

**JAY TREATY BORDER ALLIANCE**  
**CANADIAN ADVOCACY STRATEGY CONSIDERATIONS**  
**April 3-7, 2022**

**OBJECTIVE:** Indigenous peoples born in and residing in Canada and the United States seek implementation of Article 36 of the United Nations Declaration on the Rights of Indigenous Peoples by the Canadian government as required by Canadian law to ensure a right of entry and free passage between Canada and the United States.

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**BACKGROUND:**

- The Jay Treaty of 1794 between Great Britain and the United States, Art. III, provides—  
  
*“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, and freely carry on trade and commerce with each other.”*
- The United States in 1952 enacted legislation to implement the Jay Treaty by recognizing a “right of entry” for Canadian-born Indians to enter the United States (8 U.S.C. §1359).
- However, Canada has not enacted corresponding legislation to recognize a “right of entry” for U.S.-born Indians. For a treaty to have binding effect in Canada, legislation to adopt it must be enacted. Canada has never enacted legislation to implement the Jay Treaty.
- Canada enacted legislation in 2021 to adopt the United Nations Declaration on the Rights of Indigenous Peoples Act (SC 2021, c.14, June 21, 2021). The purposes of the Act are to—
  - (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and
  - (b) provide a framework for the Government of Canada’s implementation of the Declaration.
- The Declaration contains a provision directly relevant to border crossing. Article 36 provides—
  1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including

activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

- The Canadian government, through the Minister of Crown-Indigenous Relations, is now in the process of consulting with affected Indigenous peoples and other federal ministers to implement the UNDRIP Act. This effort would include implementation of Article 36 which could serve as the foundation for a right of entry for U.S-born Indians.
- The Immigration and Refugee Protection Act s.19(1) provides that—
  1. Every Canadian citizen within the meaning of the Citizenship Act and every person registered as an Indian under the Indian Act has the right to enter and remain in Canada in accordance with this Act, and an officer shall allow the person to enter Canada if satisfied following an examination on their entry that the person is a citizen or registered Indian.
  2. The Indian Act defines an “Indian” as “a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.

[Canadian-born Indians were granted Canadian citizenship in 1960 by legislation without consent. Many refuse to acknowledge Canadian citizenship.]

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#### **POLITICAL STRATEGY (targeted towards MPs)—**

1. Recognize a Right of Entry for all Indigenous Peoples
  - a. Enact Canadian legislation to implement UNDRIP Article 36 that recognizes a right of entry for Indians who are citizens or members of federally-recognized Indian nations or tribes in the United States, as follows:
    - i. *Every Canadian citizen within the meaning of the Citizenship Act, ~~and every person registered as an Indian under the Indian Act, and every person recognized as a citizen or member of an Indian nation or tribe officially recognized by the United States government~~ has the right to enter and remain in Canada in accordance with this Act, and an officer shall allow the person to enter Canada if satisfied following an examination on their entry that the person is a citizen, ~~or registered Indian, or American Indian.~~*

- b. Request establishment of a Canadian Task Force to allow MPs to coordinate and collaborate with Members of the U.S. Congress (House Northern Border Caucus) on border policy.
2. Recognize Duty-Free Trade and Inapplicability of Tariffs on Indigenous Peoples
- a. Pursue legislation to implement UNDRIP Articles 20 and 26 to secure Indigenous right to pass the border freely without imposition of any duties or tariffs.
    - i. Article 20 of UNDRIP: “Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.”
    - ii. Article 36 of UNDRIP: “Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.”
3. Establish a Joint First Nations-Senate-House of Commons Working Group on Indigenous Border Crossing Issues.
- a. The Parliament should establish with First Nations leadership a working group to implement the recommendations set forth in this briefing paper and to ensure open and consistent dialogue to achieve the desired objections.

**OPERATIONAL STRATEGY (targeted towards CBSA and other agency officials)—**

- 1. Identification/Credentials.
  - a. First Nations-issued ID cards must be accepted as allowable proof of identity and eligibility as an Indian whether born in Canada or the United States.
- 2. Training for federal officials/employees
  - a. Improved communication and treatment of Indigenous peoples at the border.
  - b. Education on the importance and need for respect of ceremonial and sacred objects.

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