



225 Years in the Making: How Canadian Universities Honour the Jay Treaty Through Cross-Border Tuition Policies

Michael O'Shea • November 2022

EXECUTIVE SUMMARY

Universities on both sides of the U.S.-Canada border can act on their historical Jay Treaty responsibilities to support Indigenous student success. In the last seven years, several Canadian universities have adopted policies that extend domestic tuition rates to Indigenous students living in the United States (U.S.), exempting them from international tuition fees. In doing so, the institutions referenced their responsibilities under the Jay Treaty of 1794, which recognizes the pre-existing right of Indigenous peoples to freely cross the U.S.-Canada border and engage in trade. While the United States does recognize the Jay Treaty – albeit with blood quantum and documentation requirements – the Canadian government does not. This brief policy explains how and why these universities adopted these policies and how other universities in Canada may follow suit, bringing their actions in line with their commitments to reconciliation and decolonization in the Truth and Reconciliation Commission (TRC, 2015) era.

Introduction: The Jay Treaty

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.

The Treaty of Amity, Commerce, and Navigation, between His Britannic Majesty and the US, or “Jay Treaty,” named after John Jay, Chief Justice of the U.S., was negotiated between the U.S. and Great Britain in 1794 and ratified by the U.S. Senate the following year. Just several years after American independence, tensions rose again with Great Britain over its ship seizures and continued North American military presence. Dispatched to London by President Washington, Jay and his hosts negotiated a 28-article treaty that pulled the two

countries away from the brink of war for the following two decades. Among the Treaty's articles is Article III, which recognizes the right of Indigenous peoples to freely cross the border between the U.S. and British North America (later Canada) – and carry on commerce without restriction or duties. Given the longstanding movement and trade of Indigenous peoples throughout Turtle Island (North America) before European contact, and given the imposition of a colonial border bisecting Indigenous homelands, these provisions of the Jay Treaty make historical, political, and ethical sense. Though the War of 1812 may have suspended the provisions of the Jay Treaty, they were restored by the Treaty of Ghent in 1814 between the United States and Great Britain¹, which concluded the conflict.

The right of cross border movement (though not commerce) 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). However, Indigenous students face bureaucratic and legal challenges in their exercise of Jay Treaty rights when entering the U.S., even some 225 years after its ratification and centuries of Indigenous advocacy, protests, and litigation. Indigenous peoples must prove 50% blood quantum to have their Jay Treaty rights recognized according to the 1952 INA (American Indian Law Alliance, 2016; Boos & McLawsen, 2013; Caron, 2017). Moreover, Canada is not a signatory to the Treaty and its Supreme Court has declined to recognize Jay Treaty cross-border mobility and commerce rights in rulings such as *Francis v. The Queen* (1956) and in *M.N.R. v. Mitchell* (2001). The Court ruled Louis Francis (Mohawk) was not exempt from paying duty on goods carried across the border and decided the Jay Treaty “was never put into effect by permanent legislation” in Canada (*Francis v. The Queen*, 1956). A 2017 Canadian Senate report on border challenges facing First Nations, however, did recommend the ratification of the Jay Treaty, or a similar implementing mechanism, in a Senate report (Caron, 2017). After announcing support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2016, Canada passed legislation in 2021 to bring federal law into alignment with UNDRIP. Implementing UNDRIP will take time, but has great relevance for the border, as Article 36 of UNDRIP recognizes the cross-border rights of Indigenous peoples divided by international borders (Jay Treaty Border Alliance, 2022).

Many Indigenous communities have referenced the Jay Treaty as they advocate for the Indigenous right of passage and trade across the border, including Mohawk ironworker Paul Diabo (who prevailed in the 1928 *Diabo* case) and Michael Kanentakeron Mitchell who led a 1969 protest against a Canadian border station on Mohawk territory and its levying of custom taxes. Each year, Haudenosaunee activists continue on a nearly century-old tradition of symbolically marching across the Rainbow Bridge at Niagara to honour the Jay Treaty and assert Indigenous sovereignty (Mitchell, 1969).

FINDINGS

In the absence of Canadian federal recognition of the Jay Treaty, a growing number of Canadian universities have moved to recognize the Treaty, specifically its provisions for the right of free passage across borders. While Canadian universities cannot ratify international treaties or change the immigration status of their students, they may have control over their international tuition rates. By waiving international tuition fees for Indigenous students living in territories claimed by the U.S. (i.e. recognizing Indigenous students as domestic students) these universities recognize that Indigenous homelands extend across borders. In doing so, they are also recognizing the right of free passage across borders as promised by the Jay Treaty.

What I refer to as “Jay Treaty cross-border tuition policies” can be powerful symbols of resurgent Indigenous sovereignty, reflecting the effectiveness of ongoing Indigenous advocacy for Treaty rights over several decades. These policies can pave the way for further commitment from universities to reconciliation and to the support of Indigenous student success in higher education. In addition, some U.S. universities, including University of Maine-Orono and the University of Minnesota-Morris offer international tuition waivers to Indigenous students in Canada but do not directly mention the Jay Treaty. All of these policies are related to, but distinct from, other cross-border tuition policies that do not specifically serve cross-border Indigenous students. For example, Wayne State University in Detroit, Michigan offers reduced tuition to students from Ontario, and the University of Illinois-Chicago offers in-state tuition to any members of federally enrolled American Indian tribes.

A sample of Canadian institutions, as identified by my research, that currently publicly waive international student tuition for Indigenous students living outside of Canada, include the following institutions:

- University of British Columbia
- University of Guelph
- University of Regina
- University of Saskatchewan
- University of Victoria
- Vancouver Island University

Specific policies will vary from institution to institution, and some institutions, such as Royal Roads University, may have internal policies for Jay Treaty recognition that are not publicly advertised. As this research is ongoing and additional institutions are considering such policies, this list will continue to grow.

POLICY PASSAGE

Among the first to adopt Jay Treaty policies in Canada were the University of Saskatchewan (USask) in 2017 (Figure 1) and Vancouver Island University (VIU) in 2018 (Figure 2). They both passed their Jay Treaty policies with unanimous support from their respective Boards. The USask policy was the result of ongoing advocacy from Indigenous faculty and staff, particularly from the Indigenous Teacher's Education Program, while VIU's policy grew out of its longstanding support for Indigenous foster youth, strong local First Nations engagement, and strong presidential leadership. At both institutions, Indigenous advocacy for Jay Treaty recognition was long-running and ongoing. Indigenous students from outside of Canada had requested the Jay Treaty be recognized in the years leading up to the official adoption of the policy. Registrars at both institutions played an important role in writing portions of text for each policy, translating vision to written policy, and processing Jay Treaty tuition requests. Both policies at both universities were passed in the years following the release of the Truth and Reconciliation Commission report, in the context of ongoing Indigenous advocacy and heightened public expectations of universities to respond to the TRC and its 94 Calls to Action. Both universities also report larger Indigenous student populations than the Canadian university average; this context may be important in terms of policy advocacy and impact.

ELIGIBILITY

Eligibility for each policy may vary from institution to institution. For example, at VIU, students must have ancestral connections to "Canadian Indigenous groups." These students may be from communities near, or divided by, the U.S.-Canada border along the 49th parallel and the Alaska-British Columbia border, such as the Sinixt people, part of the 12 Confederated Tribes of the Colville Reservation. The policy is more expansive at USask, where students are eligible if they are "Native American students" from the U.S. who "identify as Aboriginal." An example of an eligibility letter is included in the Appendix (Figure 3). This broader eligibility definition would include Indigenous students living in any territories occupied by the U.S., including, for example, Native Hawaiians. Universities considering a Jay Treaty policy will wish to consider eligibility language and scope of inclusion, while keeping in mind both could change as student use of the policy evolves.

Similarly, documentation will vary from institution to institution as each decides on eligibility and documentation requirements. Students at VIU, for example, will have a local First Nation vouch for their eligibility with a letter (example included in Appendix). At USask, "federal tribal enrollment or registration card, or similar documentation" is required. Indigenous governments and communities, rather than universities, however, will be in a better position to determine appropriate documentation (University of Saskatchewan, 2017; Vancouver Island University, 2018).

FEE ADJUSTMENTS

The core of the policy is a fee adjustment. Due to federal power over immigration and possible limits to institutional autonomy, universities cannot change Jay Treaty students' immigration status. However, they can change their international student fees. The fee adjustments for Jay Treaty students are considerable and may be especially significant for Indigenous students, given the marginalized economic position of many Native communities and the high cost of post-secondary education. For example, at USask, international undergraduate tuition rates are three times domestic rates, and graduate rates more than 1.5 times domestic ones. At VIU, credit-based undergraduate programs (this includes career and technical programs) for domestic students are \$159.94 per credit compared to \$739.50 per credit for international students (Vancouver Island University, 2023).

CONSIDERATIONS FOR UNIVERSITIES

As universities look to adopt cross-border tuition policies in recognition of Jay Treaty and education provisions of the Calls to Action, they should keep the following points in mind:

- **Sensitivity to local Indigenous attitudes toward the policy change and consultations with local Indigenous communities.** Local attitudes may differ from Indigenous faculty and staff inside the university. Indigenous attitudes are never a monolith.
- **How decision-making takes place.** Jay Treaty advocates within the university should investigate how and where the decision-making processes take place: “Who approves the tuition waiver?” “Who sets the agenda?”
- **Straightforward passage.** The passage can be straightforward, with a Board of Governors vote. Universities may have autonomy to set international tuition policies.
- After passage, Jay Treaty cross border tuition policies should be made part of **recruitment efforts** to ensure students are aware of the policies.
- **Eligibility rules and documentation requirements** should be carefully considered, while keeping in mind these policies may shift over time.
- Passing a Jay Treaty policy sends a message about **recognizing Indigenous sovereignty** and is a start for further discussion of 1) university reconciliation and decolonization efforts and 2) Indigenous student support.

- **Financial aid alone is not sufficient support to ensure success of higher education.** Providing access to higher education through tuition waiver is a start, but universities should consider what programs and institutional changes (decolonization) can support Indigenous student in higher education through graduation. Factors beyond financial aid that universities should consider include the following: Indigenous representation and visibility in student body and faculty, campus climate (microaggressions and racism), presence of Indigenous Student Centers and Indigenous-specific recruitment and mentoring, connections to home and the needs of community, and family relationships (Heavy Runner-Rioux et al., 2018; Nelson, 2015; Tachine, 2017; Waterman & Sands, 2016; Waterman et al., 2018; Youngbull, 2018).
- **Impetus for policy change may come from different departments at one university,** including Jay Treaty-eligible Indigenous students, Indigenous student affairs units, Indigenous faculty, staff, leadership. Settler allies in leadership roles, such as the President's office and Registrar, and Board of Governors may also have a role to play in securing the policy's passage.
- **Registrars' offices may play an important role in crafting policy language and may also be the site of the approval of the tuition waiver.** The Registrar should be involved in discussion at an early stage.

CONCLUSIONS

Canadian universities have a unique opportunity and responsibility to honour the Jay Treaty and extend domestic tuition rates to Indigenous students living outside of Canada. Doing so can be straightforward (often involving a Board of Governors vote) and accomplished without large financial impact to the university. Jay Treaty tuition waivers honour historic Treaty promises and support Indigenous student higher education access by reducing financial barriers. They also honour Indigenous sovereignty across homelands and uphold principles of UNDRIP. As a symbol, they can be the impetus for additional decolonizing and reconciliation acts in support Indigenous resurgence and student success.

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Acknowledgements

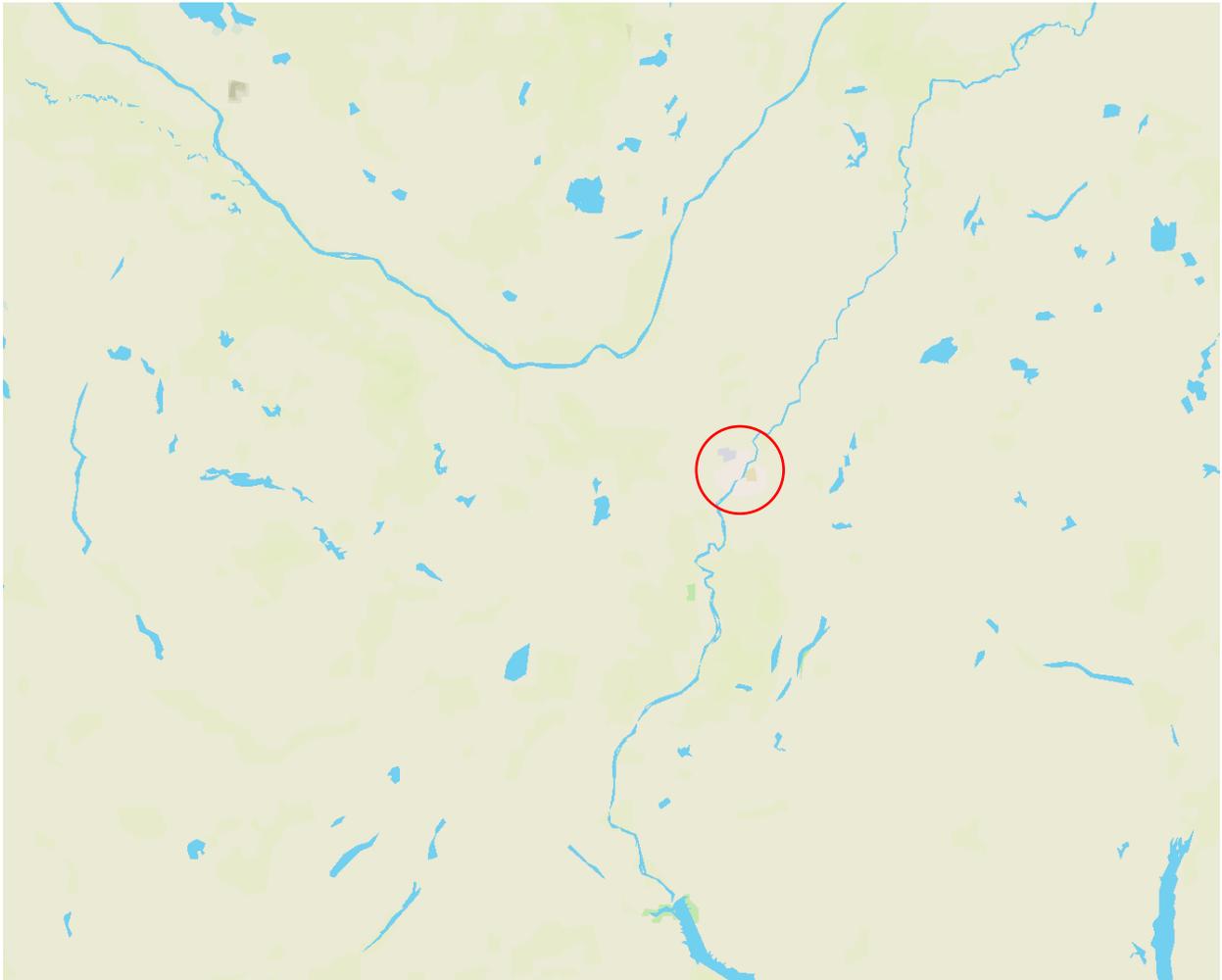
Portions of this research were funded by the Canadian Social Sciences and Humanities Research Council and supported by the Cross-Border Fellowship jointly held at Borders in Globalization (BIG) center and the Center Indigenous Research and Community-Led Engagement (CIRCLE) at the University of Victoria (territories of the Songhees, Esquimalt and W̱SÁNEĆ people). Thank you to Dr. Melissa Pineda, Dr. Jeff Corntassel, Nicky Enriquez, and Maya Krieger for their valuable inputs on content, editing and formatting.

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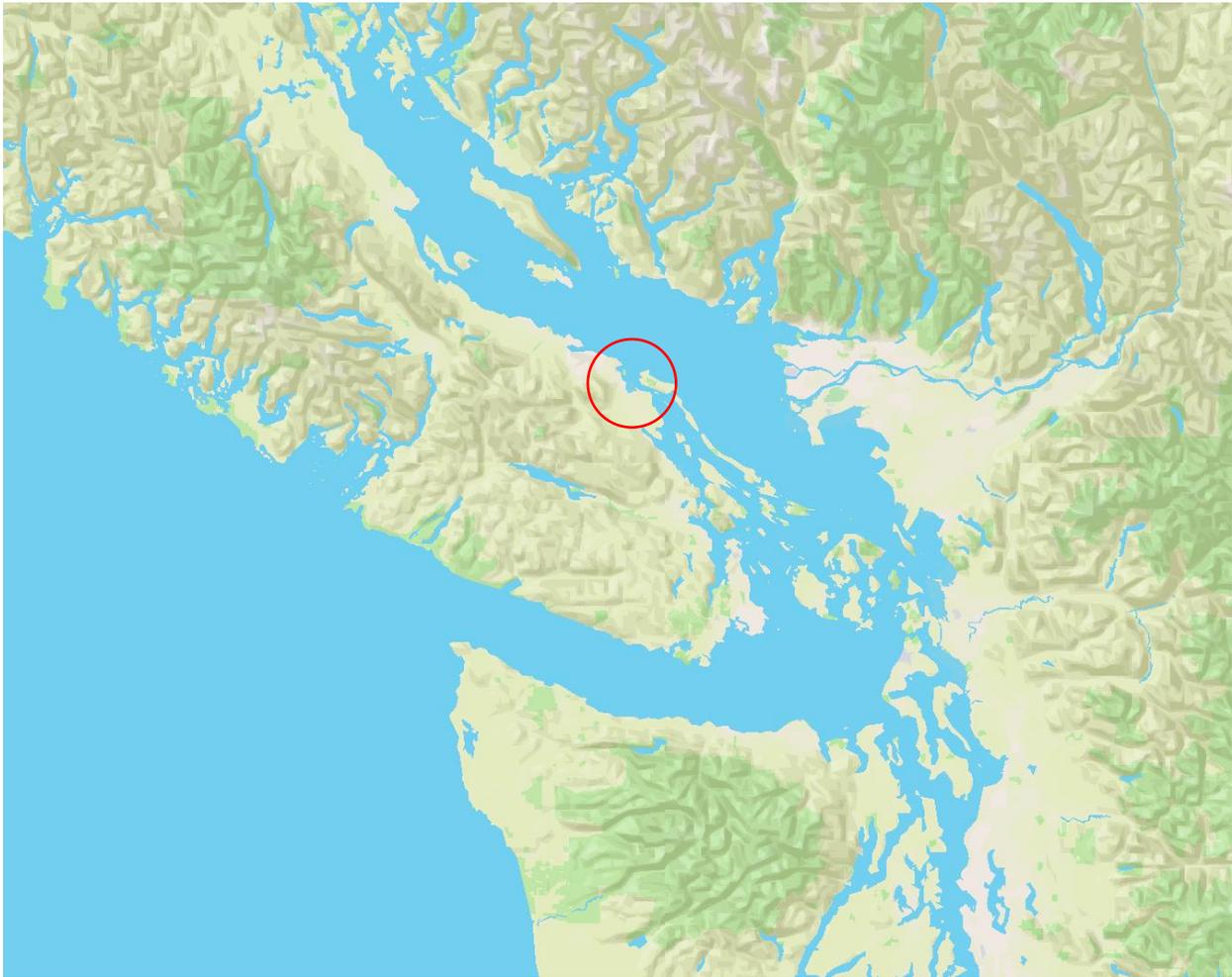
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FIGURE 1. THE UNIVERSITY OF SASKATCHEWAN



Note: The location of University of Saskatchewan, circled in red, on Treaty 6 Territory and the Homeland of the Métis. The university is located in Saskatoon along the Saskatchewan River. (Native Land Digital, 2022; University of Saskatchewan, 2022).

FIGURE 2. VANCOUVER ISLAND UNIVERSITY



Note: Vancouver Island University is situated on the traditional territories of the Coast Salish peoples. Its main campus, in Nanaimo, Vancouver Island circled in red. (The university has additional campuses in Cowichan and Powell River Campus).

FIGURE 3. JAY TREATY LETTER OF SUPPORT TEMPLATE, VANCOUVER ISLAND UNIVERSITY

[ON BAND/AFFILIATION/GROUP LETTERHEAD]

[Insert Date]

International Registration
Vancouver Island University
900 Fifth Street
Nanaimo, BC V9R 5S5

To Whom It May Concern:

We provide this letter to Vancouver Island University ("VIU") as requested by [Insert Name] in connection with an application for admission to VIU. We understand that VIU recognizes the intent of the Jay Treaty of 1795 in that an Indigenous person living outside the Canadian border whose ancestral lands are wholly or partly within Canada are recognized as a domestic student for tuition fee purposes and that this letter is required by VIU to support that recognition.

We confirm that [Insert Name] born [Date of Birth] has an ancestral connection to traditional land that is now wholly or partly within Canada.

This letter is provided to Vancouver Island University solely for the above purpose and does not constitute any further relationship or obligation of the undersigned with [Insert Name] or Vancouver Island University.

[Insert Name and Position/Authority
on behalf of Band/Affiliation/Group
and contact information]

Source material: Vancouver Island University. (2018). *Jay Treaty recognition*. Retrieved from <https://indigenous.viu.ca/services-aboriginal-students/jay-treaty>