Justice Long Overdue:
The Aboriginal Right to Free Passage

By Chuck Wright

In February 1996, gkisedtanamoogk, a Wabanaki, was prevented from returning to his family in Burnt Church, NB (Esgenoopetitj). Immigration officials refused gkisedtanamoogk's entry into Canada because he is not a Canadian citizen, a Permanent Resident or in possession of an immigrant visa. The Wabanaki people constitute several First Nations in the US (primarily Maine) and the Maritimes. Before this refusal, gkisedtanamoogk had been living with his family on the Burnt Church Reserve for over 12 years with "granted residence" in his wife's community through Wabanaki marriage custom. Without recognition by Canada, his ability to work has been impaired (no legal status) and he lived under threat of deportation (he is viewed as an illegal immigrant). Canada is constitutionally obliged to recognize the inherent right of Aboriginal peoples, moreover, Canada should recognize rights secured in the *Jay Treaty*, signed by the Crown in 1784.

Border obstruction of Aboriginal free passage between the United States and Canada creates a number of ongoing difficulties for Aboriginal peoples on or near the border, aside from the question of crossing. For some Aboriginal people, the nearest shopping areas are across the border, yet to avoid taxation they have to drive up to 100 km to the nearest store on their side. Taxation on goods brought across the border may exacerbate the financial hardship of low-income individuals and fails to recognize the nationhood of cross-border Aboriginal communities.

The border also inhibits the movement and trade of Aboriginal goods that are significant in ceremonial life because laws prohibit the import and export of certain plants and animals. Lastly, Aboriginal border nations, such as the Six Nations, have been cheated out of their lands that extend into the United States, greatly affecting their potential for economic development and their ability to maintain historic relationships.

Unlike the US, Canada has not included the Aboriginal right to free passage in its permanent statutory law. As a result, Canadian courts and immigration officials responsible for determining the validity of Aboriginal claims make decisions based on existing legislation and historical evidence. Because of the lack of appropriate legislation, decisions from Canadian courts threaten to completely eliminate the free passage rights of Aboriginal peoples.

In the case of *Minister of National Revenue v. Mitchell (1998)*, the Grand Chief of the Akwesasne Mohawk Nation attempted to enter BC carrying a number of goods with only one intended for re-sale, claiming immunity from duties. The Federal Court of Appeal concluded that the free passage right is site-specific depending on an Aboriginal peoples' historical relationship to an area. The Court further argued that the free passage of goods used for non-commercial purposes (e.g. trading) could only be claimed by groups who are historical trading partners. The free passage of goods right claimed by the Mohawk

would only be permissible for those goods purchased in New York State or traded among his nation's partners.

There is good reason for Canada to recognize the Aboriginal right to free passage – the Crown agreed to respect this right in the Treaty of Amity, Commerce and Navigation of 1794, also known as the *Jay Treaty*. The *Jay Treaty* was an agreement between Great Britain and the United States of America to solve some of the lingering problems of American secession following the American Revolutionary War. Article III defined the Aboriginals right of free passage between US and Canada and permitted the duty-free entry of Aboriginal goods. Although the War of 1812 disrupted much of this policy, Article IX of the *Treaty of Ghent* reinstated these rights.

Because of the War, and the vagueness of the *Treaty of Ghent*, some have argued that the right of free passage is void. However, at a council meeting held April 24, 1815 at Burlington, Upper Canada (now Ontario), British Deputy Superintendent General of Indian Affairs William Claus explained to Aboriginal leaders that article IX secured, "the Peaceable possession of all the country which you possessed before the late War, and the Road is now open and free for you to pass and repass it without interruption." Claus' words confirm that the right of free passage was reaffirmed in the *Treaty of Ghent*.

Although Canada did not gain full sovereignty until 1931, it should assume the prior obligations binding on its territory. Interestingly, the 1794 *Jay Treaty* is the only treaty signed by the British Crown and the United States that Canada does not honour. The 1969 Vienna Convention on Treaties signed by Canada and ratified October 14, 1970, states that, "every treaty in force is binding upon the parties to it and must be performed by them in good faith." Because the *Jay Treaty* and the *Treaty of Ghent* are international treaties, Canada has a legal obligation to recognize and protect the Aboriginal right to free passage.

The Aboriginal right of free passage also arises as an issue of self-determination. As long-time QAAC partner gkisedtanamoogk firmly states: "i contend that i am not now, was never, and will never be a 'canadian citizen' nor a 'united states citizen'… canadian immigration laws and any other laws do not apply to any Wabanaki People, in any Wabanaki territory without formal and legitimate treaties with our Confederacies. We cannot and will never recognize any boundaries or adhere to any laws placed throughout upon Wabanaki Peoples and territories that are not properly agreed to by the Wabanaki."

Since Aboriginal settlement and territorial relationships in North America predate the arbitrary creation of the Canada-US border, legislation should be informed by inherent rights of these sovereign nations. Enforcement of duties and/or denied passage is a breach of the right to self-determination "[to] freely determine their political status."

The draft UN Declaration on the Rights of Indigenous Peoples affirms the right of self-determination. In the spirit of this right, Article 35 of the Declaration states that "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 other peoples across borders." As the Declaration gains official recognition at the United Nations, Canada should "take effective measures to ensure the exercise and implementation of this right."

While Canada has refused to recognize the right of free passage, the US recognized this right by incorporating the *Jay Treaty* provisions into Section 289 of the *Immigration and Naturalization Act*: "Nothing in this title 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." Although the US statute contains many potential areas of dispute, its broad language has allowed liberal interpretations and few judicial disputes in the US.

Similarly, Canada could codify a statute that would firmly entrench the provisions of the *Jay Treaty* in its own immigration law. However, even Section 289 fails to recognize the right possessed by "tribes or nations of Indians", since it is the nation or tribe that defines membership and it is not strictly based on an individual's blood. Section 289 limits the right of free passage to race, contrary to the political recognition of this right within the *Treaty of Ghent*. Canadian legislation should protect the historic and continuing cross-border relationships of Aboriginal peoples as a political right to self-determination.

QAAC is continuing work on this long-standing concern in partnership with KAIROS' Aboriginal Rights Committee. Until Canada includes the provisions of the *Jay Treaty* in its immigration law to ensure the free movement of Aboriginals and their goods across the US-Canada border, the lives of many Aboriginal people will continue to be complicated by a border that was created through no assent of their own.

Chuck Wright is an Intern at CFSC, having completed a BA in Global Studies and Geography last spring.

***The Jay Treaty* (1794)**

Article III
"…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."

"…no duty entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians."

Article XXVIII
"It is agreed that the first ten articles of this treaty shall be permanent…"

***Treaty of Ghent* (1814), Article IX**

"His Britannic Majesty engages on his part to put an end immediately after the Ratification of the present Treaty to hostilities with all the Tribes or Nations of Indians with whom He may be at war at the time of such Ratification, and forthwith to restore to such Tribes or Nations respectively all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven previous to such hostilities."