

Border Crossing Issues and the Jay Treaty

**Standing Senate Committee
on Aboriginal Peoples**

The Honourable Lillian Eva Dyck, *Chair*

The Honourable Dennis Glen Patterson
Deputy Chair

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MEMBERS OF THE COMMITTEE

The Honourable Lillian Eva Dyck, Chair

The Honourable Dennis Glen Patterson, Deputy Chair

and

The Honourable Senators:

Lynn Beyak

Tobias C. Enverga Jr.

Sandra M. Lovelace Nicholas

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Don Meredith

Wilfred P. Moore

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Nancy Greene Raine

Murray Sinclair

Scott Tannas

Ex-officio members of the committee:

The Honourable Peter Harder, P.C., (or Diane Bellemare) and the Honourable Claude Carignan, P.C., (or Yonah Martin)

Other Senators who have participated from time to time in the study:

The Honourable Senators Maltais, Sibbeston and Watt

Parliamentary Information and Research Service, Library of Parliament:

Brittany Collier and Alexander Lavoie, Analysts

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Mark Palmer, Clerk of the Committee

Lori Meldrum, Administrative Assistant

Senate Communications Directorate:

Marcy Galipeau, Communications Officer

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Tuesday, February 2, 2016:

The Honourable Senator Dyck moved, seconded by the Honourable Senator Day:

That the Standing Senate Committee on Aboriginal Peoples be authorized to examine and report on the federal government's constitutional, treaty, political and legal responsibilities to First Nations, Inuit and Metis peoples and on other matters generally relating to the Aboriginal Peoples of Canada; and

That the committee submit its final report no later than December 31, 2017, and that the committee retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

After debate,

The question being put on the motion, it was adopted.

Charles Robert

Clerk of the Senate

BORDER CROSSING ISSUES AND THE JAY TREATY

INTRODUCTION

Since well before Confederation and the establishment of the Canada-U.S. border, First Nations in Canada have maintained close cultural and family ties with Native American communities in the United States. However the border and, more specifically, the formalities involved in crossing it make it difficult to maintain these ties. As well, for some First Nations communities straddling the Canada-U.S. border, crossing the border has become a daily activity required to go to work, school, or buy groceries. Given this context, the Standing Senate Committee on Aboriginal Peoples agreed to examine the issue of border crossings under its general order of reference, which authorizes the Committee to examine the federal government's constitutional and legal responsibilities to aboriginal peoples.

In undertaking this work, the Committee recognizes that border crossing issues are highly complex and involve issues such as citizenship, international sovereignty and security. The Standing Senate Committee on Aboriginal Peoples addressed the topic of border crossing issues and the Jay Treaty at a meeting on 17 February 2016.¹ At this meeting, the Committee heard from representatives of Indigenous and Northern Affairs Canada, the Canada Border Services Agency, the Mohawks of Akwesasne and the Assembly of First Nations. With this study, the Committee hopes to encourage the federal government and First Nations to work together to find practical solutions to the border crossing issue that will make it possible to maintain cultural and family ties between First Nations communities in Canada and Native American communities in the United States.

BORDER CROSSING AND THE JAY TREATY

Some First Nations in Canada believe they should have the right to freely cross the Canada-U.S. border. They maintain that this right was conferred on them by the 1794 Jay Treaty between Great Britain and the United States.²

In 1794, the United States and Great Britain signed the Treaty of Amity, Commerce, and Navigation, also known as the Jay Treaty, to resolve issues resulting from the independence of the United States in 1776. Article III of the Treaty, which appears below, stated that Great Britain and the United States would allow First Nations people to live on either side of the newly established border and to freely cross the border:

¹ *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

² For example, see: Christopher Curtis, "Treaty sets out border trade rights". *The Gazette*, 13 April 2013, p. B4 and Steve Arstad, "Okanagan Syilix Nation assert treaty rights to freely cross border", *Keremeos Review*, 2 June 2009, p. 26.

“It is agreed that 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 said Boundary Line freely to pass and re-pass 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’s Bay Company only excepted) and to navigate all the Lakes, Rivers and waters thereof, and freely to carry on trade and commerce with each other [...]

...No 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 re-passing with their own proper Goods and Effects of whatever nature, pay for the same any Import or Duty whatever. But Goods in Bales, or other large Packages unusual among the Indians shall not be considered as Goods belonging bona fide to Indians.”

According to a Mohawk Council of Akwesasne representative who testified before the Committee, this confirms that the border crossing rights of First Nations peoples pre-date the establishment of the Canada-U.S. border.³

Nonetheless, it is important to note that, for two reasons, the Jay Treaty has no practical application in Canada today. First, the Jay Treaty was abrogated by the War of 1812 between Great Britain and the United States. Second, the Treaty has not been implemented or sanctioned by legislation in Canada. This interpretation, which has been upheld several times by Canadian courts,⁴ was not disputed by those who testified before the Committee.

Consequently, currently when entering Canada, First Nations are subject to the same requirements as all other individuals.⁵ Individuals may enter Canada by right to live and work if they are Canadian citizens or have Indian Status in Canada. For other individuals, including Native Americans in the United States, the right to enter Canada is not automatic.⁶

The requirements are different for First Nations entering the United States. With the appropriate documentation, First Nations who are born in Canada but who do not hold American citizenship are permitted to freely enter the United States by right for the purposes of employment, study,

³ Rasennes Pembleton, Aboriginal Rights and Research Office, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

⁴ See: *Francis v. The Queen*, [1956] S.R.C. 618.

⁵ Lisa Janes, Regional Director General, Northern Ontario Region, Canada Border Services Agency, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

⁶ Lisa Janes, Regional Director General, Northern Ontario Region, Canada Border Services Agency, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

retirement, investing, and/or immigration. First Nations must prove that they have 50% Aboriginal blood quantum to enter the United States on this basis.⁷

The Committee heard that these requirements have specific repercussions for First Nations communities such as Akwesasne, who maintain close cultural and family ties on both sides of the Canada-U.S. border.

The problem for the Akwesasne Mohawk citizens was described by Grand Chief Abram Benedict this way: “entering into the United States, whether you are an American-born or Canadian-born Indian is not a problem. In reverse it is.”⁸

REAL AND PRACTICAL IMPLICATIONS

Apart from the theoretical, legal and historical issues associated with the Jay Treaty, the Committee was especially struck by the challenges faced everyday by the members of the Mohawks of Akwesasne when crossing the border. Although their community straddles the Canada-U.S. border, they consider themselves to be a single community. One of the Mohawks of Akwesasne representatives explained the situation to the Committee:

“I was born on the American side of Akwesasne. My wife was born on the Canadian side of Akwesasne. My children were born in the city of Cornwall in Ontario, but they've lived their whole lives on the American side of Akwesasne. That's common for all of our families, that interrelationships exist. That's what's unique about our community.”⁹

In addition, some parts of the Canadian side of Akwesasne are surrounded by the St. Lawrence River. The only way to get from one part of Akwesasne to another, or to elsewhere in Canada, is to go into the United States and then to re-enter Canada. This presents ongoing challenges for many Akwesasne residents who are required to cross the border for daily activities such as buying groceries and going to work. Furthermore, when members of the Mohawks of Akwesasne travel to the part of Akwesasne located in Ontario, they must cross the Canada-U.S. border, pass their destination and stop at the Canada Border Services Agency point of entry in Cornwall to report. Following this process, they must backtrack to arrive at their destination.¹⁰

Although the residents of Akwesasne learned long ago how to live in this international environment, they are seriously inconvenienced by this situation on a daily basis. For example, Grand Chief Abraham Benedict of the Mohawk Council of Akwesasne told the Committee that wait times and

⁷ *First Nations and Native Americans*, U.S. Embassy & Consulates in Canada.

⁸ Grand Chief Abram Benedict, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

⁹ James W. Ransom, Director of Tehotienawakon, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

¹⁰ James W. Ransom, Director of Tehotienawakon, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

reporting requirements were challenges faced by the community. Referring to the reporting requirements, Chief Benedict noted that this is “by far, the biggest inconvenience, the biggest annoyance that people feel every day.”¹¹

POSSIBLE SOLUTIONS EXIST

During its meeting on this issue, the Committee heard about several federal programs that have been put in place to facilitate border crossing in Canada. For example, Canpass and Nexus allow frequent, low-risk and pre-authorized travellers to expedite the process of crossing the border into the United States. The Committee also heard about a Canadian Border Services Agency (CBSA) project in Quebec that allows travellers to call in to report when the border crossing is closed for the day.¹² The Committee heard that options such as video reporting are not available at the Akwesasne border crossings.¹³

To facilitate border crossings for Akwesasne residents, the Committee heard that CBSA employees at the Cornwall crossing receive cultural awareness training and are provided with information about the community. As well, CBSA employs an Aboriginal liaison officer to work directly with the community to address challenges as they arise.¹⁴ Additionally, the *Akwesasne Residents Remission Order*¹⁵ is a regulation providing that duties are not, with some exceptions, payable on goods imported into Canada by a resident of Akwesasne for personal use; for sale by the owner of a community store to Akwesasne residents; or for use by the Mohawk Council of Akwesasne in connection with educational, hospital or social services.

In Akwesasne, not all community members are able to enter Canada by right to work and live, as many are Native Americans who do not have Canadian citizenship and are not Status Indians in Canada.¹⁶ The Mohawk Council of Akwesasne suggested that issuing a secure identification card for all their community members, whether they live in the Canadian or American areas of their nation, could address some of the border crossing challenges experienced by their community.¹⁷

¹¹ Grand Chief Abram Benedict, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

¹² James W. Ransom, Director of Tehotienawakon, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

¹³ James W. Ransom, Director of Tehotienawakon, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

¹⁴ Lisa Janes, Regional Director General, Northern Ontario Region, Canada Border Services Agency, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

¹⁵ *Akwesasne Residents Remission Order*, SOR/91-412

¹⁶ Grand Chief Abram Benedict, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

¹⁷ James W. Ransom, Director of Tehotienawakon, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

Despite these efforts to facilitate border crossings, the Committee believes that challenges remain for First Nations communities such as the Mohawks of Akwesasne. As a result, the Committee believes that the federal government must give this issue further attention and work to address the concerns of First Nations communities across Canada who straddle or are located in close proximity to the Canada-United States border.

An overarching request from the Mohawk of Akwesasne is the creation and admissibility of a secure ID card that would facilitate border crossing for their members within their territory. As Mr. Ransom suggested, “We have the ability for all three Mohawk governments to work together. You can produce one secure ID card for all of us, but each one can put its own logo on it so that it allows them to self-identify as a member of the American side or the Canadian side or the traditional government in Akwesasne.” Mr. Ransom explained to the Committee that tribes in the United States can produce their own secure identification cards that are compliant with the requirements of the Western Hemisphere Travel Initiative (WHTI). The WHTI is a plan to implement the requirement for all travellers entering the United States to show a passport or other acceptable document indicating an individual’s identity and citizenship.¹⁸ If entering the United States via land and sea, Canadian and U.S. citizens can present an enhanced driver’s license as a form of acceptable identification. Mr. Ransom confirmed that if a secure identification card was created for the Mohawks of Akwesasne, it would have to be compliant with WHTI requirements and would have the same security features as an enhanced drivers licence. The Mohawk of Akwesasne have already contracted Siemens to produce the card, and have a prototype available.¹⁹ Unfortunately, they have found some difficulty in getting the Government of Canada to become partners in this solution.

Repeated attempts were also made by the Mohawk of Akwesasne to propose solutions to the Government of Canada. As Grand Chief Abram Benedict told the committee:

The Mohawk Council of Akwesasne has repeatedly proposed solutions to exercise our rights to freely move within our territories. Since 2013, we've made numerous presentations to audiences that have included Indian and Northern Affairs Canada and CBSA on potential solutions, including an alternative reporting mechanism modelled after the CANPASS system. In addition, we've had meetings with INAC, CBSA and the United States Customs and Border Protection on a secure Mohawk Council of Akwesasne identification card to facilitate easier border crossing.

We invited INAC to join us in Washington, D.C., for a meeting in 2014 on the secure MCA identification card with Customs and Border Protection. They declined to join us. Canada has not been responsive to our attempts to find solutions; instead, they seem to find reasons

¹⁸ U.S. Customs and Border Protection, “[Western Hemisphere Travel Initiative](#)”.

¹⁹ James W. Ransom, Director of Tehotienawakon, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016.

for them not to work. Ironically, the U.S. Customs and Border Protection supports the creation of a Mohawk secure ID card.”²⁰

CONCLUSION AND RECOMMENDATION

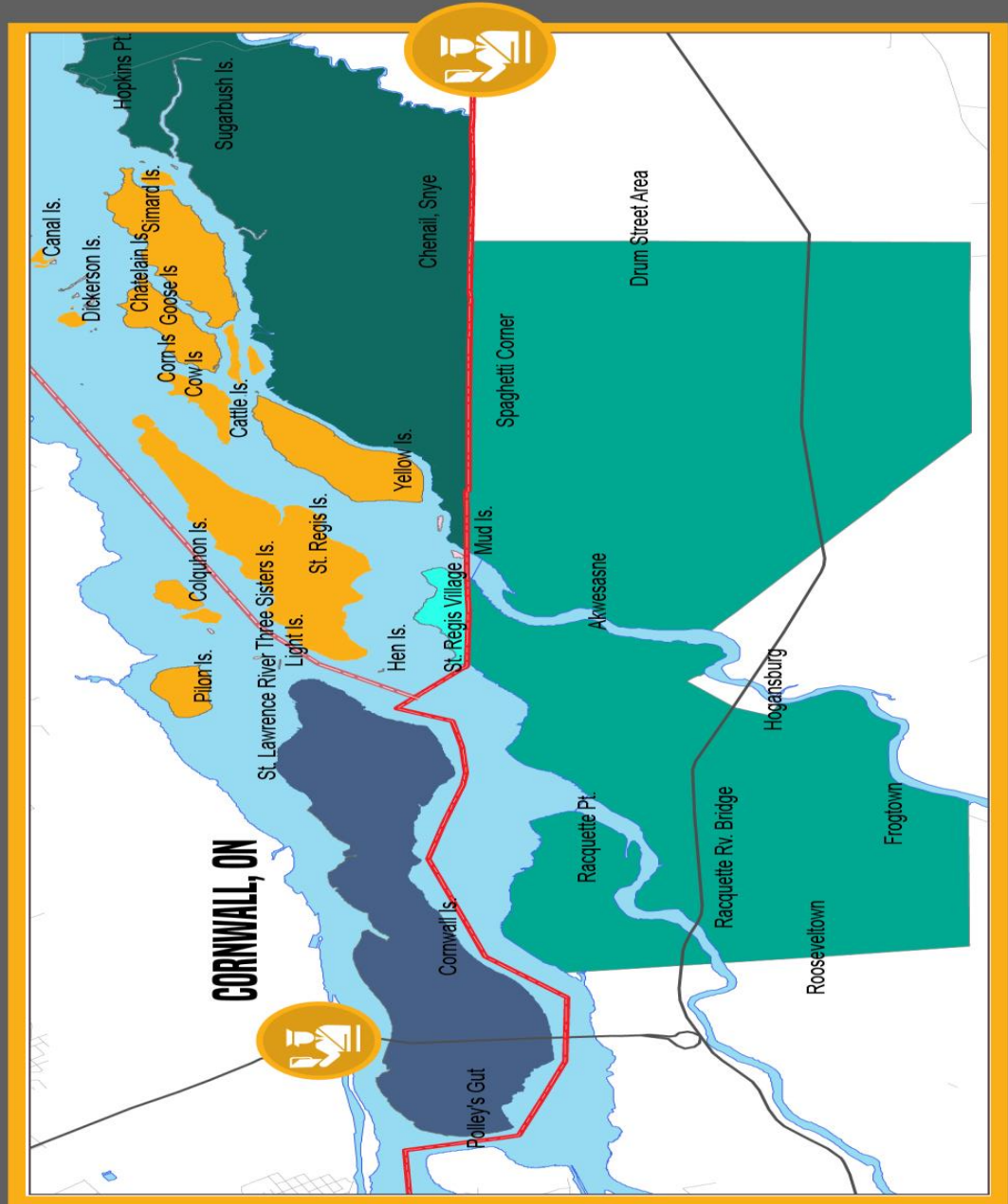
The Committee acknowledges that the question of border crossings can be complex and that can involve many stakeholders and issues that go beyond the reporting requirements. Nonetheless, the Committee believes that measures must be implemented to facilitate legitimate travel for day-to-day activities by First Nations people. Further, the Committee believes based on its hearings that CBSA is focussed on maintaining the status quo, and therefore cannot reasonably be expected to initiate and lead discussions on potential solutions. For these reasons, the Committee recommends:

That by 31 December 2016, the Minister of Indigenous and Northern Affairs appoint a special representative to explore further solutions to address Canada-U.S. border crossing challenges faced by First Nations communities across Canada. Further solutions should satisfy the needs of First Nations community members and could include: secure identification cards, telephone and video reporting, and a review of admissibility requirements for Native Americans entering Canada. This special representative shall issue a report no later than 31 December 2017.

²⁰ Grand Chief Abram Benedict, Mohawk Council of Akwesasne, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, "Issue No. 2", 1st Session, 42nd Parliament, 17 February 2016

APPENDIX A – MAP

AKWESASNE AND SURROUNDING AREA



APPENDIX B – WITNESSES

February 17, 2016

Grand Chief Abram Benedict (*Mohawk Council of Akwesasne*)

Bill Erasmus, Regional Chief (*Assembly of First Nations*)

Claudia Ferland, Director General, Individual Affairs Branch, Resolution and Individual Affairs
(*Indigenous and Northern Affairs Canada*)

Lisa Janes, Regional Director General, Northern Ontario Region (*Canada Border Services Agency*)

David Millette, Director General, Negotiations - Central, Treaties and Aboriginal Government
(*Indigenous and Northern Affairs Canada*)

Rasennes Pembleton, Researcher, Aboriginal Rights and Research Office (*Mohawk Council of Akwesasne*)

James W Ransom, Director of Tehotienawakon (*Mohawk Council of Akwesasne*)

Joe Wild, Senior Assistant Deputy Minister, Treaties and Aboriginal Government (*Indigenous and Northern Affairs Canada*)