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A Study of Indigenous Rights and Canada-United States Border through the Analysis of Historic Legal Precedents (19th-20th century) and Recent Implications

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ABSTRACT

America has expanded in size during the past several centuries as a result of the accession of numerous territories. The annexation of areas with indigenous populations has caused issues for such populations, more particularly, in the American border regions, where arbitrary boundaries have divided indigenous populations. Where certain groups formerly freely engaged with one another, today are divided and occasionally subject to criminal prosecution for upholding long-standing customs. Canadian policies changed as local motives replaced British ones. Subsequently, policies changed based on their interactions with the US. Although northern leaders considered the tribes as partners in trade and the military in 1800, American authorities perceived them as foes. Treaties negotiated by both countries became more lopsided over the years. Despite the frequent acts of violence in the US, as the century went on, the contrasts diminished, and towards its conclusion, the two nations faced disastrous outcomes

This paper falls into a broader scope and claims that throughout most of the 19th century, the governments of the United States and Canada pursued identical objectives with their policies concerning indigenous peoples. They hoped to eliminate the original peoples' distinct identity by assimilating them into the two communities in addition to obtaining the resources and the land from the native populations. Despite their rules appearing to be almost identical and their general similarities, Canadian and American officials typically adopted distinct implementation strategies for their regulations.

The research paper delves into analyses of historic legal precedents (from nineteenth to the twentieth century) to address the aforementioned concerns. Further, the research examines the present status of the legal-political issues comparably.

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I. INTRODUCTION

America has expanded in size during the past several centuries as a result of the accession of numerous territories. The annexation of areas with indigenous populations has caused issues for such populations, more particularly, in the American border regions, where arbitrary boundaries have divided indigenous populations. Where certain groups formerly freely engaged with one another, today are divided and occasionally subject to criminal prosecution for upholding long-standing customs. Canadian policies changed as local motives replaced British ones. Subsequently, policies changed based on their interactions with the US. Although northern leaders considered the tribes as partners in trade and the military in 1800, American authorities perceived them as foes. Treaties negotiated by both countries become more lopsided over the years. Despite the frequent acts of violence in the US, as the century went on, the contrasts diminished, and towards its conclusion, the two nations shared disgraceful outcomes. Throughout the most of the 19th century, the governments of the United States and Canada pursued identical objectives with their policies concerning indigenous peoples. They hoped to eliminate the original peoples' distinct identity by assimilating them into the two communities in addition to obtaining the resources and the land from the native populations. Despite their rules appearing to be almost identical and their general similarities, Canadian and American officials typically adopted distinct implementation strategies for their regulations⁴.

Native tribes that lived along what is currently the boundary between the United States and Canada interacted freely well before the earliest European settlers arrived. It seemed inconceivable that a notional boundary could cut across their territories and irrevocably divide them. That was about to alter with the settling of Europe. Colonies grew, and finally the regions that are today Canada and the United States could be distinguished from one another. Disputes raging in Europe were carried to the New World with the arrival of settlers. Acrimony and murder were introduced by battle to North America. The colonists were frequently subjected to pressures from the dominant forces in Europe. The American colonists revolted in response to such demands. Native Americans participated in the fighting from both sides. The England's king requested security for his people, as well as the Indians who might have battled for England, after the Americans had won the war. As a result, the Jay Treaty⁵ came into force, further after similar situation after another war the Treaty of Ghent⁶. These treaties allowed for

⁴ Osburn, Richard. "Problems and Solutions Regarding Indigenous Peoples Split by International Borders." *American Indian Law Review*, vol. 24, no. 2, 1999, pp. 471–85. JSTOR.

⁵ Treaty of Amity, Commerce and Navigation (Jay Treaty), 1794

⁶ Treaty of Peace and Amity ,(Treaty of Ghent), 1814

protection to Indians and permission to safely move across borders . Following the signing of the Treaty of Paris in 1783, which put an end to the American Revolutionary War, the United States of America and Britain entered into the Jay Treaty. Indigenous peoples are exempt from paying duty on commodities transported across the border and are permitted to freely traverse the U.S. border under the terms of the "Treaty of Amity, Commerce, and Navigation."⁷

II. ANALYSIS OF HISTORIC LEGAL PRECEDENTS

(A) Case : **Karunath V. United States Ex Rel.Albro**⁸

The Supreme Court of the USA has at most once examined the rights given to people of the two countries who wish to freely travel across the border. The Court addressed the continued validity of article III of the Jay Treaty⁹ in *Karnuth v. United States ex rel.Albro*. In the given case, two people from the United Kingdom applied for admission to the US in 1927. The two were judged unable to travel in order to search for job due to the immigration laws in effect at the time. They argued against the ruling by referring to the Jay Treaty's aforementioned provision. The Court took up the matter to develop a broad body of law on immigration status. They additionally talked directly on Jay Treaty Article III. The Court used criteria for international treaty interpretation for interpreting article III. By those criteria, conflict between the signatory nations does not automatically revoke treaties. The clauses establishing enduring rights that are consistent with the objectives of the conflict outlast the conflict. The Court determined in *Karnuth* also that clauses of article III allowing free travel over the borders constituted obviously incompatible with war and then were, as a result, nullified. The Court then cited authorities on international law that came to the conclusion that subsequently accords restoring rights provided that have been incompatible with wartime can only really restore such rights. The Court ultimately decided that the 1812 war had rendered that clause inoperative. As a result, the majority of Canadians were unable to freely cross the border between the two countries. This specific ruling does not affect Indians for the reason that, as stated before, rights lost during conflict are not restored unless expressly done so by later stages of the parties to the conflict. Indians' freedom to cross the boundary freely was expressly restored by the parties in the wartime of 1812 case. Because the Treaty of Ghent restored Indians' freedom to travel across the border, there are no further limitations besides those enforced by the Jay Treaty as well as the Treaty of Ghent.

⁷ Nichols, Roger L. "The Canada–US Border and Indigenous Peoples in the Nineteenth Century." *American Review of Canadian Studies* 40.3 (2010): 416-428.

⁸ *Karnuth v. United States ex rel.Albro* 279 U.S. 231 (1929).

⁹ Art. III, Treaty of Amity, Commerce and Navigation (Jay Treaty), 1794

(B) Case : Mc Candless V. United States Ex Rel Diabo¹⁰,

In the given case, Born on the Iroquois tribe's reservation in Canada, Paul Diabo was a complete member of the group. He frequently travelled into the US for employment and took several journeys across the border. He was detained in 1925 for violating immigration regulations when he entered the country. The judge ruled that Diabo was exempt from the reach of immigration rules. The court considered if the treaties putting an end to the American Revolutionary War as well as the 1812 war were relevant in order to make its ruling. The court determined that the Six Nations, a group that includes the Iroquois, disliked the internationally defined line that divided their territory. There was a defined international border separating their territories. The parties to the conflict included wording permitting for unrestricted migration of Indians from across frontier to the Jay Treaty in reaction to this. The court then took into account how the 1812 War affected the Jay Treaty. The court came to the conclusion that the rights created by the Jay Treaty weren't really nullified for one of two main reasons. With that said, the Six Nations had stayed silent throughout the conflict. They also weren't impacted by the conflict because they were a 3rd parties beneficiary and a sovereign country. The Jay Treaty safeguarded their rights. Further, Diabo's Canadian clan had helped the English independently of the Six Nations. His claims under the Jay Treaty would have been voided as a result. Nevertheless, the Treaty of Ghent gave the Indians all of their pre-1811 rights back. Both lines of reasoning guaranteed the protection of border crossing rights. As a result, it was determined that Great Britain and of Canada both had not prevented Six Nations Indians living in the Usa from crossing the border. If indeed the Jay Treaty is still in effect, as we believe it to be, then good faith and treaty adherence require the same behaviour from the United States. With that declaration, the court upheld the lower court's ruling releasing Diabo.

(C) Case : United States Ex Rel Goodwin V. Karunath¹¹

Only ten years later, a different item in court made a decision about the legality of article III of the Jay Treaty. The court restated and adopted the McCandless court's guidelines in the current instance. Goodwin belonged to the Canadian Upper Cayuga Tribe as a regular member. She entered the country undetected and also was compelled to be deported for not having a passports or immigration visa. Subsequently, she filed a writ of habeas corpus lawsuit. Her claim that the Jay Treaty safeguarded her entry to the United States served as the foundation for the writ. The trial court affirmed this and noted that her admission was also safeguarded by American

¹⁰ *McCandless v. United States ex rel. Diabo* 25 F.2d 71 (3rd Cir. 1928).

¹¹ *United States ex rel Goodwin v. Karnuth* 4 F. Supp. 660 (W.p.N.Y. 1947).

immigration regulations. She was released from detention, per the court's directive. The court must take into account two crucial problems before making a judgement. The judge had to first determine if Goodwin was Native American. Indian women who marry non-Indians or non-treaty Indians lose their Indian status within Canadian law. The court examined earlier legal decisions and legislation that described Indian status in order to rectify this. In relation to the topic in the case filed, the court found that "Indian" was an ethnic trait founded on bloodline and not a governmental differentiation.

(D) Recent Implications Of Jay's Treaty

On Nov 19, 1794, officials of the United States and Great Britain signed the Jay's Treaty. Discussions over commerce and borders led to the creation of the treaty. It is well recognized for the clause allowing Canadian Indigenous individuals to reside and work legally in the US. The bilateral clause is not accepted as enforceable by the Canadian government. Recently, One of the very few post-secondary schools in Canada to apply the Jay Treaty's provisions in this way is the University of Regina. The Treaty is acknowledged by the U.S. govt as well as Indigenous peoples from Canada who have "50% American Indian blood" are permitted to reside and serve there without limitation. Canada does not accept this clause as being legally enforceable¹². Further, In *R. v. Desautel* The Supreme Court maintained the ability of a citizen of the Lakes Tribe in Washington state to hunting in British Columbia in absence of a licence in a 7-2 decision rendered in April 2021¹³. The case's implications go far further than they initially seem. This decision might establish a precedent for Indigenous tribes living outside of Canada to enjoy constitutional freedoms inside the country. According to the verdict, Canada could occasionally have to collaborate with their American relatives on both resource allocation and land use choices. This includes negotiating treaties, that might now be required to take into account American Indigenous communities having links to Canada in the past. new duties owed to Indigenous communities beyond the Canada regarding the responsibility to consult. Regarding movement over the Canada-U.S. border and indigenous rights complaints have been made. The likelihood of further cross-border Indigenous rights rights, maybe even title claims. If Indigenous communities with a claim to rights inside Canada are totally outside of Canada, governments may be subject to an obligation to consult with such groups¹⁴.

¹² <https://www.uregina.ca/external/communications/feature-stories/current/2022/06-20.html>

¹³ *R. v. Desautel* 2021 SCC 17

¹⁴ Newman, Dwight. "The Supreme Court of Canada and Transboundary Indigenous Rights Claims: Understanding the Implications of the 2021 Decision in *Desautel*." (2022).

III. CONCLUSION

After a study of landmark legal precedents of the aforementioned incidents during the nineteenth century, two aspects about American Indians and immigration law are shown by. ,Indians were not mandated to register as immigrants or apply for visas to cross borders legally and remain as much as they like. Furthermore, previous tax deductions were no longer valid. The Jay Treaty and the Treaty of Ghent laid the foundation for concerns relating to immigration and taxes, although statutory law now supersedes both agreements. Border crossings were then governed by immigration legislation. The court asserted, so that it had in 1937, that perhaps the rights provided by the Jay Treaty just weren't reinstated, and also that article IX of the Treaty of Ghent was never put into effect. It is a secondary concern because, in contrast to its precedent, this court provided justification for the rationale why Indian exclusions are no longer applicable¹⁵. These consequences are important, and they indicate that the case, as well as several other legal advancements in the field of Indigenous rights, merit further attention. They are important for Indigenous peoples, who have experienced numerous government wrongdoings as a result of colonisation, but they also have ramifications for all Canadians, therefore they demand constant attention and discourse.

¹⁵ Supra note 1