

Agenda Item H.5.b
Supplemental Public Presentation 1
September 2017

American Indians Born in Canada and the Right of Free Access to the United States

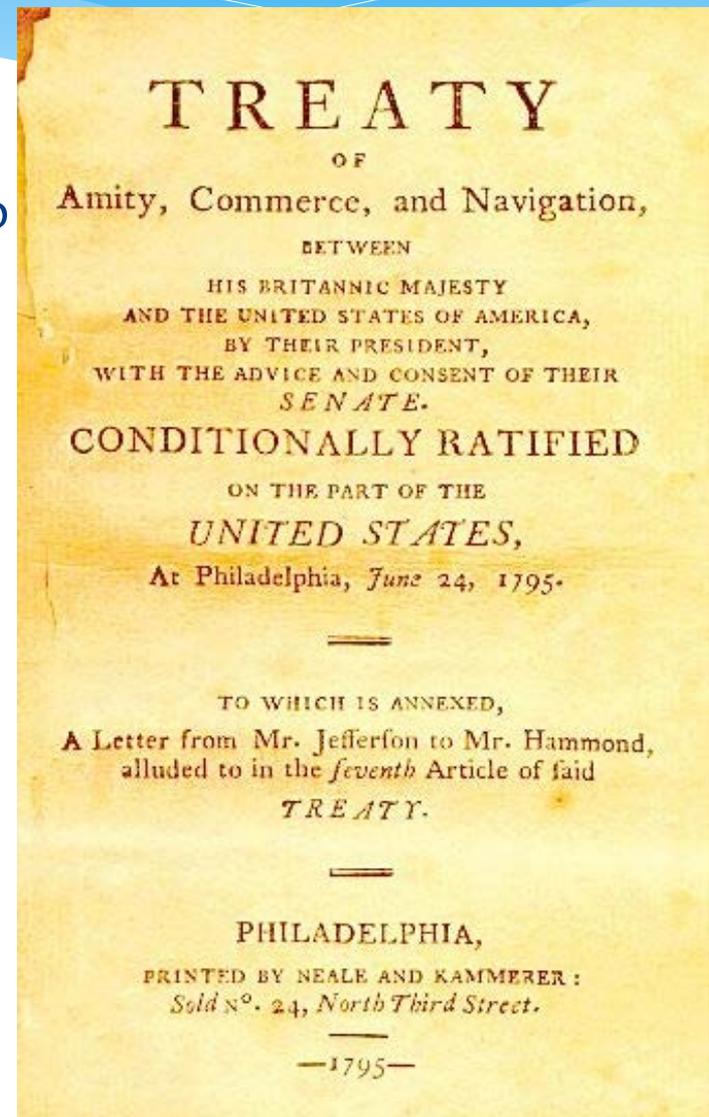
Agenda Item H.5
Public Comment
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Greg Boos, Attorney at Law, Cascadia Cross-Border Law

The Jay Treaty

- * In 1794, Great Britain and the U.S. negotiated the Jay Treaty, seeking in part to relieve tribal tensions caused by the imposition of the new border.
- * In relevant part, Article III of the Treaty provides:

It is agreed that it shall at all times be free 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 Treaty did not create a new right for Indians; it simply recognized their pre-existing right to move freely across their traditional lands now separated by the border.



The Jay Treaty and American Indians Born in Canada

- * The Jay Treaty is still treated as in force by the U.S. Department of State.
- * The relevant rights and benefits are today codified at § 289 of the Immigration and Nationality Act (INA).
- * “American Indian Born in Canada” (ABC) is a statutory term of art that encompasses indigenous peoples of North America, who were born in Canada, and who have at least a 50% native bloodline.

Who Qualifies?

- * A Canadian with “*at least 50 per centum blood of the American Indian Race.*” INA § 289. This is the only remaining racial metric in U.S. immigration laws.
- * Tribal enrollment is irrelevant to qualification – status is entirely bloodline-based.
- * Lack of tribal enrollment is equally irrelevant – status is entirely bloodline-based.

Who Does Not Qualify?

- * **A tribal card alone will not confer status as an ABC.**
Tribal membership is not dispositive because there are many tribes/bands in Canada that do not require a 50% bloodline.
- * Derivatives (spouse, children) do not qualify unless they independently meet the bloodline requirement.

Documenting as an ABC

- * The U.S. government already considers ABCs to be lawful permanent residents. They may apply to document their bloodline and status as part of a green card application; or, if they don't apply for a green card, they must have their bloodline adjudicated by a CBP officer each and every time they cross the border.
- * Burden rests on the applicant to prove their bloodline. Documentation includes evidence of parents' bloodline, grandparents' bloodline, and sometimes even the bloodlines of great-grandparents.
- * In 2015, out of the over 1 million green card applications filed that year, USCIS reported only 206 green card applications by individuals asserting ABC status. That's less than .0002%!
<https://www.dhs.gov/immigration-statistics/yearbook/2015/table7>

Reciprocity?

- * The Canadian government holds the Jay Treaty does not affect the admissibility of U.S.-born Indians to Canada.
- * However, Canadian courts recognize and protect an *aboriginal* right to freely pass the border.
 - * This right is protected by Canada's Constitution.
- * This right is not based on bloodline. It is a culturally-based test that assesses a number of factors.

What are the Benefits?

ABCs are not bound by US immigration law...

Free Passage: *“Nothing in this title [meaning the entire INA] 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.”* INA § 289.

- * Qualifying ABCs enjoy a right of free access to the United States unrestricted by U.S. immigration laws.
 - * This right of free access extends to any purpose – including living in the U.S., working in the U.S., studying in the U.S., and serving in the U.S. military.
- * No requirement to obtain visas or passports.
- * ABCs cannot be deported on any ground.

What are the Benefits?

ABCs are on equal footing with U.S. citizens for many Federal and State purposes...

- * The Welfare Reform Act of 1996 classifies all non-citizens as “qualified” or “unqualified” for Federal public benefits.
 - * At 8 USC § 1641, the Act enumerates the categories of “qualified” non-citizens, primarily: green card holders, refugees, and certain victims of domestic violence. ABCs are not on the list of “qualified” non-citizens. (but stay tuned... this statute must be read in its entirety)
 - * 8 USC § 1611(a) provides that everyone who is not listed as “qualified” is considered “unqualified,” and is ineligible for Federal public benefits. *Additionally, 8 USC § 1611(c)(1)(A) defines “Federal public benefit” to include “any grant, contract, loan, professional license, or **commercial license provided by an agency of the United States** or by appropriated funds of the United States.”*
 - * 8 USC § 1612(a)(1) exempts ABCs from the limiting provision at § 1611(a) which provides that everyone who is “not qualified” is ineligible for Federal public benefits. They are the only category of non-citizen that is exempted in this way.
 - * The constitutionality of treating ABCs differently than other non-citizens has been examined and upheld by our Federal courts, based on “the Federal Government’s unique and continuing relationship with and responsibility to the Indian people.” *Rodriguez v. United States*, 169 F.3d 1342, 1352 (11th Cir. 1999).
- * ABCs are treated as U.S. citizens for many state benefits; in Washington State for example, for the purposes of determining an individual’s citizenship status for public assistance, “U.S. citizens” are defined to include American Indians Born in Canada. WAC 388-424-0001.

What are the Benefits?

ABCs are even treated more favorably than U.S. citizens for some permitting purposes!

- * Generally, individuals seeking entry to the United States must report in person to a CBP Officer at a U.S. port-of-entry. 8 CFR 235.1.
- * An alternative to the in person reporting requirement exists in CBP's Canadian Border Boat Landing (I-68) Program, which allows certain applicants entering the United States by small boat from Canada to telephonically report their arrival to CBP. See <https://www.cbp.gov/travel/pleasure-boats-private-flyers/cbbl>.
- * While there is no requirement that such boaters must obtain a Form I-68; boaters who choose not to obtain a Form I-68 must report, in person, for inspection by a CBP Officer at a port-of-entry each time they enter the United States. Persons traveling by boat who do not have a Form I-68 and fail to present themselves for inspection are subject to arrest, possible fine, or if a Non-US Citizen, removal from the United States. See <https://www.cbp.gov/travel/pleasure-boats-private-flyers/cbbl>.
- * However, in a legal opinion published by the General Counsel of legacy INS (now DHS) regarding the scope of the I-68 program; the unique and special status of ABCs is emphasized. The INS General Counsel goes out of his way to note in his opinion that the I-68 program does not apply to ABCs at all, because "the INA does not restrict the right of Canadian natives 'who possess at least 50 per centum of blood of the American Indian race' to enter the United States. . . **These individuals are exempt from "all immigration restrictions imposed on aliens" by the INA," concluding that "Qualified Canadian born Native Americans, therefore, may sail in the United States portion of the boundary waters and land on the United States shore, without having to first obtain a Form I-68."** Genco Op. No. 92-43 (INS), 1992 WL 136938.

The Jay Treaty and American Indians Born in Canada

- * Extending HMS permit eligibility to ABCs is:
 - * Consistent with “the Federal Government’s unique and continuing relationship with and responsibility to the Indian people” including ABCs.
 - * Consistent with the our Federal and state governments’ widespread practice of placing ABCs on equal footing with U.S. citizens.
 - * Continues to satisfy the policies underlying the U.S. citizenship requirement for vessel permitting.

Treaty of Amity, Limits & Navigation

Art. 1st -

2. This agrees with our proper boundary.

3. The Instructions do not mention this, but I thought it might prevent disputes in future & would have an immediate good effect with the Indians.



4. - The wording of the latter part of this article seemed objectionable. Various alterations were proposed. It required much contest to obtain any alteration from the mode first proposed by Spain, whose doubts were principally founded on a jealousy of our settling in Ohio. The substance however appears to me not disadvantageous when considered as connected with the provision in the 2nd art. The wording fully authorized by my instructions.

5. This article occupied much time & great prolixities were to be removed. The only hint not well founded which may appear objectionable is the kind of defensive alliance we herein make with Spain against

George Washington's analysis of Article III of the Jay Treaty...

“3. The instructions do not mention this, but I thought it might prevent disputes in future & would have an immediate good effect with the Indians.”