ojibway, Potowatome, Huron, and Ottawa Nations were reassured that the border would not affect their mobility:

> [The King] has . . . taken the greatest care of the rights and independence of all the Indian nations who by the last Treaty with America, are to be perfectly free and unmolested in their trade and hunting grounds and to pass and repass freely undisturbed to trade with whom they please.[16]

The United States attempted, in 1795, to license First Nations traders, thus restricting which of them could trade with the British.[17] Britain took this to be a violation of Article III of the Jay Treaty and proposed that it be agreed that no stipulation entered into after the Jay Treaty should be taken to derogate from the rights in Article III.[18] This resulted in the Explanatory Article to the

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[14] J. A. Combs, *Power, Politics and Ideology: A Case Study of the Jay Treaty* (Ann Arbor: University Microfilms International, 1964) at 136.

[15] *Supra* note 12 at 146–51.

[16] Quoted in O'Brien, *supra* note 1 at note 26.

[17] Treaty of Grenville, (U.S.–Wyandots, Delawares, and other Tribes) 3 August 1795, 7 Stat. 49.

[18] J. Bigelow, *Breaches of Anglo-American Treaties,* (New York: Sturgis & Walton, 1917) at 17.

Jay Treaty,[19] which reiterated Article III and included the British concern about subsequent actions by either state.

The War of 1812 created hindrances to free passage of all individuals. The Treaty of Ghent,[20] signed in 1814, ended the hostilities between Britain and the United States. The right of free passage of aboriginal people was reiterated in Article IX of that treaty:

> The United States engage . . . to restore to such Tribes or Nations respectively all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven. . . . [H]is Britannic Majesty engages on his part . . . to restore to such Tribes or Nations respectively all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven.

The Treaty of Ghent was explained to First Nations people by the British Deputy Superintendent General of Indian Affairs in 1815 at Burlington, Ontario:

> I will now repeat to you one of the Articles of the Treaty of Peace which secures to you the Peaceable possession of all the country which you possessed before the late War, and the Road is now open and free for you to pass and repass it without interruption.[21]

At a time when it was of advantage to Britain to ensure the rights of the First Nations people, those rights were assiduously protected, with much assurance to the Native peoples that the colonizing nations would not interfere with the existence of the First Nations. The British and the Americans were then treating the First Nations as independent nations. This is evident from the fact that "Indians" were distinguished from British subjects and American citizens in the various treaties and articles. As well, the fact that treaties were concluded between the British and First Nations indicates the independence of the First Nations at that time.

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[19] Explanatory Article to the Third Article of the Jay Treaty, 4 May 1796, (U.S.–Gr. Br.) 8 Stat 130, T.S. no. 106.

[20] Treaty of Peace and Amity, 24 December 1814, (U.S.–Gr. Br.), 13 Bevans 41.

[21] O'Brien, *supra* note 1 at 320.

III. THE AMERICAN POSITION

1. Immigration

In 1924, the United States passed their first *Immigration Act* to restrict border crossing rights of First Nations people from Canada.[22] The *Immigration Act*, read in conjunction with the *Citizenship Act*,[23] which granted citizenship to U.S. born aboriginals, had the effect of subjecting Canadian born aboriginals to the same immigration laws as other non-U.S. citizens.

In 1925, Paul Diabo was arrested by U.S. Immigration officials. He was a Mohawk from the Quebec side of the Mohawk reserve working in the United States. Immigration officials arrested him for working without authorization from U.S. Immigration. Diabo challenged the arrest on the grounds that Article III of the Jay Treaty guaranteed his immunity from the provisions of American immigration laws.[24] The Court agreed, and stated that:

> [T]hat article did not create the right of the Indian to pass over land actually in their possession, for, subject to the general dominant right of sovereignty claimed by all European nations based on discovery, the right of the Indian to possess the soil until he surrendered his right by sale or treaty has been recognized.[25]

Thus, the Court found that the First Nations right not to be impeded by the border was an inherent aboriginal right, not a right created by the Jay Treaty. The Treaty merely recognized and affirmed the right.[26]

2. Customs

U.S. Customs does not allow duty free passage of goods by First Nations people to any extent greater than that permitted to everyone else. *Karnuth* v. *United States ex rel. Albro* [27] (the *Karnuth* de-

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[22] *The Immigration Act of 1924*, c. 190, s. 13(c), 43 Stat. 153 (U.S.).

[23] *Citizenship Act of 1924*, ch. 233, 43 Stat. 253 (U.S.).

[24] *McCandless* v. *United States ex rel. Diabo*, 25 F.2d 71 (3d Cir. 1928).

[25] *Supra* note 24 at 72.

[26] See also *Akins* v. *Saxbe*, 380 F. Supp. 1210 at 1220 (D. Me 1974) at 1220, where the District Court of Maine said that there was an "aboriginal right . . . to move freely within their own territory without regard to the International Boundary and free of the restrictions imposed by the immigration laws."

[27] 279 U.S. 231 (1929).

cision) considered the impact of the Jay Treaty on non-aboriginal people. The U.S. Supreme Court said that Article XXVIII, which purported to make the rights in Article III permanent, could not be interpreted as guaranteeing them in perpetuity. The War of 1812 had abrogated the free border-crossing rights. The Treaty of Ghent, which reinstated the rights of aboriginal people only, was not mentioned in this case.

A subsequent case, which considered the right of a Canadian aboriginal person to take goods into the U.S. duty free, *United States* v. *Garrow,*[28] used the *Karnuth* case to determine that Garrow did not have such a right, because the War of 1812 had abrogated the right. The Treaty of Ghent was, according to the Court, a non-self executing treaty, and no executing legislation was ever implemented. They did not consider the issue of inherent aboriginal rights.

The U.S., then, has two policies with regard to border crossing by aboriginals; the people may pass freely, but goods imported by aboriginals are subject to duty and taxes.

IV. THE CANADIAN POSITION

1. Before 1982

Section 88 of the *Indian Act*[29] says:

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

In *Francis* v. *R.*,[30] the Supreme Court of Canada considered whether "treaty" in section 88 (then section 87) included the Jay Treaty, thus exempting First Nations people from duty and taxes payable on imported goods. Louis Francis had bought a used washing machine, oil heater, and refrigerator from relatives on the

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[28] 88 F.2d 318 (C.C.P.A. 1937).

[29] *Supra* note 5.

[30] [1956] S.C.R. 618.

American side of the Caughnawaga Mohawk reserve (which is divided by the border). Canada Customs charged him the duty and taxes on the items, which he paid under protest. The Court found that, although legislation exempting Native people was implemented shortly after the Jay Treaty was ratified, at the time that Francis imported the goods there was no such legislation in effect. Parliament had the authority to amend or repeal the legislation and, in any event, the Jay Treaty rights were abrogated by the War of 1812. Here, the Court said that the state of war had made it impossible that subjects of one sovereignty should freely pass into the territory of another. It was not considered that at the time of the war, First Nations people were not subjects of any sovereignty in their own view or in the view of the British, as evidenced by the distinction made between His Majesty's subjects and "Indians" in the Treaty. The *Indian Act,*[31] in section 87 (now section 88), only exempted aboriginal people from legislation that conflicted with treaties between Canada (or Britain in right of Canada) and First Nations, not treaties to which the First Nations were not signatories. The Supreme Court of Canada followed the *Karnuth* and *Garrow* decisions of U.S. Courts.[32]

2. After 1982

Section 35 of the *Constitution Act, 1982*[33] reads as follows:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

The Ontario Court of Appeal considered whether section 35 altered the aboriginal position with respect to the Jay Treaty in *R.* v. *Vincent.*[34] Elizabeth Vincent is a member of the Lorette Huron Band. She was found in possession of $1680 worth of tobacco, on which no duty had not been paid, and $60,030 in cash. She admitted that she intended to sell the tobacco in her store on the reserve. The Court first considered whether Article III of the Jay Treaty would exempt her from customs duties and taxes. The appellant

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[31] *Supra* note 5.

[32] *Supra* notes 27 and 28.

[33] Schedule B of the *Canada Act* (U.K) 1982, c. 11.

[34] (1993), 12 O.R. (3d) 427, leave to appeal to Supreme Court of Canada refused 14 October 1993.

relied on a French version of Article III, which would exempt First Nations people from duties on "leurs propres effets et *marchandises* de quelque nature qu'ils soient" (emphasis added). The Court rejected this argument because the Jay Treaty was between the U.S. and Great Britain, in English, and there was no official French version. The version provided by the appellant was a translation of the English treaty. The English version makes no allusion to an exemption for commercial goods other than pelts.[35] The Court said:

> In this case, the tobacco imported by the applicant in seven large cardboard boxes could not be considered exempt from duty, because the tobacco was "goods in bales or other large packages unusual among Indians." We reject the appellant's argument that the expression "their own goods and effects" excludes only goods not belonging to Indians.[36]

The Court then, in *obiter dicta*, discussed whether the Jay Treaty was a treaty within the meaning of section 35 of the *Constitution Act, 1982*. If, the Court said, the word "treaty" in the *Constitution Act* was to be given the same meaning as in section 88 of the *Indian Act*, then *Francis*[37] would dictate that the Jay Treaty was not a treaty within the meaning of section 35.

Lacourcière J.A., then considered the opinions of various authors, including Lysyk, Slattery, and Hogg, on whether subsection 35(1) is broad enough to include treaties that benefit aboriginals. The authors agreed that it may be broad enough, but expressed uncertainty (*Vincent* was the first case to discuss this). The Court took this uncertainty to be a point against such an interpretation:

> the final conclusion of the first judge does not seem to be clearly supported by the learned authors who leave some doubt on the question.[38]

In addition, the Court asserted that the framers of the *Constitution Act* must have intended the word "treaties" to mean that which it meant in previous Canadian decisions, or they would have used a different word. This, despite the holding in *Edwards* v.

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[35] There is still no duty imposed on pelts from the U.S., whether worked or not, according to Chapter 41 of the Tariff Code.

[36] *Supra* note 34 at 432.

[37] *Supra* note 30.

[38] *Supra* note 34 at 435.

A.G. Can. that constitutional interpretation is to be carried out with a view to the Constitution as a "living tree capable of growth and expansion within its natural limits."[39] Also, in the *B.C. Motor Vehicle Reference,*[40] Lamer, J. said that framers' intent was to be given little weight in interpretation, lest it "stunt the growth" of the living tree.

The Court then stated that it accepted the arguments of the Attorney General of Canada that to accept that international treaties of benefit to "Indians" would derogate from the sovereignty of Canada to alter those agreements. This argument was based on the fact that permission of the aboriginal people would be required, even if the other signatory to the treaty failed to uphold its obligations. With respect, these arguments should not go to the interpretation of the constitutional provision in defining the right, but rather to limitations on the right, if such are found appropriate. This approach is more consistent with a broad and liberal interpretation of the Constitution.

The fact that aboriginal rights under treaty are given constitutional status ought also to affect the subsequent finding by the Court that international treaties cannot confer rights upon subjects of the signatory countries. Aboriginal people have a different status from Canadian citizens and U.S. citizens.

Further, the Court finds, even if the Jay Treaty was a treaty within the meaning of section 35, the rights in Article III were extinguished prior to that date. Here, the Court refers to and follows *Karnuth* and *Garrow.*[41] Those cases were, however, American cases. If the right had been extinguished, it would have to be by an act of the Canadian government, not by the American government.

There are further considerations, not discussed by the Court in *Vincent*, on the issue of the inclusion of the Jay Treaty under section 35. First, there would be no Anglo–First Nations treaties with respect to free passage of the border because of the existence of the Jay Treaty and the Treaty of Ghent. The First Nations were made aware of the existence of those treaties,[42] and would not therefore bargain for a right they already had. A broad and purposive interpretation of section 35 would take this into account.

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[39] [1930] A.C. 114 (P.C.) at 136.

[40] *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486 at 509.

[41] *Supra* notes 27 and 28.

[42] See *supra* notes 16 and 21 and accompanying discussion.

Second, implementation of the treaties would entail an absence of legislation. Subsequent legislation may have been enacted without awareness of the provisions of the treaties, and would go to whether the right had been extinguished, not whether it ever became effective.

Section 35 also refers to aboriginal rights. The Court in *Vincent* does not discuss this. A case currently being considered deals with aboriginal rights with respect to free passage of the border.[43] Tracey Ann Smith is a member of an American Indian Band and has U.S. citizenship. She is also a member of the Stanjikoming First Nation in Ontario, by virtue of the Stanjikoming First Nation Band Membership Code, but is not a status Indian under the *Indian Act.*[44] Her common law spouse lives at Stanjikoming First Nation. She was denied entry to Canada on the grounds that she did not have status and had not been granted an immigrant visa pursuant to subsection 9(1) of the *Immigration Act.*[45] She will argue that the right to cross the border freely is an aboriginal right within the meaning of section 35 of the *Constitution Act, 1982*, and that subsection 9(1) of the *Immigration Act* is inconsistent with that right.

Aboriginal rights stem from aboriginal sovereignty. They are inherent, not created by acts of Parliament. Dickson, J. (as he then was) found, in *Guerin* v. *The Queen,*[46] that the source of aboriginal rights is independent of acts of the Canadian government (or Britain acting in right of Canada), and predates them. This is reiterated in *R.* v. *Sparrow,*[47] where the Court also says that an aboriginal right must have been exercised prior to the arrival of the colonists and have been an integral part of the First Nations community. This would surely apply to border crossing rights, given that the border is a construction of U.S. and British relations, and is irrelevant to First Nations. The notion of inherent aboriginal rights concurs with the U.S. decision in *Diabo,*[48] where the U.S. court found that the Jay Treaty had not created the right of free passage; the right had existed prior to the signing of the treaty. And, the

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[43] See *Smith* v. *Canada,* [1993] 2 C.N.L.R. 190 (Ont. Gen. Div.), additional reasons in (1993), 13 O.R. (3d) 215 (Gen. Div.), leave to appeal refused (1994), 23 Imm. L.R. (2d) 235 (Ont. Gen. Div.).

[44] *Supra* note 5.

[45] *Supra* note 3.

[46] [1984] 2 S.C.R. 335.

[47] [1990] 1 S.C.R. 1075.

[48] *Supra* note 24.

fact that "Indians" were distinguished from Americans and British subjects in the early documents, and the existence of Anglo–First Nations treaties indicates that the British themselves thought of the First Nations as independents, who had existing sovereignty prior to the arrival of the Europeans.

If the aboriginal right to cross the border had been extinguished prior to 1982, then it would not be protected by section 35. The test for extinguishment, set forth in *Calder* v. *British Columbia (A.G.)* [49] and reiterated in *Sparrow,*[50] is that Parliament must have demonstrated a clear intent to extinguish the right. This would not be accomplished by U.S. regulation of border crossing, nor would U.S. cases be of any assistance in deciding this. Even the existence of the *Immigration Act* and other Canadian legislation regulating border crossing would probably not be sufficient. In *Sparrow*, the Court rejected the argument that Parliament extinguishes an aboriginal right by passing legislation inconsistent with the exercise of that right. In the context of *Sparrow,* this means that fisheries regulations were merely regulating the exercise of the right, and were not to be taken as extinguishing it. The Court also rejected the argument that the right existed in the form that it took in 1982 (i.e.: limited by the regulations), as that would imply that Parliament had partly extinguished the right, an action which required clear and plain intent to be shown.

If it is held that section 35 protects aboriginal rights to crossing borders, then the next question is, to whom does it apply? Subsection 35(2) limits the application of subsection 35(1) to the "Indian, Inuit and Métis peoples *of Canada*" (emphasis added). If this is interpreted narrowly to refer to people with status recognized under the *Indian Act* and born in Canada, then Smith ends up trapped in a circular argument. The Canadian government and the border still restrict the movement of aboriginal peoples. If, however, it includes members of Canadian bands, as determined by the bands themselves, then some control will rest with the First Nations, but the border will still define which Nations have that control.

The American response, under the Jay Treaty, has been to consider the right to be based on racial characteristics rather than on

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[49] [1973] S.C.R. 313.

[50] *Supra* note 47.

political affiliation.[51] This was reflected in the *Immigration and Nationality Act of 1952,*[52] which defined those entitled to pass the border freely as those with at least 50 percent Indian blood, who were not adopted members of families or tribes. This still gives control to the government, rather than to the First Nations, because the government defines who is aboriginal. The best solution would be to have the bands decide to whom the right should be extended, either by extending membership to individuals, or by defining eligible groups.

Once it has been determined who has the right to cross the border freely, it must be determined what is encompassed by that right. American jurisprudence has held that it entitles aboriginal people freely to enter and work in the U.S., to collect social benefits, and to be immune from deportation.[53] The Canadian response might be to read the group that is eligible for the right into subsection 4(3) of the *Immigration Act*, thus guaranteeing them the same rights and obligations of First Nations people with status under the *Indian Act* and Canadian citizens. This would mean that the right would encompass freedom from visa and authorization requirements, inapplicability of inadmissible persons categories, and freedom from deportation. Anything less would be inconsistent with the underlying notion that free passage of the border is an inherent aboriginal right. However, the Supreme Court of Canada, in *Sparrow,* allowed for the possibility of a limitation on aboriginal rights, if there is a valid legislative objective (more specific than "public policy"), if the limitation is consistent with the Crown's historic fiduciary obligation to aboriginal peoples, and if the limitation is minimal and is arrived at after consultation with aboriginal groups.[54]

V. CONCLUSION

Arguments have been presented here for the recognition by the Canadian legal system of the inherent aboriginal right to cross the border. This is not to say that the right exists only upon recognition

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[51] *United States ex rel. Goodwin* v. *Karnuth,* 74 F. Supp. 660 (W.D.N.Y. 1947).

[52] Ch. 477, s. 289, 66 Stat. 163, 234 (1952).

[53] See, *Akins* v. *Saxbe,* 380 F. Supp. 1210 (D.Me 1974), and *Yellowquill,* 16 I. & N. Dec. 576, as cited in O'Brien, *supra* note 1.

[54] *Supra* note 47 at 1114.

by the courts, but is merely an acknowledgment that First Nations must attain control over their rights, either by court challenge, or by negotiations with the Canadian government. It may be that the latter course is more flexible with respect to remedy. Questions of who is to be considered aboriginal for the purposes of the right, who may determine who is eligible, and who may determine the scope of the right could be determined by consultation with aboriginal groups. If a court challenge were successful, however, it might provide a catalyst for negotiations.