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 Latest Discoveries.

THE JAY TREATY: CHALLENGING FIRST NATIONS' RIGHT TO TRADE IN NORTH AMERICA

By Ian MacNeill

Is it possible that a 200-year-old treaty between Britain and the United States could open the door for First Nations in British Columbia to export logs and lumber to First Nations buyers in the US without being subject to duties or the limitations of international trade barriers, such as countervailing duties currently being imposed by the US on Canadian lumber imports?

The Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America, more commonly known as the Jay Treaty after US negotiator John Jay, was signed in London, England in 1794. The primary objective was to more normalize relations between the two powers after their messy divorce, a.k.a. the American Revolutionary War (1775–1783). Among other things the treaty sought to start the process of determining where the boundary should be drawn between the United States and what was to become Canada.

On the understanding that this as-yet-to-be-determined line in the sand would cut through traditional Aboriginal lands and trade routes the treaty contained an interesting clause. Article III stated that “Indians dwelling on either side of the said boundary line” have the right “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.” What’s more, they were entitled to carry on this commerce without paying “any impost or duty whatever.”

It’s the bit about carrying on trade and commerce with each other that’s got registered professional forester, First Nations strategic advisor and TLA Director Matt Wealick thinking. Although Canada never ratified the treaty and has been reluctant to honour it, the United States did sign it and has honoured it, at least with respect to the passing back

and forth part. For generations First Nations in Canada have been able to live and work in the US; Wealick used his status to get a Green Card in 1999 so he could play pro hockey in Texas for the El Paso Buzzards. He reasons now that if the US is obligated to honour the immigration bit it should also be obligated to honour the trade bit. “I’m proof that they support the Jay Treaty with respect to immigration, and assuming they can’t pick and choose which pieces to support, and that the other part of it is free trade, First Nations in BC should be allowed to bring goods into the States without paying duties.”

So what now, load up the truck and head for the border?

Not so fast.

There are a number of ducks that need to be lined up first—not the least of which is finding First Nations partners south of the border willing to play ball—and then there are the legal issues



that would have to be cleared up, says Angeline Nyce, a First Nations lawyer who is also a registered professional forester. These can turn into quite a laundry list and could include, but are not restricted to: is the Jay Treaty in fact a treaty, if it is, is it enforceable in the sense that you can take specific promises and enforce them, and if so, in what jurisdiction? Remember, Canada never did ratify. Even if you can establish that there is a “right” to free trade between First Nations in Canada and the US, the question could then become, is it possible to justifiably limit that right by enforcing regulations applying to duties and levies if the exercise of those rights had the potential to do “harm” to affected parties? Expect the US Lumber Coalition to have an opinion on this one.

“I’m skeptical in the sense that on the Canadian side of the border the way the law is now the courts don’t consider it as an enforceable treaty in terms of

whether it provides an open right to trade,” says Nyce. The way “the law is now” is based on several attempts by First Nations to test it in the past. In the 1950s Louis Francis, a Mohawk from Akwesasne, a nation that straddles the Quebec-New York border, was charged duty on a used washing machine he attempted to bring into Canada. The case went all the way to the Supreme Court before getting tossed on a technicality. Fast forward to 1988 when Akwesasne Grand Chief Mike Mitchell along with various other grand chiefs and 400 Mohawks walked across the International Bridge from the US to Canada bringing with them various goods for community use and as gifts for other First Nations. Grand Chief Mitchell was charged with violations of the *Customs Act* and after 13 years of wrangling the Supreme Court ruled in 2001 that the aboriginal right claimed had not been established. As a result, duties could be imposed

and ordered Chief Mitchell to pony up \$361.64. According to the newspaper *First Nations Drum*, a bitterly disappointed Chief Mitchell, “who grew up watching customs agents confiscating goods at the checkpoint near his home, “just lost faith in the Canadian system.”

So, does that mean park the truck and hang up the keys?

Not at all, says Nyce. First Nations seeking access to trading rights can and should use the promises made in the Jay Treaty as part of their arguments. “You can at least say, way back when, promises were made, and this is foundational to the law and the way it has developed. Start from that point and work forward to Section 35 of the *Canadian Constitution Act* (recognizing Aboriginal and treaty rights), and then try and prove what that means in terms of our rights to harvest trees and trade and sell them.”

Obviously legal decisions in Canada do not carry the weight of law in the

United States. In that case the promises made in the Jay Treaty could be used to plead a case for allowing First Nations in Canada to obtain “exemptions” from restrictions and duties. Considering the hard-nosed attitude of the US Lumber Coalition that may seem like a hard sell, but Gary Bull, head of Forest Resources Management at UBC, says there’s reason for optimism. A few years ago Professor Bull invited the US Lumber Coalition and various other players to engage in a dialogue at the university, and while not much changed on an official level, US coalition members did say that “if there is anything we are sympathetic to, it is community forests and First Nations.” One could infer from this that the Americans would at least be open to discussion.

In any event, Professor Bull says that the proposition is worth testing if only because of the way in which it could potentially advance tenure reform in BC, a system he describes as completely dysfunctional.

“If we’re going to have a solution for a lot of the forest land base in Canada we’re going to have to involve Aboriginal communities in finding a joint solution,” says Bull. “If that becomes the vehicle for moving material across the border, and it gives Aboriginals a fair share of the business partnership, then it’s a sensible thing to do.”

Potential industry partners for First Nations looking to advance cross-border trading are also paying attention. “It’s definitely an interesting prospect,” says John Iacoviello, forestry and timber development manager at Probyn Log. “Hopefully we’ll hear more about it.”

Dusty old document that it may be, the Jay Treaty nevertheless illustrates recognition on the part of the treaty signatories that First Nations had, and should continue to have, the right and ability to travel and trade in their traditional territories, and that that right should not be infringed.▲

(Continued from page 19)

Succession and Exit Plan

Given that JimCo holds the shares of TruckCo, there are complications that will arise should Jim want Holdco to sell the shares of JimCo. If Jim’s children decide that they would like to be involved in any of Jim’s businesses, there is currently no means of allowing them to share in the future growth of JimCo.

By restructuring Jim could be able to un-complicate the sale of JimCo while keeping TruckCo or he could bring in means to allow the children to share in future growth as they learn to run the business.

Creditor Risk

Given the nature of Jim’s businesses, there is significant exposure to creditors. Should an accident occur in JimCo, creditors can make a claim against any of the assets of JimCo.

Estate Planning

Currently no estate planning work has been done to attempt to minimize Jim and Sarah’s estate tax should they both die. All the value in the corporate group currently attributes to Jim and as the value of the group grows, the estate tax liability to Jim and Sarah grows.

In Conclusion

As you can see from the above case scenario, inappropriately structuring the business can result in significant tax and business issues. It’s important to discuss your individual circumstances with a professional who can guide you and help you effectively plan for a business structure. However, over the next few issues I’ll show you how Jim can update his business structure to address his tax issues, plan to exit, protect his assets, and plan his estate effectively.▲

Stay tuned for Part Two: Tax-based structures where we will talk about ways Jim can update his structure to be more tax friendly.

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