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JAY TREATY AND INDIGENOUS STUDENT MOBILITY ACROSS THE CANADA-U.S. BORDER: A FOCUS ON THE CASCADIA REGION

By: Michael O'Shea¹, Cross-Border Visiting Fellow

The Jay Treaty Then and Now²

It is agreed, that it shall at all times be free ... 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. — Jay Treaty, 1794

Signed between the U.S. and Great Britain, the Jay Treaty (Officially the “Treaty of Amity Commerce and Navigation, between His Britannic Majesty”) recognized the pre-existing right of Indigenous peoples to cross the border between the U.S. and British North America (later Canada) and carry on commerce without restriction.

Over the last 230 years, Indigenous Nations have used the Jay Treaty to advocate for their rights to cross the Canada-U.S. border, which bifurcates Indigenous nations and homelands/waterways. The right of Indigenous peoples under the Jay Treaty to live, work, and study in the United States has been protected by U.S. statute since 1952.

More recently, post-secondary institutions on both sides of the border have begun to recognize the Treaty for tuition purposes by waiving international tuition for students crossing the border. While Canada does not currently recognize the Jay Treaty, at the urging of Indigenous advocates like the Jay Treaty Border Alliance, the country is set to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) through bill C-15 and ease restrictions on Indigenous border crossings.³



INTRODUCTION

This Border Brief describes the latest developments in the use of the Jay Treaty for international tuition waivers at U.S. and Canadian higher education institutions. In recent years, a growing number of Canadian post-secondary institutions have recognized the Jay Treaty for extending domestic tuition to Indigenous students crossing the border to access higher education. The policies were passed in the spirit of honoring the Jay Treaty, a 1794 treaty that recognizes the pre-existing right of Indigenous peoples to cross the Canada-U.S. border. The Treaty, not recognized by the Canadian government, is honored by the U.S. federal government, but with a 50% blood quantum requirement and accompanying documentation⁴. Navigating the process of asserting Jay Treaty rights to enter the U.S. can be difficult and stressful, especially if border agents are not familiar with the Treaty.

This brief is based on research conducted through surveys, interviews, and the author's previous publications⁵ to illustrate opportunities for universities and policy makers to support Indigenous student mobility across the Canada-U.S. border by recognizing the sovereignty and self-determination of Indigenous Nations. The information may also be of interest to Indigenous students as they consider their own higher education journeys. Jay Treaty policies are just one way to support Indigenous students in higher education by working toward the promises of reconciliation and Indigenousization. The Jay Treaty tuition waiver, though significant, does not guarantee student success. To ensure Indigenous student success, universities must move beyond providing “access” to university⁶ and take concrete measures to make campuses and classrooms more accessible to Indigenous students.⁷

Blood Quantum Requirement

Under U.S. law, an Indigenous person crossing the border from Canada⁸ can live, work, and study in the U.S. so long as they can prove at least 50% Indigenous ancestry, or “blood quantum,” through supportive documentation⁹, which can be difficult to obtain.¹⁰ Specifically for students, an Indigenous person could also qualify for federal student aid and establish in-state residence to access in-state tuition at public post-secondary institutions.

The Tribal Border Crossing Parity Act, introduced to the U.S. Congress in 2019, would amend the 1952 Immigration and Naturalization Act to remove the blood quantum requirements and “[recognize] the right of Indian tribes to establish their own standards for citizenship.”¹¹ In the words of the Jay Treaty Border Alliance, who advocated for its passage, the Act would “recognize proof of enrollment in a federally recognized tribe when crossing into their own territory rather than being continually objected to institutionalized discrimination.”¹²

Jay Treaty and Indigenous Students in the U.S and Canada

Based on the author's survey and research data to date¹³, a growing number of Canadian post-secondary institutions have recently made public statements acknowledging the Jay Treaty and passing international tuition waivers (offering lower domestic tuition) for Indigenous students residing across the Canada-U.S. border. Approximately 18 Canadian institutions have publicly recognized the Jay Treaty and offer international tuition waivers.¹⁴ These policies stand even in the absence of Canadian federal recognition of the Treaty. Three more offer internal policies, while one (University of British Columbia) does not explicitly mention the Jay Treaty but does waive international tuition fees. At least two other institutions offer one-off policies that are not public.

In the U.S., several institutions mention the Jay Treaty in the context of federal aid and scholarships, in-state residency and tuition eligibility, as well as health insurance. In these cases, Jay Treaty status may be included alongside other eligible groups such as U.S. citizens, U.S. permanent residents, refugees, asylees and other eligible non-U.S. citizens. For a discussion of how an Indigenous student from Canada can live, work, or study in the U.S. see the American Indian Law Alliance handbook.¹⁵

Some institutions emphasize their recognition of the Jay Treaty for admission and tuition purposes (e.g., recognizing an Indigenous student from Canada as a domestic student). These include Northwest Indian College (Lummi Nation), University of Montana, University of Northern Michigan, the University of Arizona, and the Institute of American Indian Arts (IAIA). IAIA, in partnership with the American Indian College Fund (AICF) offers a scholarship, for which Jay Treaty-eligible students are able to apply. By emphasizing their recognition of the Jay Treaty these institutions may send a message to students and communities about their commitment to supporting Indigenous students, honoring the Treaty, and recognizing cross-border Indigenous sovereignty. Other organizations affiliated with higher education that recognize the Jay Treaty for applicant eligibility include the Ford Foundation Fellowship¹⁶ and the American Council of Learned Societies.¹⁷ Two other institutions (University of Maine-Orono and University of Minnesota-Morris) have policies that waive international fees for certain Indigenous students from Canada but do not mention the Jay Treaty directly — similar to UBC's policy.

Note that according to the U.S. Department of Education, students who officially qualify for Jay Treaty rights are eligible for federal student aid.¹⁸ This benefit would theoretically apply to all institutions across the U.S. that accept federal aid for students — even if an institution does not specifically mention the Jay Treaty on its website or offer a tuition waiver. All students eligible for Jay Treaty Rights who establish residence in a state could also receive in-state tuition.¹⁹ This may be the reason that many U.S. institutions might not have Jay Treaty-specific policies listed on their websites, or mention Jay Treaty eligibility in regards to qualifying for U.S. federal aid.²⁰

Canada does not recognize the Treaty, while the U.S. government does, though with important caveats.²¹ The lack of Jay Treaty recognition at the federal level creates more room for Canadian institutions to individually recognize the Treaty in spirit of reconciliation and campus Indigenization. In the U.S., any qualifying Indigenous student from Canada may apply for U.S. federal student aid, but the Jay Treaty alone does not grant in-state tuition. A student would need to first establish state residency to qualify for in-state tuition, and residency requirements vary by state, often between six and 24 months.²² Some U.S. institutions, however, such as the University of Montana²³, do recognize an Indigenous applicant from Canada as a domestic student under the Jay Treaty. Given this patchwork of policies, it is important for all U.S. institutions to recognize the Jay Treaty by providing Indigenous students access to in-state tuition and broadening eligibility to Indigenous students living in Canada — and without the 50% blood quantum requirement.

Jay Treaty in the Cascadia Region

The Cascadia region is home to Indigenous Coast Salish peoples “who have lived in the Salish Sea basin, throughout the San Juan Islands and the North Cascades watershed, from time immemorial.”²⁴ In the Coast and Strait Salish region spanning British Columbia and Washington, several Canadian, and one U.S. institution recognize the Jay Treaty (publicly and internally). These include Vancouver Island University and University of Victoria. University of British Columbia waives international tuition, while Royal Roads has an internal (not public) Jay Treaty policy. The single institution on the U.S. side of the border that references Jay Treaty benefits for students beyond U.S. federal aid eligibility is the Northwest Indian College, a Tribal College in Lummi Nation. Students covered by the Jay Treaty are considered “resident students.”²⁵

No other institution in Washington State explicitly recognizes the Jay Treaty, beyond what is already recognized under federal law. All public higher education institutions do extend in-state tuition rates to Indigenous students from neighboring states outside of Washington, per 1994 state legislation for students whose “traditional tribal boundaries included portions of the state of Washington, or whose tribe was granted reserved lands within the state of Washington.” However, these benefits are limited geographically, politically, and financially. The policy is limited to students “domiciled” (living) in Washington, Oregon, or Idaho — and who are members of federally recognized tribes.²⁶ Moreover, the policy only waives out-of-state tuition fees; it does not waive tuition entirely. Students living in Canada who might otherwise qualify, would not be eligible. The University of Washington maintains an online list of federally recognized tribes whose members would qualify for in-state tuition.²⁷

Oregon has a similar policy, albeit with fewer geographic restrictions, that extends in-state tuition to qualifying Indigenous students. Students must be “an enrolled member of a federally recognized tribe of Oregon or a Native American tribe that

had traditional and customary tribal boundaries in parts of the state of Oregon or that ceded or reserved lands within the state of Oregon.” These tuition waivers would extend to all public higher education institutions and to some 50 tribes in Oregon and bordering states.²⁸

The low number of U.S. institutions in the Cascadia region that publicly reference the Jay Treaty reflect differences in the status of the Treaty on each side of the border.

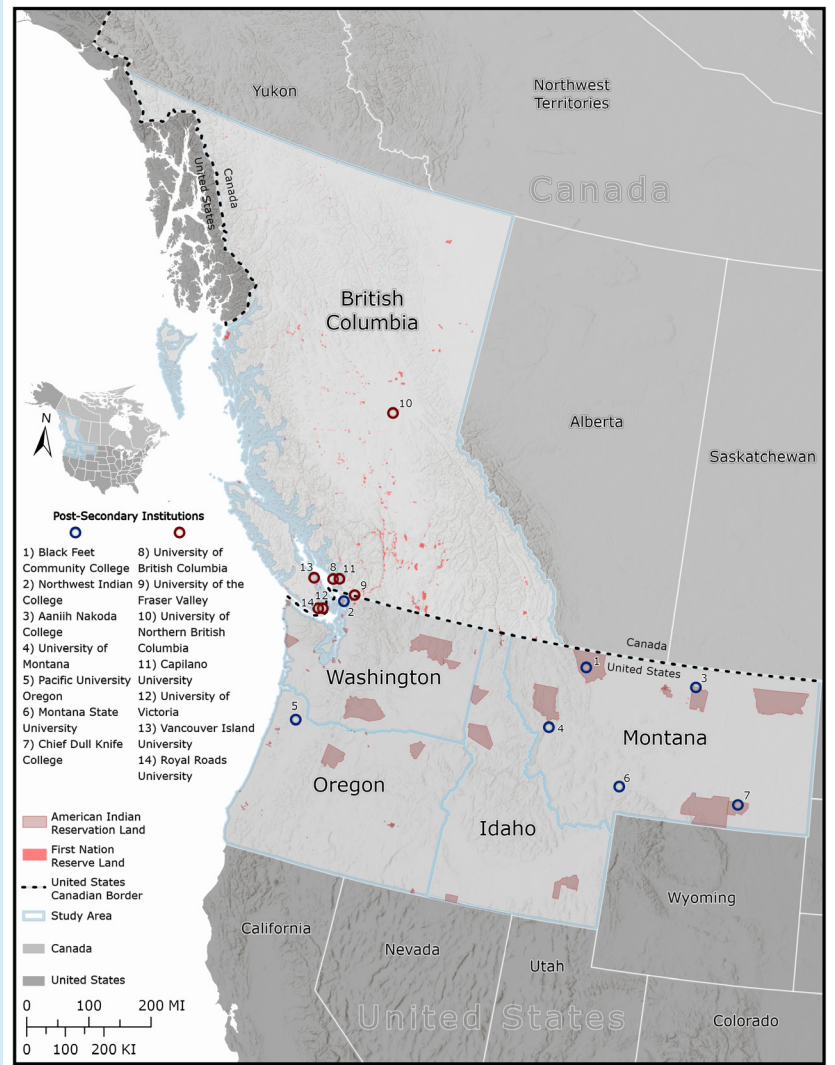
Documentation and Jay Treaty Card

Given the barriers Indigenous peoples face crossing the U.S.-Canada border into their own homelands, one set of policy solutions center on documentation, specifically a type of card or ID. Border agents are often not familiar with Jay Treaty rights, may violate sacred items carried by those crossing the border²⁹, and proving Jay Treaty eligibility can be onerous.³⁰ One proposal is “a non-expiring Jay Treaty Card” for Indigenous peoples crossing into the U.S. to “document the holder’s legal rights and status under the Jay Treaty, including the right to work”³¹ who qualify under the Jay Treaty. This would comply with the requirements of post 9/11 Western Hemisphere Travel Initiative (WHTI) for U.S. and Canadian travelers to present a passport or other approved document denoting identity and citizenship when entering the U.S., and “it would speed the crossings of those entitled to Jay Treaty Status and free up [Customs and Border Protection] inspectors for duties other than repeated bloodline adjudications.”³²

POLICY CONSIDERATIONS

Below are some policy considerations that may support Indigenous student mobility in the Cascadia region, particularly across the Canada-U.S. border, and broaden access to higher education. Some policies may require multi-party engagement with Indigenous communities, universities, state governments, and federal border agencies.

- Expand in-state tuition eligibility at public institutions in Washington State and Oregon to include students from Canada.
- Broaden in-state tuition eligibility at Washington State public institutions to include Indigenous students from areas beyond the region of Washington, Idaho, Montana, and Oregon. This was an area of advocacy from Native American Student Union at Western Washington University.
- Pass Jay Treaty tuition waiver policies that recognize the Jay Treaty for all universities especially those near the Canada-U.S. border.³³
- Build on Jay Treaty international tuition fee waiver policies and move further toward Indigenousization of universities:
 - Match financial aid to better support and welcome Indigenous students.



Sample of institutions that recognize or reference the Jay Treaty within the study area.

Map Authored 10/2023: Skylar Magee, BPRI Research Assistant

Data From: ESRI, ESRI Canada, Homeland Infrastructure Foundation-Level Data (HIFLD), Natural Earth Data, USGS.

Map Projection: NAD 1983 (2011) Contiguous USA Albers.

- Develop a “Jay Treaty card” or similar documentation to ease border crossings and make asserting Jay Treaty rights more straightforward.
- Ratify the Jay Treaty (Canada) and lift 50% blood quantum restrictions in the U.S. per the Tribal Border Crossing Parity Act.

CONCLUSION

The above policies only pertain to geographic and financial access, a reminder that access is only a start when thinking about supporting Indigenous success from enrollment through graduation (and employment). The Jay Treaty policy or any kind of tuition waiver should be not understood as a stand-alone initiative, but rather part of broader pro-Indigenous initiatives that recognize Treaty rights and support student success beyond access. Financial aid, such as that provided by the Jay Treaty tuition waiver, is a necessary but insufficient condition alone for Indigenous student success on university campuses. Financial aid must be accompanied by other forms of campus Indigenousization, such as changes to campus atmosphere, faculty hiring, student support, and curriculum.³⁴

ENDNOTES

1. You may contact Michael O'Shea at michael.oshea@mail.utoronto.ca with any comments or feedback. The author would like to acknowledge the contributions of Jennifer Bettis, Skylar MacGee, Dr. Laurie Trautman, and Dr. Jeff Ganohalidoh Corntassel (Cherokee Nation) with valuable editing, mapping, and formatting help. This brief has been funded by the Border Policy Research Institute at Western Washington University and the SSHRC-funded 21st Century Borders Research Program at the Centre for Global Studies at the University of Victoria.
2. Note this document is not a substitute for legal advice or educational advising. You should speak to a trusted lawyer, community leader, or educational advisor for guidance about navigating the Jay Treaty and your education options across the U.S.-Canada border.
3. For more information see Border Crossing Rights Under the Jay Treaty from the American Indian Law Alliance.
4. American Indian Law Alliance. (2016). Border Crossing Rights Under the Jay Treaty. Pine Tree Legal Assistance. <https://www.ptla.org/border-crossing-rights-jay-treaty>
5. This Border Brief builds on the author's previous policy brief, 225 Years in the Making: How Canadian Universities Honor the Jay Treaty Through Cross-Border Tuition Policies. <https://biglobalization.org/outputs/225-years-in-the-making-how-canadian-universities-honour-the-jay-treaty-through-cross-border-tuition-policies/>
6. Waterman, S. J., Lowe, S. C., & Shotton, H. J. (Eds.). (2018). Beyond access: Indigenizing programs for Native American student success. Taylor & Francis
7. Cote-Meek, S. (2020). Colonized classrooms: Racism, trauma and resistance in post-secondary education. Fernwood Publishing.
8. I use "Canada" and the "United States" to refer to the two nations that have come to occupy the Indigenous territory on Turtle Island (north American) through settler-colonization, forcible removal, and displacement. Territories may be unceded or ceded through treaty relationships, though frequently treaties were violated through settler encroachment, military action, and removal (Treuer, 2019). I use "Turtle Island" alongside "North America" to decenter colonial languages and geographies. Turtle Island is used in many Indigenous creation stories in which the world is created on the back of a Turtle (Robinson, 2018). Treuer, D. (2019). The heartbeat of Wounded Knee: Native America from 1890 to the present. Penguin. Robinson, A. (2018). Turtle Island. The Canadian Encyclopedia. <https://www.thecanadianencyclopedia.ca/en/article/turtle-island>
9. The right of Indigenous cross border movement, but not commerce into (lands occupied by) U.S. from (lands occupied by) Canada has been affirmed by case law in the 1928 Diabo U.S. Supreme Court ruling, and in statutory law, most recently in the 1952 U.S. Immigration and Naturalization Act (INA) §1359. Application to American Indians born in Canada.
10. See: Kamel, Nabil; Nordby, Lindsey; Haro, Henry; and Swearingen, Claire, "The Effect of the Canada-U.S. Border on the Vancouver, BC, and Seattle, WA, Music Network" (2019). BPRI. 115. https://cedar.wvu.edu/bpri_publications/115/; (American Indian Law Alliance, 2016); Boos, G. & McLawsen, G. (2013). "American Indians born in Canada and the right of free access to the United States". BPRI. 69. https://cedar.wvu.edu/bpri_publications/69/; U.S. Citizenship and Immigration Services. <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act>
11. See: <https://www.jaytreatyborderalliance.com/tribalbordercrossingparityact>
12. See: <https://www.jaytreatyborderalliance.com/tribalbordercrossingparityact>
13. O'Shea, M. (2023). Honouring the Jay Treaty: Cross-Border Tuition Policies at Vancouver Island University and the University of Saskatchewan [Unpublished doctoral dissertation]. University of Toronto.
14. Capilano University (North Vancouver)- International Tuition Waiver (Public); First Nations University- International Tuition Waiver (Public); Ontario College of Art and Design- International Tuition Waiver (Public); Ontario Tech University- International Tuition Waiver (Internal); Royal Roads University- International Tuition Waiver (Internal); University of British Columbia- Cross-border tuition policy, does not mention Jay Treaty; University of Fraser Valley- International Tuition Waiver (Internal); University of Guelph- International Tuition Waiver (Public); University of Northern British Columbia- Jay Treaty Tuition Policy in Progress; University of Prince Edward Island- International Tuition Waiver (Internal); University of Regina- International Tuition Waiver (Public); University of Saskatchewan- International Tuition Waiver (Public); University of Toronto- International Tuition Waiver (Public); University of Victoria- International Tuition Waiver (Public); University of Waterloo; International Tuition Waiver (Public); Vancouver Island University- International Tuition Waiver (Public); Western University (Ontario)- International Tuition Waiver (Public); York University (Graduate Admissions)- International Tuition Waiver (Public). *Note:* This list is not exhaustive. "Public" or "internal" refers to whether the policy is publicly shared or is an internal policy upon request. "International tuition waiver" refers to a waiver of international tuition differential, i.e., granting lower, domestic tuition.
15. See: American Indian Law Alliance. (2016). Border Crossing Rights Under the Jay Treaty. Pine Tree Legal Assistance. <https://www.ptla.org/border-crossing-rights-jay-treaty>
16. See: https://sites.nationalacademies.org/pga/fordfellowships/pga_171940
17. See: <https://www.acls.org/competitions/acls-leading-edge-fellowships/>
18. See: <https://studentaid.gov/understand-aid/eligibility/requirements/non-us-citizens>
19. Gomez, D. (2019). Financial Aid for Native American Students. FinAid. <http://www.finaid.org/otheraid/natamind.phtml>
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21. O'Shea, M. (2022). <https://biglobalization.org/outputs/225-years-in-the-making-how-canadian-universities-honour-the-jay-treaty-through-cross-border-tuition-policies/>
22. <https://finaid.org/otheraid/stateresidency/>
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24. "Tribal Lands Statement." (2023). Western Washington University. <https://www.wvu.edu/tribal-lands-statement>
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26. [RCW 28B.15.0131](http://www.rcw.gov/RCW28B150131)
27. "Federally recognized tribes whose members would qualify for resident tuition." (2018). University of Washington, Office of the Registrar. https://cdn.doem.washington.edu/registrar/pdf/OUR_RES_FRT-ResTuition.pdf
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29. Ross, R. (2021). Let Indians Decide: How Restricting Border Passage by Blood Quantum Infringes on Tribal Sovereignty. Wash. L. Rev., 96, 311.
30. "#20 BIG Podcast – "US/Canada Border and Cross-Border Cascadia Region." (2023). Borders in Globalization. <https://biglobalization.org/outputs/20-big-podcast-us-canada-border-and-cross-border-cascadia-region/>
31. Boos, G., & McLawsen, G. (2013). American Indians Born in Canada and the Right of Free Access to the United States. Concurrently published:(1) Vol, 18. p. 26.
32. Boos, G., & McLawsen, G. (2013). American Indians Born in Canada and the Right of Free Access to the United States. Concurrently published:(1) Vol, 18. p. 26.
33. See author's earlier brief (O'Shea, 2022) for explanation of how these policies can be passed in a straightforward way through a university's board of governors of a similar decision-making body that sets tuition rates.
34. Pidgeon, M. (2016). More than a checklist: Meaningful Indigenous inclusion in higher education. Social inclusion, 4(1), 77-91.

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