

# BELONGING AND THE RIGHT TO BELONG

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## ABSTRACT

An American Indian should be able to freely enter the United States from Canada and settle in the country. Although the Jay Treaty recognized this right as early as 1794, the legality of such passage is consumed by a quagmire of immigration law, federal bureaucracy, and underdeveloped legal regimes. The Supreme Court of Canada, however, recently enhanced the legal rights of American Indians in Canada in the case *R v. Desautel*. But does the Supreme Court of Canada improve the situation, or instead further muddy the waters by introducing judicial fiat into an already overly complicated legal regime? In this Comment, I argue that to improve the free passage legal regime, the United States should look to the text of the Jay Treaty and reinforce the right to free passage for American Indians. This regime will include transferring the regulation of Indian passage to federally recognized tribes. Further, to protect individual Indians, the United States should treat free passage as an aspect of the religious liberty of Indians in the United States. Ultimately, the greatest authority in determining belonging and the right to belong should be returned to American Indians.

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### INTRODUCTION: THE CURRENT STATE OF “FREE PASSAGE” ACROSS THE UNITED STATES–CANADA BORDER FOR AMERICAN INDIANS

The Founding Fathers of the United States first recognized the now little-known free passage right of American Indians contemporaneously with the ratification of the US Constitution.<sup>1</sup> Yet this forgotten right has been brushed into the dustbin of history for the people it impacts most, reducing this important right to a footnote in the immigration laws of the United States and Canada.<sup>2</sup> In the 1794 Treaty of Amity, Commerce, and Navigation—also known as the Jay Treaty—the United States and Great Britain recognized the “free passage” of “Amerind” (American Indian) tribal groups located on or near the US-Canada border.<sup>3</sup> Over the 228 years of (supposed) enforcement of this treaty, American Indian tribes purportedly continue to enjoy the right to freely move across the US-Canada border.<sup>4</sup> In the United States, Section 289 of the Immigration and Naturalization Act and Title 8, Section 289.2 of the Code of Federal Regulations

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<sup>1</sup> See Bryan Nickels, *Native American Free Passage Rights under the 1794 Jay Treaty: Survival Law and Canadian Common Law*, 24 B.C. INT’L & COMPAR. L. REV. 313, 313 (2001).

<sup>2</sup> *Id.*

<sup>3</sup> Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.K.—U.S., T.S. No. 105 [hereinafter *The Jay Treaty*].

<sup>4</sup> Nickels, *supra* note 1, at 314.

enshrine the right of Canadian-born American Indians<sup>5</sup> to freely move into the United States<sup>6</sup>—but the mere presence of statutory text does not ensure easy application of the law.

Such free passage rights are not as clearly codified in Canada as in the United States.<sup>7</sup> While previously dominated by common law rulings that limited or outright restricted free passage, a recent expansion of aboriginal rights indicates a shift towards a liberalization of free passage and other rights for noncitizen Canadian Indians, which, in some ways, closely mirrors the system currently used in the United States.<sup>8</sup> But the expansion of aboriginal rights is an imperfect solution to a quagmire of American Indian free passage on the US-Canada border, especially when issues of tribal membership, tribal existences, ancestral land claims, and modern Indian rights protections, such as the Indian Civil Rights Act further complicate the issue.

A recent case from the Supreme Court of Canada possibly provides an alternative third-way solution to this perplexing issue of free passage. In October of 2010, a member of the Lakes Tribe of the Colville Confederated Tribes—a federally recognized<sup>9</sup> tribe located in the United States—partook in a ceremonial tribal hunt on his ancestral homelands.<sup>10</sup> During the hunt, the member, Rick Desautel, shot a cow elk. Following the kill, Desautel honored the animal as his ancestors once did: he skinned the animal, removed the heart and liver, and finally quartered and packed the meat.<sup>11</sup> After returning to camp, Desautel reported his actions to the local game wardens.<sup>12</sup>

Desautel reported himself because he had just executed a supposedly illegal hunt in British Columbia, Canada. Desautel is an American Indian from the United States and had no legal right to hunt in Canada at the time of the hunt, as his tribe lacked recognition from the Canadian government.<sup>13</sup> Therefore, according to Canada, Desautel lacked any

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<sup>5</sup> See 8 U.S.C. § 1359 (“[S]uch right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.”).

<sup>6</sup> Nickels, *supra* note 1, at 314.

<sup>7</sup> *Id.* at 314–15.

<sup>8</sup> See, e.g., *R. v. Desautel*, 2021 SCC 17 (Can.).

<sup>9</sup> Indian Tribal Entities within the Contiguous 48 States Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4637 (Jan. 28, 2022).

<sup>10</sup> Anna V. Smith, *How an Arrow Lakes Elk Hunt became a Case of Tribal Recognition*, HIGH COUNTRY NEWS (Oct. 28, 2019), <https://www.hcn.org/issues/51.18/indigenous-affairs-a-hunt-for-tribal-recognition-at-the-us-canada-border-sinixt-desautel> [<https://perma.cc/HU7Y-FLVE>].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

aboriginal right to the land. Prosecutors eventually charged Desautel for hunting without a license and hunting as a nonresident of Canada.<sup>14</sup>

In truth, Desautel's hunt had an ulterior motive. While it was a ceremonial hunt, Desautel planned this hunt to highlight the problems his and similarly situated tribes faced: the exclusion of tribal members from their ancestral lands caused by the formation of the US-Canada border excluding.<sup>15</sup> Importantly, Desautel's hunt brought the Lakes Tribe to the Canadian government's attention after the latter had declared the tribe extinct in Canada in the 1950s.<sup>16</sup> Desautel's case posed a unique and interesting query for Canada's highest court: Can a nonresident claim aboriginal rights to ancestral lands in Canada?<sup>17</sup> The court answered yes but drafted a limited exception in which the noncitizen Indian must overcome threshold questions pertaining to the Indian's linkage to the prior occupiers of land now under the sovereignty of Canadian authorities.<sup>18</sup>

Like those of many tribes,<sup>19</sup> the Colville Confederated Tribes' ancestral lands straddle the US-Canada border. This border, established after initial tribal settlement, now separates families, tribes, and societies. This situation results in a complex and multilayered legal conundrum relating to centuries-old treaties, Indian sovereignty, US and Canadian law, and the recognition of certain rights of the inhabitants of these now-divided lands.

Ancestral Indian land is integral to American Indian culture and religious practice.<sup>20</sup> In fact, most American Indians have land-based religions, which means they practice their religion within specific geographic locations.<sup>21</sup> For many tribes, free access to their ancestral lands is an absolute necessity for religious practice, which makes the concept of free passage even more important for Indians now separated from their ancestral lands by the US-Canada border.<sup>22</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Brett Forester, *No Border for Indigenous Nations Straddling US, Canada*, INDIAN COUNTRY TODAY (Apr. 23, 2021), <https://indiancountrytoday.com/news/no-border-for-indigenous-nations-straddling-us-canada> [https://perma.cc/MEF7-YG8V].

<sup>18</sup> *R. v. Desautel*, 2021 SCC 17, at paras. 22–23 (Can.).

<sup>19</sup> Joshua Keating, *The Nation that Sits Astride the U.S.-Canada Border*, POLITICO MAG. (July 1, 2018), <https://www.politico.com/magazine/story/2018/07/01/akwasasne-american-indian-community-218936/> [https://perma.cc/555C-CC7G]; see also A. Smith, *supra* note 10.

<sup>20</sup> Rosalyn R. LaPier, *Why Native Americans Struggle to Protect Their Sacred Places*, THE CONVERSATION (Aug. 14, 2018, 6:32 AM), <https://theconversation.com/why-native-americans-struggle-to-protect-their-sacred-places-101300> [https://perma.cc/WS6A-H2VC].

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

This Comment argues that the United States should develop an alternative to the Jay Treaty and other current legal regimes for Indian free passage. These laws are overly complicated, poorly practiced, and simultaneously rigid yet broad. In short, the current American system is ineffective at properly protecting Indians' free passage right. Further, *Desautel* is a step backwards. The Canadian system is as ineffective as the American system in protecting Indians' free passage right. As an alternative, this Comment proposes a new American law that would create a limited exception, allowing noncitizen tribal members of federally recognized Indian tribes to engage in religious observance on ancestral lands straddling the US-Canada border. While this proposed law somewhat mirrors the Canadian rule created in *Desautel*, it exceeds *Desautel* by recognizing and furthering the free passage right first recognized in the Jay Treaty.<sup>23</sup> Unlike the Canadian concept of aboriginal rights for noncitizen tribal members, this Comment's proposal is truly rooted in the protection of religious practices.

This Comment will explore the complex and multifaceted issue of religious observance on ancestral lands granted through the use of free passage. Part I breaks down important contextual background into four sections, each covering a different subtopic. Part II, tracking Part I, weaves together and analyzes the problematic areas of both the American and Canadian systems and provides a potential remedy to those problems. Finally, Part III will conclude with the key takeaways going forward for development of this area of American Indian law.

## I. BACKGROUND

### A. CONFEDERATED TRIBES OF THE COLVILLE RESERVATION AND THE SINIXT PEOPLE

The Confederated Tribes of the Colville Reservation are federally recognized<sup>24</sup> tribes located across eastern Washington, Oregon, and Idaho, also extending north into British Columbia.<sup>25</sup> These lands cover nearly

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<sup>23</sup> Canada does not recognize the Jay Treaty as a binding document and therefore does not follow it. See Caitlin C.M. Smith, *The Jay Treaty Free Passage Right in Theory and Practice*, 1 AM. INDIAN L. J. 161, 161–62 n. 7 (2012).

<sup>24</sup> Indian Tribal Entities within the Contiguous 48 States Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4637 (Jan. 28, 2022).

<sup>25</sup> Trisha Johnson, *Confederated Tribes of the Colville Reservation: A Brief History*, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION (June 16, 2021).

thirty-nine million acres and are home to twelve unique tribes.<sup>26</sup> Although different tribes, anthropologists group these people into the Plateau Culture Area because of similarities in language and culture.<sup>27</sup> The original Colville Reservation extended up to the US-Canada border, but in 1892, the Confederated Tribes ceded the northern half of the reservation to the United States.<sup>28</sup> While the Colville Reservation—according to the borders set by the Federal government<sup>29</sup>—is entirely within Washington State, three of the confederated tribes have ancestral lands in Canada: the Okanogan, the Lakes, and the Colville.<sup>30</sup>

The Sinixt are the Canadian contingent of the Lakes Tribe of the Colville Reservation.<sup>31</sup> Following the establishment of the US-Canada border in the region, many members of the Sinixt settled south in the United States.<sup>32</sup> As a result, tribal members from the United States had to move north to access the ancestral lands in Canada. However, in 1956, the Canadian government declared the Sinixt people extinct,<sup>33</sup> meaning tribal members—whether Canadian or American—lacked a legal claim to an ancestral link to the lands. Therefore, even though the Sinixt’s existence continued through the Lakes Tribe of the Colville Reservation, in the Canadian government’s eyes, no modern Sinixt people—Lakes Tribe or otherwise—had an ancestral link to the lands.

The Sinixt are not the only Indian tribe divided by the US-Canada border. To wit, twenty-five unique tribes possess lands that straddle the United States’ international borders.<sup>34</sup> As a result, the Sinixt people are not the only tribe lacking access to ancestral lands. Rather, Aboriginal rights and free passage are pervasive and important issues for numerous American Indian tribes on the US-Canada border.

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; see Act of July 1, 1892, ch. 140, Stat. 62-64.

<sup>29</sup> BUREAU OF INDIAN AFFS., COLVILLE INDIAN RSRV.: GREEN ENERGY BUS. DEV., [https://www.energy.gov/sites/prod/files/2016/01/f28/8\\_colville\\_cary\\_tonasket.pdf](https://www.energy.gov/sites/prod/files/2016/01/f28/8_colville_cary_tonasket.pdf) [https://perma.cc/B4PS-2FXV] (last visited Oct. 22, 2023).

<sup>30</sup> Johnson, *supra* note 25.

<sup>31</sup> Jack McNeel, *The Sad, Strange Saga of the Sinixt People*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/the-sad-strange-saga-of-the-sinixt-people> [https://perma.cc/KB5Y-4WVF].

<sup>32</sup> Johnson, *supra* note 25.

<sup>33</sup> Kristy Gover, *The Potential Impact of Indigenous Rights on the International Law of Nationality*, 115 AJIL UNBOUND 135, 136 (2021).

<sup>34</sup> Rachael Marchbanks, *The Borderline: Indigenous Communities on the International Frontier*, J. AM. INDIAN HIGHER EDUC. (Feb. 19, 2015), <https://tribalcollegejournal.org/borderline-indigenous-communities-international-frontier/> [https://perma.cc/RWQ3-YLCP].

## B. ABORIGINAL RIGHTS AND R. V. DESAUTEL

“Aboriginal rights are collective rights which flow from Aboriginal peoples’ continued use and occupation of certain areas [of Canada].”<sup>35</sup> The Canadian Constitution codifies the protections of these rights in section 35.<sup>36</sup> It does not, however, define Aboriginal rights. Instead, section 35 merely recognizes and affirms “existing aboriginal and treaty rights of the aboriginal peoples of Canada.”<sup>37</sup> Section 25 of the Charter of Rights and Freedoms further protects Aboriginal rights in declaring that the section “shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.”<sup>38</sup>

Because Aboriginal rights are not defined, the Canadian court system possesses the purview to confront the ambiguity of Aboriginal rights.<sup>39</sup> Aboriginal rights are a “principle of Canadian common law that defines the constitutional links between the Crown and Aboriginal peoples and regulates the interplay between Canadian systems of law and government (based on English and French law) and native land rights, customary laws, and political institutions.”<sup>40</sup> In other words, Aboriginal rights are premised on the nexus of Aboriginal history and the Crown’s purported sovereignty.

The Canadian case *R. v. Desautel* sought to clarify and resolve these shortcomings of Aboriginal rights. On October 14, 2010, Richard Lee Desautel, an American Indian of the Lakes Tribe of the Colville Confederated Tribes, shot an elk near Castlegar, British Columbia.<sup>41</sup> Following his hunt, Mr. Desautel reported his hunt to the local game warden.<sup>42</sup> Canadian authorities charged Mr. Desautel for violating the Wildlife Act’s prohibitions on hunting without a license and hunting big game while a

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<sup>35</sup> Erin Hanson, *Aboriginal Rights*, INDIGENOUS FOUNDS., [https://indigenousfoundations.arts.ubc.ca/aboriginal\\_rights/](https://indigenousfoundations.arts.ubc.ca/aboriginal_rights/) [<https://perma.cc/2KNU-GWLTV>].

<sup>36</sup> See generally Constitution Act, 1982 (U.K.); see Jeffrey Wutzke, *Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claim*, 22 AM. IND. L. REV. 509, 527 n. 114 (1998) (“The Canadian constitution is actually a collection of acts passed by the British, and now Canadian, parliaments between the Quebec Act of 1774 and the present”).

<sup>37</sup> Constitution Act, 1982, § 35 (U.K.).

<sup>38</sup> *Id.* § 25.

<sup>39</sup> Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. BAR REV. 727, 728 (1987).

<sup>40</sup> *Id.* at 732.

<sup>41</sup> *R. v. Desautel*, 2021 SCC 17, at para. 3 (Can.).

<sup>42</sup> *Id.*

nonresident.<sup>43</sup> Mr. Desautel argued that under Aboriginal rights, he had the right to hunt in his Sinixt ancestors' traditional territory.<sup>44</sup>

As the court observed, by 1872, most Sinixt people moved out of their lands in British Columbia; however, the tribe never gave up the claim to those lands.<sup>45</sup> In fact, as late as the 1930s, the Lakes Tribe used its lands in British Columbia for hunting, even though it lived on the Colville Reservation in Washington State.<sup>46</sup> Canada outlawed this kind of activity through the Game Protection Amendment Act.<sup>47</sup> Following the death of the last living Canadian Indian of the Lakes Tribe in 1956, the government declared the tribe extinct in Canada.<sup>48</sup> As a result, the lands reverted as the Crown's sole title.<sup>49</sup>

At the trial level, the presiding judge found Mr. Desautel properly exercised his Aboriginal right in using the Sinixt people's ancestral lands. Further, the judge found that Mr. Desautel met the continuity requirement because, even though the Canadian government declared the tribe extinct, "the connection to the land was still present in the minds of the members of the Lakes Tribe."<sup>50</sup> As a result, the judge held the Wildlife Act violated Mr. Desautel's right to use his ancestral lands.<sup>51</sup>

On appeal, the Provincial Superior Court held that "the words 'aboriginal peoples of Canada' in s. 35(1) must be interpreted in a purposive way, and mean Aboriginal peoples who, prior to contact, occupied what became Canada."<sup>52</sup> Therefore, the judge dismissed the appeal.<sup>53</sup> On further appeal to the Provincial Court of Appeal, that court found that "it is not a requirement that there be a present-day Aboriginal community in the geographic area where the claimed right is exercised."<sup>54</sup> Instead, the court relied on a multistep analysis established in *R v. Van der Peet*.<sup>55</sup> The court

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<sup>43</sup> *Id.* (citing Wildlife Act, RSBC 1996, c. 488).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at para. 5.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (citing Game Protection Amendment Act, 1896, S.B.C., c. 22).

<sup>48</sup> *Id.* at para. 6.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at para. 8.

<sup>51</sup> *Id.* at para. 9.

<sup>52</sup> *Id.* at para. 10.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at para. 12.

<sup>55</sup> See generally Erin Hanson & Tanisha Salomons, *Van der Peet case*, INDIGENOUS FOUNDS., [<https://perma.cc/HN4H-3JMR>] (citing *R. v. Van der Peet*, [1997] 2 S.C.R. 507) (last visited Oct. 10, 2023) (explaining the *Van der Peet* test requires a fact-finding judge to do a deep dive into the history and connection of the modern-successor tribe and the purported ancestral lands of that

explained, “There is no requirement under the *Van der Peet* test . . . that the claimant must be a member of a contemporary Aboriginal community located in the geographic area where the right was historically exercised.”<sup>56</sup> Agreeing with the lower courts, the Provincial Court of Appeal thus dismissed the appeal.

Finally reaching the Supreme Court of Canada on appeal, the Supreme Court found that non-Canadian Indians can be recognized as Aboriginal peoples of Canada and, therefore, noncitizen Indians have a right to their ancestral lands.<sup>57</sup> The Supreme Court of Canada stated that under the requisite purposive reading of s. 35(1) of the Constitution Act, 1982, the statute should be read broadly to include the modern-day successors of the original Aboriginal tribes to effectuate the recognition of the Aboriginal rights of Aboriginal peoples in the reconciliation process.<sup>58</sup> The court therefore reasoned, “The Aboriginal peoples of Canada under s. 35(1) are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact. This may include Aboriginal groups that are now outside Canada.”<sup>59</sup>

Looking prospectively, any future party claiming Aboriginal rights must first<sup>60</sup> establish that the tribe is the modern-day successor of an Aboriginal society which occupied lands that are now Canada at the time of the first European contact.<sup>61</sup> Then the normal analysis follows.<sup>62</sup> Discussed in depth later, the normal analysis requires a series of conditions to be met before a judge determines a group to be ancestrally linked to the lands of an Aboriginal people of Canada.<sup>63</sup>

The dissent in *R. v. Desautel* makes the compelling argument that because Mr. Desautel could not establish continuity between his modern Lakes Tribe and the traditional territory of the Sinixt people in Canada, his claim should have failed.<sup>64</sup> The dissent explains,

Using the test as proposed by the courts below defines “aboriginal peoples of Canada” solely in terms of occupation prior to contact, which

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tribe. While the test does require the judge to consider the Aboriginal perspective, the judge also must consider outside factors, such as European influence on the Aboriginal use of the land).

<sup>56</sup> *R. v. Desautel*, 2021 SCC 17, at para. 12 (Can.).

<sup>57</sup> *Id.* at paras. 22–23.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at para. 31.

<sup>60</sup> *Id.* at para. 5 (this is referred to as the “threshold question.”).

<sup>61</sup> *Id.* at para. 47.

<sup>62</sup> *Id.*; for further discussion of the normal analysis, see Hanson et al., *supra* note 55.

<sup>63</sup> See *id.*

<sup>64</sup> See *R. v. Desautel*, 2021 SCC 17, at para. 95 (Can.).

is inconsistent with this Court's acknowledgment that s. 35(1) rights "may only be exercised by virtue of an individual's ancestrally based membership in the present community."<sup>65</sup>

Therefore, the dissent reasons, the modern-day successor must necessarily be present in—and only in—Canada.<sup>66</sup> The dissent concludes, "The framers' intent was to protect the rights of Aboriginal groups that are members of, and participants in, Canadian society. It has no interest in protecting groups that, plainly, have no connection to it."<sup>67</sup>

The implications of *R. v. Desautel* are vast and sweeping.<sup>68</sup> First, noncitizen Indians may claim Aboriginal rights in Canada. This furthers Canada's goals of recognition and reconciliation. Second, lower courts now must determine if the supposed modern-day tribe is a successor of the Aboriginal society that occupied the modern-day Canadian lands at the time of the first contact with Europeans. While seemingly simplistic, these are massive requirements. The burden of these requirements will weigh heavily on both the tribes and the courts, as the courts are the only means of recognizing Aboriginal rights. This means that a handful of jurists possess all the power to determine the rights of an entire cohort of people.

### C. AMERICAN INDIAN LAW IN PERSPECTIVE: FREE PASSAGE IN A BROKEN SYSTEM

Unlike Canada's complex understanding of free passage and Aboriginal rights, the United States—statutorily speaking—has a seemingly straightforward legal regime; however, the actual implementation of that regime is a quagmire. Section 289.2 of Title 8 of the Code of Federal Regulations (CFR) states, "Any American Indian born in Canada . . . [who] has maintained residence in the United States since his entry, shall be

<sup>65</sup> *Id.* at para. 102 (citing *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 24).

<sup>66</sup> *Id.* at para. 104.

<sup>67</sup> *Id.* at para. 105.

<sup>68</sup> See generally Elizabeth England, *R v Desautel: Who are the "Aboriginal Peoples of Canada"?*, CTR. FOR CONST. STUDS. (Jun. 23, 2021), <https://www.constitutionalstudies.ca/2021/06/r-v-desautel-who-are-the-aboriginal-peoples-of-canada/> [<https://perma.cc/4P8N-7QZ9>] (discussing Aboriginal rights in the context of *R. v. Desautel*) ("This decision is significant because the Supreme Court of Canada recognized that Aboriginal rights claimants under section 35 of the *Constitution Act, 1982* do not need to be citizens or residents of Canada. It emphasizes the underlying principles of Aboriginal Law: to 'recognize the prior occupation of Canada by organized, autonomous societies and reconcile their modern-day existence with the Crown's assertion of sovereignty over them.' It also sets out guidance for future courts to determine whether a person belongs to one of the 'Aboriginal peoples of Canada' and therefore has Aboriginal rights under section 35.") (citations omitted).

regarded as having been lawfully admitted for permanent residence.”<sup>69</sup> This statute’s foundations lay in the aforementioned Jay Treaty of 1794, which protected the free passage of Indians located on or near the US-Canada border regardless of the Indian’s original residency.<sup>70</sup>

In theory, a Canadian-born member of an American Indian tribe (possessing 50 per centum blood of the American Indian race) may enter the United States upon showing an Indian and Northern Affairs Canada ID card at the border.<sup>71</sup> However, in reality, such a transaction requires multiple levels of bureaucracy, alphabet soup agency regulations, and boots-on-the-ground knowledge of a 228-year-old treaty.<sup>72</sup> The main takeaway is that, statutorily speaking, free passage for Canadian-born Indians of the American Indian race who possess 50 per centum of blood of that race is readily available, especially in comparison to the Canadian regime for free passage.

The American system’s major flaws are: (1) the vague language of the Jay Treaty and subsequent statutes, and (2) that these laws were written before a full-fledged immigration agency or system existed. To further complicate the matter, although the Jay Treaty is one of the earliest treaties in American history, its current status is up in the air for legal scholars.<sup>73</sup> However, assuming the Jay Treaty is still valid,<sup>74</sup> the current interpretation and implementation of free passage is a hodgepodge.<sup>75</sup> Santa Fe Public Defender Caitlin C.M. Smith’s informative piece highlights the plethora of obstacles presented by the lack of a uniform enforcement or knowledge of the various free passage laws.<sup>76</sup> Smith found that many agency officials

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<sup>69</sup> 8 C.F.R. § 289.2.

<sup>70</sup> See generally The Jay Treaty, *supra* note 3.

<sup>71</sup> See C. Smith, *supra* note 23, at 166.

<sup>72</sup> See *id.* 177–78.

<sup>73</sup> For a longer discussion on the on-going debate as to the enforceability and viability of the Jay Treaty, see Yablon-Zug et al., *infra* note 91; for the United States Department of State’s interpretation of the history of the Jay Treaty and potential problems presented by United States Supreme Court caselaw, see *infra* note 74.

<sup>74</sup> See U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES & OTHER INT’L AGREEMENTS OF THE U.S. IN FORCE ON JAN. 1, 2020, at 70, <https://www.state.gov/wp-content/uploads/2020/08/TIF-2020-Full-website-view.pdf> [<https://perma.cc/A3PN-DMRD>] (“Only article 3 so far as it related to the right of Indians to pass across the border, and articles 9 and 10 appear to remain in force. But see *Akins v. U.S.*, 551 F.2d 1222 (1977)” (emphasis added)).

<sup>75</sup> See C. Smith, *supra* note 23, at 161.

<sup>76</sup> See generally *id.* This piece specifically looks at how desk clerks wield significant authority and (albeit occasionally incorrect) knowledge over individuals seeking information and guidance pertaining to free passage. Smith’s research involved both internet searches spanning public and private resources, and telephone calls with government agencies. Smith found that, depending on which agency (e.g., Bureau of Indian Affairs, U.S. Customs and Immigration Services, the Social

“were not familiar with the free passage right, although some of them looked up relevant rules or asked colleagues and then passed on their findings to me. A few operators were extremely well-informed; others gave me serious misinformation.”<sup>77</sup>

The vague treaty and statutory language paired with the patchwork of (typically contradictory) agency interpretations and implementations of those statutes results in a bureaucratic minefield for prospective free passage Indians.<sup>78</sup> If agency officials do not understand the free passage right because of how the agency implements the law, how do we expect an individual unfamiliar with American Indian Law and the Jay Treaty to leverage the legal system to enforce the Indian’s free passage right?<sup>79</sup>

#### D. THE IMPORTANCE OF ANCESTRAL LANDS IN INDIAN RELIGIOUS PRACTICES

This section provides an important foundational truth for the solution to Indian free passage: land is not just property. Rather, any law governing free passage should protect the unique bond between a tribe and the land. For the Lakes Tribe of the Colville Confederated Tribes, the Columbia River basin holds both economic and cultural importance. In this area, human presence dates back at least ten thousand years.<sup>80</sup> In addition to fishing, Indians who lived along the Columbia River engaged in hunting, trapping, and foraging—turning the area into societal centers as settlements developed.<sup>81</sup>

Tribes and First Nations have been governing the use of land and water resources in the international Columbia Basin for thousands of years. Individually and collectively, the stewardship of land, water, and other natural resources is not just an issue of self-determination for tribes and First Nations. Rather, this stewardship . . . is considered a sacred responsibility.<sup>82</sup>

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Security Administration, etc.) was contacted, available information provided by the agency, meaning there seemingly was not consistent enforcement of the Jay Treaty’s free passage provision.

<sup>77</sup> *Id.* at 171.

<sup>78</sup> *See generally id.* (explaining the difficulties in obtaining information about the Jay Treaty from American immigration agencies).

<sup>79</sup> *See id.* at 177–78 (arguing for clearer laws regarding Indian free passage rights).

<sup>80</sup> Matthew J. McKinney et al., *A Sacred Responsibility: Governing the Use of Water and Related Resources in the International Columbia Basin through the Prism of Tribes and First Nations*, 37 PUB. LAND & RES. L. REV. 157, 164 (2016).

<sup>81</sup> *Id.* at 165.

<sup>82</sup> *Id.* at 192.

As a result, the region's natural resources became important both for livelihoods and as aspects of their spiritual beliefs.<sup>83</sup> For example, according to a tribal creation myth, salmon—a quintessential feature of the Pacific Northwest—offered itself to feed the region's early settlers.<sup>84</sup> Stemming from this myth is the first salmon ceremony, “an important part of the traditional tribal religion [that] connects ‘followers to the land and to the culture practiced by their ancestors.’”<sup>85</sup>

“The cultural and spiritual identities of tribes and First Nations, albeit with variations, have always been, and continue to be, sustained through the deliberate stewardship and use of land and water.”<sup>86</sup> While unmistakably important economically, a tribe's ancestral lands carry much greater weight spiritually and culturally than any potential economic benefit. These kinds of considerations have not been accounted for in binding documents such as the Jay Treaty, the American or Canadian legal regimes, or even in *R. v. Desautel*.

## II. ANALYSIS

### A. THE JAY TREATY, ABORIGINAL RIGHTS, AND THE CODE OF FEDERAL REGULATIONS: WHICH REGIME TO FOLLOW?

In theory, the Jay Treaty should be the beginning and end of this conversation—it plainly states the right of American Indians to freely cross the US-Canada border at all times. Although most of the Jay Treaty is no longer in force, the provisions relating to free passage of American Indians remain in force.<sup>87</sup> Yet, there is ongoing debate as to whether the right of free passage as established in the Jay Treaty exists currently or if it only survives through statute.<sup>88</sup> Therefore, the United States and Canada independently developed interpretations of the Jay Treaty which led to various modifications, codifications, and reimaginings of the protections afforded to American Indians in the Jay Treaty. It is this patchwork that currently controls the issue of free passage in the United States and Canada.

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<sup>83</sup> *See id.* at 164–65.

<sup>84</sup> *Id.* at 171.

<sup>85</sup> *Id.* at 172 (citations omitted).

<sup>86</sup> *Id.*

<sup>87</sup> C. Smith, *supra* note 23, at 161–62.

<sup>88</sup> *Id.*; *see also id.* n.6.

### 1. *The Jay Treaty and its Potential Power*

As previously stated, free passage originated in 1794 with the Jay Treaty between the United States and Great Britain. This treaty outlined, among other things, that “it is agreed that it shall at all times be free . . . to the Indians dwelling on either side of the [US-Canada border], freely to pass and repass [between the United States and Canada].”<sup>89</sup> The War of 1812 and the subsequent Treaty of Ghent abrogated and then reinstated the provisions of the Jay Treaty which pertained to free passage of American Indians.<sup>90</sup> However, the extent of reinstallation of this particular protection is an ongoing debate in legal circles.<sup>91</sup> Assuming it qualifies as an enforceable treaty, the Jay Treaty wields great power over the issue of free passage—it is truly the cornerstone of all subsequent free passage disputes.<sup>92</sup>

To properly understand the Jay Treaty, one must first analyze Article III, as it is the pertinent provision:

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 also 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 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. But it is understood, that this Article does not extend to the admission of Vessels of the United States into the Sea Ports, Harbours, Bays, or Creeks of His Majesty’s said Territories; nor into such parts of the Rivers in His Majesty’s said Territories as are between the mouth thereof, and the highest Port of Entry from the Sea, except in small vessels trading bona fide between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any Frauds in this respect. Nor to the admission of British vessels from the Sea into the Rivers of the United States,

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<sup>89</sup> The Jay Treaty, *supra* note 3.

<sup>90</sup> See Nickels, *supra* note 1, at 316.

<sup>91</sup> Compare generally Marcia Yablon-Zug, *Gone but not Forgotten: The Strange Afterlife of the Jay Treaty’s Indian Free Passage Right*, 33 QUEEN’S L.J. 565 (2008) (arguing the Jay Treaty was “implicitly abrogated” by the War of 1812 with such relevant provisions not reinstated); with Dan Lewerenz, *Historical Context and the Survival of the Jay Treaty Free Passage Right: A Response to Marcia Yablon-Zug*, 27 ARIZ. J. INT’L & COMP. L. 193 (2010) (arguing the Treaty of Ghent restored the relevant provisions as extrapolated through contemporaneous treaties between the United States and Indian tribes); but cf. MacKenzie *infra* note 96 (“[T]he Treaty was merely suspended by the war of 1812 [sic] and was not abrogated. It has been held and Admitted that the Treaty as a whole survived.”).

<sup>92</sup> See generally MacKenzie, *infra* note 96, at 436 (analyzing the case *Karnuth v. United States, on Petition of Albro, for Cook*, 279 U.S. 231 (1929). *Karnuth*’s central question pertained to the viability and enforceability of Article III of the Jay Treaty).

beyond the highest Ports of Entry for Foreign Vessels from the Sea. The River Mississippi, shall however, according to the Treaty of Peace be entirely open to both Parties; And it is further agreed, That all the ports and places on its Eastern side, to whichsoever of the parties belonging, may freely be resorted to, and used by both parties, in as ample a manner as any of the Atlantic Ports or Places of the United States, or any of the Ports or Places of His Majesty in Great Britain.<sup>93</sup>

The first sentence shows that the Jay Treaty concerns the interests of three groups: the citizens of the United States, citizens of Canada, and Indians.<sup>94</sup> This concern, however, dissipates when the section takes a turn towards international traversal—indicating a different treatment of private individuals and government entities.<sup>95</sup>

The historical record supports that, at the time of passage, the signers understood the perpetual and uninterrupted application of the Jay Treaty’s Article III language.<sup>96</sup> This history supports reading “at all Times be free” to indicate that the treaty is agreed upon in perpetuity, regardless of cessation of consent by either party. It further indicates that the Jay Treaty’s Article III should be enforced in perpetuity. But, as is often the case, how the treaty works in theory is not fully realized in practice.

The Jay Treaty does not create a right to free passage; it merely recognizes the right to free passage.<sup>97</sup> Given the language “at all Times,” the Jay Treaty preserves an extant right rather than creates the right, because that right exists outside of the Jay Treaty.<sup>98</sup> Free passage is,

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<sup>93</sup> The Jay Treaty, *supra* note 3.

<sup>94</sup> No consideration of what constitutes a citizen is given to this language due to the scope of the comment.

<sup>95</sup> While the stream of debate over individual versus governmental fluvial rights never runs dry, this comment merely concerns itself with those sections pertinent to free passage. Alas, such a tempestuous comment is left for another author to shore up.

<sup>96</sup> N. A. MacKenzie, *The Jay Treaty of 1794*, 7 CAN. BAR REV. 431, 436 (1929). The author of this article further posits, “The validity of Article III[] of the Jay Treaty is clearly a matter to be decided by an international tribunal, and not by a national court, no matter how able or unbiased.” *Id.* at 437. The particular proposition introduces an especially complex question of who determines when a treaty is valid or not. However, the Supreme Court of the United States continually holds that Congress possesses the authority to abrogate a treaty through subsequent legislative action. For an in-depth discussion of this particular question, see Cong. Rsch. Serv., *Breach and Termination of Treaties*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S2-C2-1-10/ALDE\\_00012961/\[https://perma.cc/SZ76-MEF2\]](https://constitution.congress.gov/browse/essay/artII-S2-C2-1-10/ALDE_00012961/[https://perma.cc/SZ76-MEF2]) (last visited Nov. 20, 2022). This reading of the Jay Treaty is supported by the text—Article XXVIII states, “It is agreed, that the first ten articles of this treaty shall be permanent[.]” The Jay Treaty, *supra* note 3.

<sup>97</sup> See The Jay Treaty, *supra* note 3. To wit, the Jay Treaty does not explicitly create any rights; rather, it reaffirms or recognizes, among other things, the right to free passage.

<sup>98</sup> *Id.* at art. 3.

ultimately, part of freedom of movement<sup>99</sup>—a human right.<sup>100</sup> Regardless of Jay Treaty recognition, Indians were free to travel on the land, as they did before the creation of the United States or Canada. In explicitly protecting this free passage, both the United States and the Kingdom of Great Britain recognized the Indians' right to free passage in perpetuity, regardless of the Jay Treaty's lifespan.

The Jay Treaty's current ambiguity does not defeat free passage. Through the treaty's codification, the free passage right for Indians exists in more than one location in American law. Therefore, there is no need to rely solely on the Jay Treaty. But the Jay Treaty provides the clearest expression of what free passage encompasses.

The Jay Treaty remains the clearest expression of an American Indian's right to free passage against the labyrinth of American immigration laws: "The Jay Treaty free passage right remains, in theory at least, as an exception to the requirements that the United States Customs and Immigration Service otherwise requires from people who would choose to immigrate to the United States."<sup>101</sup> In other words, the Jay Treaty continues as a small but important exception for select individuals. For many government agencies, it is nothing more than a forgettable blip on the screen. But the Jay Treaty creates a hugely impactful possibility for Indians arbitrarily separated by the US-Canada border. As a result, in theory, the Jay Treaty is hitherto the most effective protection of the free passage regime. But even so, it does not truly solidify the right to free passage as it should. Its fault lies in its plainness. Both *Desautel* and the current text of the Code of Federal Regulations fail to outline a strong free passage regime because they are based on the insufficient language of the Jay Treaty. Rather, the Jay Treaty should be treated as providing a foundation for free passage—not the final word on free passage.

## 2. *The Code of Federal Regulations*

Although substantially lacking any explanation or directive, Title 8 of the Code of Federal Regulations contains the sections pertinent to the

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<sup>99</sup> See Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 *FORDHAM L. REV.* 315, 321 (1984) (The guarantees of the Jay Treaty are no longer followed and instead today's US-Canada "border divides tribal governments, lands and families, and impedes freedom of movement and economic development") (emphasis added).

<sup>100</sup> Allan D. Vestal, *Freedom of Movement*, 41 *IOWA L. REV.* 6, 42 (1995) (quoting *Ex parte Archy*, 9 Cal. 147, 162–64 (1858)).

<sup>101</sup> C. Smith, *supra* note 23, at 162.

free passage right. These sections are 289.1,<sup>102</sup> 289.2,<sup>103</sup> and 289.3.<sup>104</sup> Surprisingly, only one section of the United States Code codifies Indian free passage.<sup>105</sup> Free passage is found elsewhere in the CFR, such as in Title 7 (Agriculture)<sup>106</sup> and in Title 22 (Foreign Relations).<sup>107</sup> Taken altogether, the CFR vaguely outlines an obscure free passage right for American Indians. It also maintains the outdated definition of Indian, being possessing at least “50 per centum” American Indian blood.<sup>108</sup> “Federal laws and regulations contain minimal information about how the Jay Treaty free passage right functions as a practical manner.”<sup>109</sup> These sections provide no substantive explanation of free passage—they merely mention it as an instrument of the law. For the most part,

These provisions raise as many questions as they answer. What types of identification must Jay Treaty migrants produce in order to benefit from the right? In particular, how does a person prove that she “possess[es] 50 per centum or more of the blood of the American Indian race”? If Jay Treaty migrants are “regarded as having been lawfully admitted for permanent residence,” are they eligible for ordinary legal permanent resident status (i.e. green cards)? If so, may they remain in the United States without obtaining a green card? What public benefits

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<sup>102</sup> “The term *American Indian born in Canada* as used in section 289 of the Act includes only persons possessing 50 per centum or more of the blood or the American Indian race. It does not include a person who is the spouse or child of such an Indian or a person whose membership in an Indian tribe or family is created by adoption, unless such person possesses at least 50 per centum or more of such blood.” 8 C.F.R. § 298.1. Although this section fails to explicitly mention free passage, it applies the Jay Treaty’s definition of Indian. *See* The Jay Treaty, *supra* note 3.

<sup>103</sup> “Any American Indian born in Canada who at the time of entry was entitled to the exemption provided for such person by the Act of April 2, 1928 (45 Stat. 401), or section 289 of the Act, and has maintained residence in the United States since his entry, shall be regarded as having been lawfully admitted for permanent residence. A person who does not possess 50 per centum of the blood of the American Indian race, but who entered the United States prior to December 24, 1952, under the exemption provided by the Act of April 2, 1928, and has maintained his residence in the United States since such entry shall also be regarded as having been lawfully admitted for permanent residence. In the absence of a Service record of arrival in the United States, the record of registration under the Alien Registration Act, of 1940 (54 State. 670; 8 U.S.C. 451), or section 262 of the Act, or other satisfactory evidence may be accepted to establish the date of entry.” 8 C.F.R. § 289.2.

<sup>104</sup> “The lawful admission for permanent residence of an American Indian born in Canada shall be recorded on Form I-181.” 8 C.F.R. § 289.3.

<sup>105</sup> *See* 8 U.S.C. § 1359 (“Nothing in this subchapter 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.”). Once again, this section lacks an explicit mention of the free passage right, but rather should be read in conjunction with the Jay Treaty. The use of language taken from the Jay Treaty supports as much.

<sup>106</sup> 7 C.F.R. § 273.4(a)(3)(i).

<sup>107</sup> 22 C.F.R. § 42.1(f).

<sup>108</sup> *Supra* note 102.

<sup>109</sup> C. Smith, *supra* note 23, at 165.

are Jay Treaty migrants eligible for when they arrive in the United States? Few of these questions are answered by the regulations.<sup>110</sup>

These questions pertaining to the regulations of the free passage right show how unthoroughly explained this right is in American immigration law.<sup>111</sup> Additionally, it is the job of unelected agency officials to interpret these threadbare provisions and implement proper regulations of the free passage right.<sup>112</sup> Alarming, between the United States Code, the CFR, and a questionable treaty from the 1790s, the latter provides the clearest explanation of American Indians' free passage right.

In comparison to the regime of Aboriginal rights in Canada, one should expect the United States, with the various aforementioned laws, to have a more comprehensive scheme of handling free passage. Unfortunately, this simply is not the case. Rather, both sides of the US-Canada border equally fail in producing a robust—and clear—system of codifying and protecting the free passage right recognized so long ago.<sup>113</sup> In Canada, achieving Aboriginal rights means navigating the Canadian legal system—an onerous and expensive process. In the United States, an Indian's future is in the hands of unelected bureaucrats interpreting and following vague and outdated statutory and regulatory provisions. The situation is, therefore, extremely precarious. One mistake, and an entire tribe of people may lose what is most sacred and important to them and their culture.

Currently, the Jay Treaty provides the best protection for the Indian free passage right. But for an imprecise, frail, over-200-year-old treaty (which may not even be enforceable anymore), change is certainly needed. The Jay Treaty fails to guide the bureaucracies or have the strength necessary to protect free passage. This change should recognize the importance of Indian sovereignty, but also create a simple and easy-to-follow regime to re-establish the streamlined process of the Jay Treaty—no need for databases, registries, special passes, or permissions.

### 3. *Aboriginal Rights as Explained in Desautel*

Compared to the United States, Canada entrusts the courts with the regulation of free passage: “The Canadian government, in contrast, never truly incorporated the Jay Treaty into permanent statutory law.

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<sup>110</sup> *Id.* at 166.

<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> Nickels, *supra* note 1, at 314.

Instead, Canadian courts have been sustaining the Jay Treaty provisions through common law treatment, typically under the ‘Aboriginal rights’ doctrine.”<sup>114</sup> *Desautel* squarely placed Aboriginal rights at issue before the Supreme Court of Canada.<sup>115</sup> As previously explained, the Supreme Court of Canada held that an Aboriginal right to ancestral land exists for non-Canadian Indians who can prove a prior linkage to the land.<sup>116</sup> However, the court’s explanation of Aboriginal rights closely mirrors the American understanding of free passage.<sup>117</sup>

First, for Aboriginal rights to apply, the “Aboriginal group must be an ‘aboriginal peopl[e] of Canada.’”<sup>118</sup> While this seems like a tautology, the phrase “of Canada” was the main source of controversy in *Desautel*. According to the court, “The words ‘of Canada’ are capable of different meanings, as ‘of’ can be used to express a wide range of different relationships.”<sup>119</sup> Therefore, Aboriginal rights analysis necessarily requires that the party seeking the rights be “an aboriginal people of Canada.”<sup>120</sup> To establish a group as an aboriginal people of Canada, the Court explains, “The scope of ‘aboriginal peoples of Canada’ is clear: it must mean modern day successors of Aboriginal societies that occupied Canadian territory at the time of European contact. As a result, groups whose members are neither citizens nor resident of Canada can be Aboriginal peoples of Canada.”<sup>121</sup>

Once the court ascertains that the rights-seeking group is the modern-day successors of Aboriginal people of Canada, the court applies the *Van der Peet* test.<sup>122</sup> The *Van der Peet* test<sup>123</sup> requires the court to analyze ten criteria to determine Aboriginal rights according to section 35(1). These ten criteria are:

1. Courts must take into account the perspective of Aboriginal peoples themselves.

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<sup>114</sup> *Id.*

<sup>115</sup> R v. *Desautel*, 2021 SCC 17, para. 15 (Can.).

<sup>116</sup> R. v. *Desautel*, 2021 SCC 17, at paras. 22–23 (Can.).

<sup>117</sup> *Id.* at paras. 22–23; Nickels *supra* note 1, at 338 (stating natives moving into the U.S. enjoy great respect for prehistoric rights and free movement).

<sup>118</sup> *Id.* at para. 18 (Can.) (citing Constitution Act, 1982 § 35.1(U.K.)).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at para. 20.

<sup>121</sup> *Id.* at para. 23.

<sup>122</sup> *Id.* at para. 47.

<sup>123</sup> Also known as the “Integral to a Distinctive Culture Test”, Erin Hanson & Tanisha Salomons, *Van der Peet case*, INDIGENOUS FOUNDATIONS, [https://indigenousfoundations.arts.ubc.ca/van\\_der\\_peet\\_case/#\\_ftn1](https://indigenousfoundations.arts.ubc.ca/van_der_peet_case/#_ftn1) [<https://perma.cc/HN4H-3JMR>] (citing *R. v. Van der Peet*, [1997] 2 S.C.R. 507) (last visited Oct. 10, 2023).

2. Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant had demonstrated the existence of an Aboriginal right.
3. To be integral [the] practice, custom or tradition must be of central significance to the Aboriginal society in question.
4. The practices, customs, and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs, and traditions that existed prior to contact.
5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims.
6. Claims to Aboriginal rights must be adjudicated on a specific rather than general basis.
7. For a practice, custom, or tradition to constitute an Aboriginal right, it must be of independent significance to the Aboriginal culture in which it exists.
8. The integral-to-a-distinctive-culture test requires that a practice, custom, or tradition be distinctive; it does not require that that practice, custom, or tradition be distinct.
9. The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom, or tradition is only integral because of that inquiry.
10. Courts must consider both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.<sup>124</sup>

The second step of determining Aboriginal rights is to look back in time and answer the questions posed by the criteria.

The *Van der Peet* test offers weak footing for plaintiffs seeking to protect Aboriginal rights.<sup>125</sup> While the Supreme Court of Canada outlined what constitutes Aboriginal rights, these criteria are, however, wholly insufficient to define (and thereby limit) Aboriginal rights. The language is simply too vague and necessitates a long, case-by-case analysis, which problematically gives the judge extreme power to determine if a group can claim Aboriginal rights. However, any deeper, more specific definition of Aboriginal rights is likely to stir controversy for excluding groups. For example, the dissent in *R v. Desautel* took precisely this perspective on Aboriginal rights, such that they only apply to those tribes presently in

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<sup>124</sup> *Id.*

<sup>125</sup> *R. v. Desautel*, 2021 SCC 17, para. 53 (Can.).

Canada.<sup>126</sup> The dissent's reading, therefore, would wholly exclude any member of a non-Canadian group. But the majority's vague interpretation also allows the courts to limit which groups gain Aboriginal rights through judicial discretion. "Some critics view [the *Van der Peet* test] as enabling the Crown to extinguish rights at the point of definition."<sup>127</sup> As a result, the *Van der Peet* test presents a catch-22 of judicial discretion in defining Aboriginal rights: more specificity is apt to exclude potential Aboriginal peoples; less specificity is likely to extend the criteria beyond the point of viability as a legal test.

More importantly, as John Burrows—a leading academic of indigenous and constitutional law in Canada—states, "Aboriginal is retrospective. It is about what was, 'once upon a time,' central to the survival of a community, *not necessarily* about what is central, significant, and distinctive to the survival of these communities *today*."<sup>128</sup> Burrows makes an excellent challenge to the *Van der Peet* test: being so fixated on the past makes you blind to the present. An American Indian may have any number of reasons to seek out his Aboriginal rights in Canada. Mr. Desautel, for example, wished to regain legal recognition in Canada for his people and preserve the claim to their ancestral lands, traditions, and customs. But the reason for seeking Aboriginal rights ought not be limited by the historicity of claims.<sup>129</sup>

The seventh criteria of the *Van der Peet* test states that an Aboriginal right requires a practice, custom, or tradition to be of independent significance to the Aboriginal group's culture.<sup>130</sup> Does this mean that if two groups, one American and one First Nations, share a tradition of moving to a certain area during a drought, but the Americans wish to go to a different area of the general region, that tradition does not qualify the American tribe for Aboriginal rights? The point of the hypothetical is to show that today's needs are just as important as yesterday's. A tribe should be able to gain Aboriginal rights regardless of how previous generations used the land.

The Aboriginal right as explained by the Supreme Court of Canada pales in comparison to the free passage right enshrined in the Jay Treaty. The interesting twist is that the Supreme Court of Canada allegedly

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<sup>126</sup> R. v. Desautel, 2021 SCC 17, para. 102 (Can.); see also 11nn. 61–64.

<sup>127</sup> Hanson et al., *supra* note 123.

<sup>128</sup> JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* 60 (Univ. of Toronto Press 2002).

<sup>129</sup> See generally R. v. Desautel, 2021 SCC 17 (Can.).

<sup>130</sup> Hanson et al., *supra* note 123.

sustains the Jay Treaty through these common law mechanisms.<sup>131</sup> As the *Desautel* Court showed, though, the Canadian understanding of free passage differs significantly from the American understanding of free passage, creating both a more restricted and narrow right than the Jay Treaty prescribed.<sup>132</sup> In Canada, free passage is a judicially regulated business requiring a judge to “find” the right rather than recognizing that Indians have the right “at all times.” Undergoing an onerous and expensive process, an Indian must navigate the Canadian system’s obstacle course of legal hurdles to achieve the Indian’s Aboriginal right.

The *Desautel* court’s decision does not actually touch the issue of free passage; rather, the court seemingly skirts the issue and focuses solely on Mr. Desautel’s use of land.<sup>133</sup> This is, however, a glaring issue left untreated. A non-Canadian Indian may have an Aboriginal right to land in Canada, but *Desautel* skips explaining how to go from the United States into Canada to use the land. In its decision, the Supreme Court of Canada recognized the right, but was mute on how to fully exercise it.<sup>134</sup>

When read together with the Jay Treaty, the ruling was reasonable. Canada does not implement the Jay Treaty in a thorough manner—instead, it relies on judges to implement the treaty. As a result, the *Desautel* opinion is not as neat as it seems. While the vague language hampers the Jay Treaty, further codification of free passage rights in the US Code of Federal Regulations creates a clearer definition of the right to free passage.

## B. THE NATIVE VOICE: INDIAN PERSPECTIVES ON RELIGIOUS USE OF ANCESTRAL LANDS

Indians are not a monolithic cohort of religious, cultural, and societal beliefs. While general trends do exist, each tribe handles its affairs in its own respective ways. Further, this Comment does not purport to speak for individual tribes or make sweeping generalizations about those tribes. Rather, this section explores potential—realized or otherwise hypothetical—contentions or affirmations Indian Tribes pose to the current regimes implemented by the United States and Canada.

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<sup>131</sup> Nickels, *supra* note 1, at 314.

<sup>132</sup> R. v. Desautel, 2021 SCC 17, para. 2 (Can.) (holding that modern-day successors of Aboriginal societies who do not reside in Canada may exercise an Aboriginal right).

<sup>133</sup> *Id.* at paras. 62, 66 (Can.).

<sup>134</sup> *Id.* at para. 83.

### 1. *The Indian Perspective in Favor of Desautel's Position*

Numerous First Nations tribes filed intervener memoranda<sup>135</sup> before the Supreme Court of Canada in favor of Desautel's general position. For example, the Assembly of First Nations (AFN), which represents more than six hundred First Nations, filed an intervener memorandum which argued for the Supreme Court of Canada to apply the United Nations Declaration on the Rights of Indigenous Peoples<sup>136</sup> in recognizing the First Nations people's right to self-determination and self-government, especially as it pertains to laws and jurisdiction in determining citizenship.<sup>137</sup> Because the intervener memorandum cannot take a position on the outcome,<sup>138</sup> one must infer AFN's support of Desautel's position. This is not, however, difficult when the AFN takes the position that "the rights of a nation which existed since time immemorial and prior to contact with a settlor state cannot be subsequently defined or unilaterally infringed upon by another nation."<sup>139</sup>

Further, the Indigenous Bar Association (IBA)<sup>140</sup> in Canada argued for an interpretation of section 35 which included a broad reading of Aboriginal peoples to include those which do not currently inhabit their ancestral lands.<sup>141</sup> Yet again, while not explicitly supporting Desautel's position—as doing so would violate the Supreme Court of Canada

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<sup>135</sup> "The purpose of an intervention is not to support a party but to advance the intervener's own view of a legal issue before the Court. Despite the participation of interveners, the case remains a dispute between its parties. However, the fact that an intervener's submission aligns it generally with one party over another does not, without more, make the submission inappropriate." David Power, *November 2021 – Interventions*, SUP. CT. OF CAN. (Nov. 15 2021), <https://www.scc-csc.ca/ar-lr/notices-avis/21-11-eng.aspx> [<https://perma.cc/YJ7V-D4VZ>].

<sup>136</sup> See generally GA Res. 61/295 (Sept. 13, 2007); see also Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507, 547–48 (2011) ("The most significant development in recent years has been the adoption of the U.N. Declaration on the Rights of Indigenous Peoples. The Declaration contains several provisions that acknowledge the rights of indigenous peoples to their lands.") (footnote omitted).

<sup>137</sup> R. v. Desautel, 2021 SCC 17 (Can.) (Factum of the Intervener Nuchatlaht First Nation at para. 33).

<sup>138</sup> Power, *supra* note 135 ("Interveners should not take a position on the outcome of an appeal, whether in written or oral argument.")

<sup>139</sup> R. v. Desautel, 2021 SCC 17 (Can.) (Factum of the Intervener Nuchatlaht First Nation at para. 16).

<sup>140</sup> "The IBA is a not-for-profit federal corporation continued under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23, and a national association comprised of Indigenous lawyers, judges, legal academics and scholars, articling students, law clerks, paralegals and law students." *About*, INDIGENOUS BAR ASS'N (last visited Jan. 15, 2023), <https://www.indigenous-bar.ca/about/#legacy> [<https://perma.cc/L9N3-J377>].

<sup>141</sup> See R. v. Desautel, 2021 SCC 17 (Can.) (Factum of the Intervener Indigenous Bar Association in Canada at para. 7).

Rules—the arguments raised in its intervenor memorandum indicate that the IBA broadly supports Desautel’s position.<sup>142</sup>

Individual tribes also filed intervenor memoranda supporting Desautel’s positions. In addition to AFN and the IBA, intervening parties included the Métis National Council and Manitoba Metis Federation Inc.,<sup>143</sup> the Okanagan National Alliance,<sup>144</sup> the Lummi Nation,<sup>145</sup> the Grand Council of the Cress (Eeyou Istchee)/Cree Nation Government,<sup>146</sup> Nuchatlaht First Nation,<sup>147</sup> the Whitecap Dakota First Nation,<sup>148</sup> the Peskotomuhkati Nation,<sup>149</sup> and the Mohawk Council of Kahnawà:ke.<sup>150</sup> Each one of these tribes presented a unique perspective on the potential implications of possible decisions from the Supreme Court of Canada. These tribes voiced their concerns, questions, and recommendations to help the Supreme Court of Canada formulate its decision and ultimately rule on the case at bar.

Of the multitude of interveners, the Mohawk Council of Kahnawà:ke (MCK) presents an especially interesting argument because—as a tribe that straddles the US-Canada border—the intervenor memorandum invokes the concerns of tribal members located in the United States.<sup>151</sup> The MCK’s “place names” in the United States and Canada “reflect this connection.”<sup>152</sup> The MCK’s memorandum speaks to the fact that Mohawks domiciled in the United States have the same historical and cultural connection to Canadian lands as the MCK.<sup>153</sup> Further, if the US-domiciled tribe received additional legal requirements to use the land, those burdens “would exacerbate the existing discrimination and difficulties they face.”<sup>154</sup> The MCK, therefore, advocates not only for the well-being of the Canadian strand of their tribe, but also for the American strand—acknowledging the potential impacts and burdens a decision from

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<sup>142</sup> See *id.* at paras. 24–25.

<sup>143</sup> *Id.* (Factum of the Interveners Metis National Council and Manitoba Metis Foundation).

<sup>144</sup> *Id.* (Factum of the Intervener Okanagan Nation Alliance).

<sup>145</sup> *Id.* (Factum of the Intervener Lummi Nation).

<sup>146</sup> *Id.* (Factum of the Intervener Grand Council of the Crees (Eeyou Istchee/Cree Nation Government)).

<sup>147</sup> *Id.* (Factum of the Intervener Nuchatlaht First Nation at para. 4).

<sup>148</sup> *Id.* (Factum of the Intervener Whitecap Dakota First Nation at para. 13).

<sup>149</sup> *Id.* (Factum of the Intervener Peskotomuhkati Nation at para. 12).

<sup>150</sup> *Id.* (Factum of the Intervener Mohawk Council of Kahnawà:ke at para. 2).

<sup>151</sup> *Id.* (Factum of the Intervener Mohawk Council of Kahnawà:ke at para. 31).

<sup>152</sup> *Id.* at para. 13.

<sup>153</sup> *Id.* at para. 14.

<sup>154</sup> *Id.* at para. 15.

the Supreme Court of Canada could create for noncitizen members of the tribe.<sup>155</sup>

While it seems, then, that a large segment of First Nations supposedly supports Desautel's positions, it is extremely difficult to gauge tribal and individual support, because members may have positions that differ drastically from those of tribal leaders, and tribal leaders' opinions are difficult to ascertain when the tribe did not file an intervening memorandum. In the same way an elected official cannot represent the opinion of every single one of their constituents, it is possible individual Indians disagree with arguments laid out on their behalf in memoranda. But assuming the tribal leaders speak for the tribe, these memoranda are the best available way to discern tribal positions on this issue. Indeed, these intervenor memoranda show that, broadly speaking, many First Nations support Desautel's position. This support is important for remedying past errors in the relationship between the First Nations and the Canadian government. Previously, Canada acted without any regard for the First Nations' perspective. While the Supreme Court of Canada's decision ultimately decided the issue without any explicit First Nations perspective,<sup>156</sup> the decisions of the various justices incorporated concerns and issues presented in the intervening memoranda.

Taken together, the intervening memoranda present a coherent if not cohesive favorable Indian perspective on the expansion of Aboriginal rights as expressed in *R. v. Desautel*. But such a perspective fails to adequately show complete Indian support for Desautel's position. However, compared to the US system, at least the Native perspective exists for the record. Ultimately, the likelihood of a complete and uniform perspective on Aboriginal rights is extremely low due to the diversity of thoughts, agendas, and goals of the various First Nations.

## 2. *The Indian Perspective Against Desautel's Position*

The uniqueness of Mr. Desautel's case may be a cause of concern for both Canadian and American tribes. For the Lakes Tribe, because the Canadian government declared the Sinixt People extinct, the Sinixt

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<sup>155</sup> See *id.* at para. 2.

<sup>156</sup> *R. v. Desautel*, 2021 SCC 17, para. 35 (Can.) (it is possible that individual members of the Supreme Court of Canada are or have a background affiliation with the First Nations. However, none of the members expressly spoke *for* the First Nations. Rather, the author treats the intervening memoranda as the First Nations speaking for themselves—none of which were parties directly involved in the case).

people's claim to the Aboriginal right to use the land does not interfere with the same claims as potentially asserted by another Aboriginal group. This could possibly include Sinixit tribal members already using the land. For example, in the case of the MCK and the Mohawks, had an American Mohawk used ancestral lands in Canada for a ceremonial hunt, their claim to Aboriginal rights may compete with the MCK's own claim of Aboriginal rights to that land. While it seems in most cases such competition would not exist, it is not impossible to think such challenges could arise.

Further, a reversal of circumstances in Mr. Desautel's case may not yield the same results. Had Mr. Desautel been a member of a Canadian tribe and wished to hunt in the Colville Reservation in the United States, it is unclear if such a ceremonial hunt would be welcomed by the reservation. Resources such as fish and wildlife on reservations cannot be regulated by the federal government; rather, individual tribes regulate these resources.<sup>157</sup> While a tribe may welcome a noncitizen from Canada to hunt on the ancestral lands, other tribes may ask for noncitizens (regardless of tribal affiliation) to purchase a permit or contribute to the tribe in some way. In essence, a blind application of the Supreme Court of Canada's decision in an American legal context would result in limiting the sovereignty of American Indian tribes, taking away their authority to determine who can use their lands. While "the individual's relationship to land connects them to a pre-contact Indigenous community,"<sup>158</sup> the post-contact sovereign Indian tribe should have the ultimate say on who may use its land.<sup>159</sup>

In general, although tribes cannot explicitly support an outcome in the case, they that filed intervenor memoranda indicate approval of the eventual decision of the Supreme Court of Canada in *R. v. Desautel*. However, because this decision neither explicitly consulted the Indian perspective nor directly involved tribal governments in drafting the decision, that

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<sup>157</sup> BUREAU OF INDIAN AFFS., INDIAN AFFAIRS MANUAL, Part 56, Ch. 1, § 1.2(A)(1) (2017) ("With some exceptions, there is no Congressional authority to regulate hunting, fishing, trapping, and gathering on Indian reservations. Neither do state laws and regulations generally apply to on-reservation fish and game activities by Indians. Accordingly, except where limited by federal statute or treaty, Indians enjoy exclusive rights to hunt, fish, trap, and gather on trust and restricted lands within the exterior boundaries of their reservations. Tribes also retain jurisdiction over these activities on their respective reservations except for allotted parcels of land within the boundaries of their reservations... Other Indians may engage in these activities only with the consent of the individual allottee.").

<sup>158</sup> Gover, *supra* note 33.

<sup>159</sup> See Convention on Certain Questions Relating to the Conflict of Nationality Law, Apr. 12, 1930, 179 L.N.T.S. 89 (entered into force July 1, 1937).

decision is not without potential fault. Ultimately, tribes argue that they—not the government—should have the final say.<sup>160</sup>

### C. THE SOLUTION TO INDIAN FREE PASSAGE

As previously illustrated, land is simply not treated the same in Native culture as it is in the rest of the United States. The United States has not responded to the issue of land vis-à-vis native tribes in the correct way. Rather, US solutions to land disputes prioritize economic value and property rights. This is, however, not how the United States ought to approach the issue of Indians' sacred land. In the United States, religious protection laws recognize the unique relationships congregations have with certain areas, whether they be schools, churches, or cemeteries.<sup>161</sup> Similar protections ought to be applied to Indian-held land as well. However, rather than protecting *how* the land can be used, the United States should codify American Indians' rights to determine *who* can use the land.

On one end of the spectrum, there is the Canadian treatment of free passage. In that system, judges are tasked to deeply scrutinize a claim for an Aboriginal right through an application of the rigid *Van deer Peet* analysis.<sup>162</sup> The results of this analysis have the potential of denying a community access to its communal lands through an Aboriginal rights argument.<sup>163</sup> And while many tribes applauded the Supreme Court of Canada's decision in *R v. Desautel*, the dissent raises potential shortcomings of the decision, the foremost being that non-Canadian tribes can abuse the system to receive access to lands the Canadian constitution reserved for Canadian tribes.<sup>164</sup>

On the opposite end of the spectrum, the American treatment of free passage right impedes the ability of Indians to traverse the US-Canada border freely as outlined in the Jay Treaty. Further, the use of unelected bureaucrats tasked with interpreting and implementing vague regulations, similar to Canada's use of judges, allows for individuals to decide the rights of tribes. The United States may claim to support free passage, and free passage may exist (at least nominally) in the law, but, borrowing the

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<sup>160</sup> See generally, e.g., Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1314–15 (2021).

<sup>161</sup> See 42 U.S.C. §§ 2000cc-1 to -5.

<sup>162</sup> *R. v. Desautel*, 2021 SCC 17 (Can.) (Factum of the Interveners Metis National Council and Manitoba Metis Foundation at para. 10).

<sup>163</sup> *Id.*

<sup>164</sup> *R. v. Desautel*, 2021 SCC 17, paras. 104–05 (Can.) (Cote, J., dissenting).

language of a recent United States Supreme Court decision, these laws “might as well be written on dissolving paper sold in magic shops.”<sup>165</sup>

In the middle of these two regimes lives the Jay Treaty—the clearest expression of Indian free passage and the apparent root of all troubles. The Jay Treaty exists as if it were an entity separate from these two regimes. However, both systems are derived from it, and both claim to carry on the spirit of the law, yet neither care to follow it verbatim. Rather than doing away with the Jay Treaty, the American regime should recognize its foundational character. Indeed, if both systems returned to the text of the Jay Treaty, Indian free passage would be clear cut. The Jay Treaty is not, however, the solution to the problem. In many ways, the Jay Treaty presented the first hurdle for the free passage right. Prior to the Jay Treaty, there were no inhibitions on the free passage between the United States and Canada because the countries were, in essence, the same. It was only through the separation and creation of the United States that free passage became an issue. The solution must, therefore, come from somewhere else.

The major flaw in the previously mentioned systems is a non-Indian entity determining who can and cannot use the land. This is akin to the government regulating who can worship at a specific church without the congregation having any say. Worse though, is that not only is the government limiting who can use tribal lands, but the way the government goes about determining who can use those lands—by virtue of agency authority and vague statutes—is entirely arbitrary and ineffectual at protecting free passage for American Indians. And although the Canadian system claims to incorporate the Native perspective, the fact that this perspective must be incorporated instead of being *the* determiner shows its place in the system. Ultimately, different groups of people are lumped together and treated the same—without truly having the power to determine who belongs. Further, the 50-percent-Indian-blood requirement of the Jay Treaty—and further extrapolation by regulations—is an out-of-date measure to determine who does and does not belong.<sup>166</sup>

I propose the United States enact a new statutory scheme—building on but not limited by the Jay Treaty—to codify free passage rights as a form of religious protection. First, this new scheme should recognize the

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<sup>165</sup> *Id.*; *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1887 (2021) (Alito, J., concurring).

<sup>166</sup> See Rebekah Ross, *Let Indians Decide: How Restricting Border Passage by Blood Quantum Infringes on Tribal Sovereignty*, 96 WASH. L. REV. 311, 341–42 (2021) (arguing that “the blood quantum provision must be removed from [8 C.F.R. 289.2], as advocated by the Tribal Border Alliance”).

religious importance of native lands and—most importantly—provide robust protections to access those lands. In some ways, the United States already does this, albeit unsatisfactorily.<sup>167</sup> However, to truly protect lands, the United States should develop a specialized scheme that recognizes the fact Indian land is akin to cultural heritage sites—but specifically limit access to those sites to tribal members. In some parts of the United States, this is already accepted practice.<sup>168</sup>

Next, who can access the land should be determined by the individual Indian tribes rather than the federal government. In both Canada and the United States, legal passage into a certain region requires the government to declare it as such. In fact, both the majority and dissent in *R. v. Desautel* agree on this point—judges should decide, not the tribes themselves.<sup>169</sup> Instead, it should be the Native peoples' decision to make. To wit, in the United States, Indian tribes determine qualifications for tribal membership.<sup>170</sup> Interestingly, the Jay Treaty did not limit American Indians only to areas under Indian control. Rather, the language is such that the free passage is maintained “at all times.”<sup>171</sup> This provision of the Jay Treaty should continue into the new iteration of the free passage law. An Indian should not have their right to cross the US-Canada border determined by a different tribe if the right to cross exists independent of that tribe. However, there also cannot be a *carte blanche* of free passage. Rather, the right to free passage should extend only to those recognized as Indian tribal members by current tribal standards.

This Comment would be remiss to not address the question of practicality. With so many unique tribes, how does giving these tribes final say improve a system already hampered by irregular enforcement and unclear standards? This proposal's aim is not to create a perfectly streamlined

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<sup>167</sup> Compare 42 U.S.C. § 1996 (codifying federal protection and preservation of religious freedom for the traditional religions of American Indians, “including but not limited to access to sites, use and possession of sacred object, and freedom to worship through ceremonials and traditional rites.”); with Celeste Wilson, *Native American and Free Exercise Claims: A Pattern of Inconsistent Application of First Amendment Rights and Insufficient Legislation for Natives Seeking Freedom in Religious Practice*, 8 THE CRIT: CRITICAL STUD. J. 1, 26 (2015) (highlighting the ineffectiveness of 42 U.S.C. § 1996 in uniformly protecting Indian religious freedom).

<sup>168</sup> See generally Barclay & Steele, *supra* note 160 (exploring the current methods implemented to protect Indian sacred sites and potential reform to provide more thorough protections to such sites).

<sup>169</sup> See *R. v. Desautel*, 2021 SCC 17, para. 47 (Can.); see also *id.* at para. 105 (Cote, J., dissenting).

<sup>170</sup> *Tribal Enrollment Process*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/tribes/enrollment> [<https://perma.cc/3QHQ-TAT2>] (last visited Oct. 4, 2023) (“Tribal enrollment requirements preserve the unique character and traditions of each tribe. The tribes establish membership criteria based on shared customs, traditions, language and tribal blood . . . The criterion varies from tribe to tribe, so uniform membership requirements do not exist.”).

<sup>171</sup> The Jay Treaty, *supra* note 3.

legal regime. On the contrary, this proposal recognizes that tribal rule *should* depend on the tribe—there is no need for uniformity or organization. If a tribe wishes to exclude all members not on the reservation from using its lands, it should have every right to do so. A potential shortcoming of this proposal is it assumes that tribes would not govern in such a way. But, at the very least, it leaves the tribe ultimate say.

This poses yet another interesting conundrum: What about the last Indian of a tribe trying to return to the tribe's ancestral lands? In that case, would that Indian need to receive special permission from the tribe currently inhabiting those lands? According to the Jay Treaty's "at all times," is the Indian free to roam wherever, even if those lands fall outside of the territory of an extant tribe, or is the Indian limited to roam only within the former boundaries of the ancestral lands? Although this system is not perfect, it is a pragmatic balancing approach of the necessity of law, sovereignty, and order while preserving the right to free passage. It incorporates tribal sovereignty in a way no previous regime has, but also considers the importance of sovereignty for the United States and Canada. Most importantly, it allows a level of tribal self-determination of who belongs and who has the right to belong.

### III. CONCLUSION

According to the 2012 US census, there were an estimated 5.2 million American Indians making up approximately 2 percent of the United States' population.<sup>172</sup> In the 2016 Canadian census, there were approximately 1.67 million Aboriginal people, making up 5 percent of Canada's population.<sup>173</sup> Of these millions, only six tribes straddle the US-Canada border.<sup>174</sup> That said, free passage could potentially affect every single Indian living in the United States and Canada. Unlike other international border problems, this issue directly impacts a supposedly extant free passage right for thousands of people. The likelihood of both the United States and Canada reforming their systems is low, but I propose a new way forward that citizens and governments of both countries should consider.

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<sup>172</sup> Admin. for Native Ams., *American Indians and Alaskan Native – By the Numbers*, U.S. DEP'T OF HEALTH & HUM. SERVS. (2012), <https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-numbers> [<https://perma.cc/8CQD-BGU2>].

<sup>173</sup> Crown-Indigenous Rels. & N. Affs. Can., *Indigenous peoples and communities*, GOV'T OF CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1100100013785/1529102490303> [<https://perma.cc/YTT5-GUTE>] (last modified Aug. 30, 2022).

<sup>174</sup> Marchbanks, *supra* note 34.

Even though the legal right to free passage for American Indians exists on paper, does any beneficiary actually enjoy free passage?

Free passage is a pressing problem for thousands, if not millions, of Indigenous people throughout the United States and Canada. While the story of Rick Desautel is compelling, unfortunately, not everyone has the resources or emotional bandwidth that Desautel had in taking this issue up to the Supreme Court of Canada. Ultimately, however, Desautel should have never felt compelled to do this in the first place. The Jay Treaty is clear in its language, yet modern legal regimes, statutes, and regulations prevent the ideal system—that is, one that tracks with the text of the treaty—from ever existing.

My proposal creates a new regime—inspired by but not built upon the Jay Treaty—which properly considers the native perspective in free passage. Unlike the alternatives, this solution gives American Indians the greatest authority in determining who belongs.