Life on the Hardened Border

Bruce Granville Miller

The many Coast Salish groups distributed on both sides of the US-Canada border on the Pacific coast today face significant obstacles to travel across the international border, and in some cases are denied passage or intimidated into not attempting to cross. Historically, the Coast Salish peoples of the Salish Sea—including Puget Sound in what is now the United States, southeastern Vancouver Island in Canada, the adjacent mainland, and the lower Fraser River and other nearby areas—were mutually connected in large-scale social networks of marriage and kinship. People traveled through the region to participate in the ritual lives of neighbors, including winter and summer ceremonials, and for mutual defense against outsiders.[1] During the early contact period, Hudson's Bay Company factors at the new trading forts remarked on the hundreds of freight canoes traveling the Salish Sea to sell goods.[2] The present-day Coast Salish people continue to travel, now largely on land, between communities.

The current situation regarding travel by Aboriginal people reflects the hardening of the border by US officials following the events of what has become known as 9/11. After extremists launched an assault on the World Trade Center towers in New York City a bureaucratic environment emerged that was increasingly hostile to the interests of these Aboriginal groups because of demands for security. In addition, the problems encountered by individual Aboriginal travelers at the border reflect a transformed American impression of Canada, now commonly treated politically and administratively as a state from which enemies of America are positioned to harm American interests.

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These new perceptions create an environment that enables Homeland Security officers to regard Aboriginal peoples seeking to cross the border (under legal conventions that allow the passage of Aboriginal peoples) as suspect. Officers then act on their own received, stereotypical notions of what a "real Indian" looks like and deny passage to those they consider to be fakes. The cooperation between American border personnel and Aboriginal people, based on personal relations, which until recently characterized the Peace Arch border crossing at the Washington State–British Columbia border, has now disappeared.

These border issues reflect a larger pattern of the denial of Aboriginal rights and challenges to tribal sovereignty by the American state and its citizenry. Kevin Bruyneel, for example, writes that in response to litigation involving the Mille Lacs Band of Ojibwe, former Minnesota governor Jesse Ventura believed that if the tribe held treaty rights established during the nineteenth century, they should use birch bark canoes.[3] Bruyneel's analysis points to the spatialization of the discourse reflected in Ventura's comments: if tribes are part of and within the United States and its political system, they are not sovereign and cannot make demands on the state; if they are sovereign, they are outside of the United States and also cannot make demands. Further, Bruyneel points to a temporal dimension to Ventura's public comments, in that Aboriginal or treaty rights are thought to be from an archaic time and without application to the modern world. In brief, Bruyneel argues that, although Ventura's views do not create policy, the United States seeks to bind tribes narrowly in space and time in order to limit political and economic self-expression, and, more broadly, self-identity. Others have pointed in the same direction, including Gayla Frank and Carole Goldberg's recent work on the US federal government's efforts to erode the sovereignty of the Tule River tribe of California through the diminution of its territory and efforts to erode historical systems of leadership.[4] My analysis is consistent with Bruyneel's approach, but includes the additional twist that US law provides rights, in theory, to Aboriginal people who are spatially distinct in quite a different way, anomalous in that they are not resident in, or citizens of, the United States. This anomaly has become intolerable to some officials in a time of suspicion and fear.

The border problems addressed here are not unique to the Salish Sea or the Coast Salish people. They reflect dilemmas faced by the many Aboriginal communities all along the 49th parallel dividing the United States and Canada, and for Aboriginal peoples moving within their own homelands overlapping the US-Mexico border. To some extent, the borderlands have local features, and some regions are more isolated and less amenable to careful control by border officials. The Salish Sea region is one of the most densely populated and is carefully regulated by border officials; the desert region along the Arizona-Sonora state border, for example, is the opposite, although here, too,

surveillance has increased. I leave it to others to detail just how the current regimes of control are manifested in other regions, however, and give my attention to the Coast Salish world, with particular focus on the issues facing Aboriginal peoples of Canada who attempt to enter the United States.

The circumstances for those Coast Salish resident in the United States who hope to enter Canada are quite different. Canadian law has not embedded legal rights for Aboriginal movement across the border in the same way as the United States, and Canadian courts have denied the applicability of an eighteenth-century agreement known as the Jay Treaty. Canada remains less openly concerned with the movement of terrorists into Canada, a circumstance that appears to frustrate US officials. American border practice is constructed on a quasi-military model, and the Canadian counterpart is constructed on a civilian model, although Canadian Border Service personnel will soon be outfitted with guns for the first time. The United States has recently attempted to push Canada into a uniform border policy, which would entail the elaboration of the so-called continental security perimeter.

In making these arguments, I rely on my own previous border studies, current interviews with Coast Salish people about their experiences at the border, and the case of a Coast Salish man, Dr. Peter Roberts, a dentist, who was detained for attempting to cross the border in 2008 by virtue of his status as Aboriginal and his green card (permanent residency card).[5] In addition, a justice summit held in 2003 provides direct insight into American approaches to the border as they concern Aboriginal people; and because Washington State is a border state, with Seattle a short drive from the forty-ninth parallel, coverage of border issues by the *Seattle Times* gives a useful indication of American attitudes and approaches.

The Years Prior to 2001

There have not always been difficulties in border transit. In 1794, the predecessor government to Canada, Great Britain, signed the Treaty of Amity, Commerce, and Navigation (commonly known as the Jay Treaty) with the newly formed United States, which recognized the right of free travel of Aboriginal peoples across the international border. Soon afterward the War of 1812 abrogated this treaty, but in 1814 its terms were reestablished in the Treaty of Peace and Amity (otherwise known as the Treaty of Ghent).

In more recent years the terms of the Jay Treaty have largely been integrated into US administrative law and practice. The website of the US Embassy, Consular Services Canada puts it this way: "The Jay Treaty, signed in 1794 between Great Britain and the United States, provided that American Indians

could travel freely across the international boundary. The United States has codified this obligation in the provisions of Section 289 of the Immigration and Nationality Act (INA) as amended. Native Indians born in Canada are therefore entitled to enter the United States for the purpose of employment, study, retirement, investing, and/or immigration."[6]

By the 1990s, US officials attempted to facilitate the movement of Coast Salish winter spirit dancers across the border. As I previously have written:

> The immediate problem for Spirit Dancers travelling between Coast Salish communities located across the border is the incompatibility of customs regulations and the spiritual state of susceptibility. Initiates may be placed in spiritual danger if, for example, someone looks directly into their faces. Masks and other regalia cannot be handled by non-dancers, and the cedar costumes and headdresses as well as the wooden staffs carried by black- and- red faced dancers sometimes appear bizarre and suspicious to border agents.
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> A particular difficulty facing the Spirit Dancers is the cultural prohibition on the communication of specific information about winter Spirit Dancing. Dancers do not reveal the nature of their spirit helpers, nor do they ordinarily describe to outsiders the specifics of their regalia or longhouse practices. To reveal specifics could place dancers in physical danger and reduce the efficacy of their relationship with their spirit helper. This circumstance has made it difficult for Salish people to describe their concerns. US officials have recently attempted to educate border personnel about these topics, and a member of a Washington state tribe has proposed establishing an education module.
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> Chief Frank Malloway, of the Yakweakwioose Band of the Stó:lō Nation of B.C., noted that border personnel have recently allowed longhouse initiates to pass the border without visual inspection if they are accompanied by longhouse leaders who present identification for each of them. While "oldtimers" (long-time border officials) on the American side merely used to wave Stó:lō Spirit Dancers through the crossing, in more recent years border guards have tightened their scrutiny. However, through a consultative process, many guards have "learned not to look in the mask boxes or at the dancers." As part of this process, longhouse leaders notify border personnel prior to hosting ceremonies requiring the presence of dancers on the other side of the border. [7]

Coast Salish people living on the border, and known to border guards, previously moved easily and "[exploited] the job market of Whatcom County, Washington [with] a daily return to their reserve [in Canada]. One member of the Semiahmoo Nation noted 'It's easier for the Semiahmoo. So many of us have worked in the US for the past thirty, forty, fifty years. We've been working on and off since teenagers, commuting back and forth. They [government officials] know us at the border.'"[8]

The United States has imposed particular rules for identifying those Aboriginal people born in Canada who qualified for inclusion under the terms of section 289 of the Immigration and Naturalization Act. Eligible people must provide evidence to Homeland Security showing at least 50 percent blood quantum (although in some US federal documents the figure is given as 51 percent). The documentation could be an identification card from the Canadian Bureau of Indian and Northern Affairs (sometimes called INAC) or a written statement from a band official regarding ancestral origins on band letterhead, together with documentary evidence (including birth certificates or other records). The specific blood quantum and photographic identification must be provided.

The United States does not consider some factors that are regarded as relevant in Canada, such as whether an individual holds federal status or whether that individual is a member of a treaty band. Significantly, Métis association identification cards are generally not accepted.[9] However, Canadian Métis have recently gained new forms of official recognition, in the Charter of Rights and Freedoms contained within the Constitution Act of 1982. Section 35(2) acknowledges their status as, in the language of the document, "Aboriginal people." In addition, Métis resource rights have been established in Canada through litigation, notably the 2003 *Powley* case. Still, the Métis have not gained traction with US officials as legally recognizable indigenes. This is another case in which internal attributions of identity and those of the Canadian state are ignored by the United States in favor of blood quantum criteria. The term *Métis* is sometimes used to refer to people of mixed Aboriginal and European descent. However, Métis academic Chris Andersen and Métis lawyer Jean Teillet observe that *Métis* refers to a nation with its own membership codes and not simply to those of mixed ancestry.[10]

"Border Hardening" Post-9/11

The events following the terrorist attacks on the World Trade Center buildings in New York City and elsewhere have largely eliminated all of this local cooperation based upon personal relations. During previous years, in many cases border officials knew Coast Salish people by sight and officials cooperated in the movement of spiritually vulnerable longhouse initiates. The *Seattle Times* reported that since September 11, 2001, some two thousand officers have been added to border services in the north.[11] The border is no longer as quiet as it once was, and now the main north-south passage between Washington State and British Columbia, the Peach Arch crossing, is bristling with dozens of Homeland Security personnel. New security devices have been emplaced

and upgraded cameras have been installed. A US government report notes the administrative changes following the creation of the Department of Homeland Security: "The United States now has a unified inspections operation at the borders; one inspector is charged with examining people, animals, plants, goods, and cargo upon entry to the country. . . . The transfer of these functions to the Department of Homeland Security (DHS) marks a significant policy shift concerning all of these functions, clarifying that—although there are important commercial, economic, health, humanitarian, and immigration responsibilities—*ensuring the security of our borders is the top priority*."[12]

Ruth Ellen Wasem and colleagues write, "After the September 11, 2001 terrorist attacks, Congress enacted further measures aimed at improving immigration inspectors' terrorist detection capabilities [through the 2002 Enhanced Border Security and Visa Reform Act (PL 107-173)]. Congress also included antiterrorism provisions in legislation reauthorizing the U.S. Customs Service in 2002. CBP [Customs and Border Protection] inspectors now are tasked with more effectively accomplishing the laws and policies of the legacy agencies."[13]

As these reports indicate, the terrorist events of 9/11 led to new US policies that have had the indirect outcome of *hardening* the border (a term that entered the lexicon by 2004 and implies enhanced security) for those Aboriginal peoples moving about in their historic homelands. The war on terror has stimulated the routinization and diffusion of American exceptionality, the implicit notion that normal due process and human rights might be appropriately eroded or suspended. However, US officials have responded minimally to requests to negotiate these differences from Aboriginal tribes located along the northern border in the United States and from bands in Canada and have treated these Aboriginal entities as if they were the equivalent of local governments, with little voice and no leverage.[14]

I argue that these adverse effects on Coast Salish peoples are not primarily the direct results of policy but rather are unintended consequences. They are examples of the tendency in US policy to fail to consider the implications for the Aboriginal peoples of North America in the pursuit of issues that register as more important. The US emphasis post-9/11 has been on what is viewed as security over any other issue, a position that has resulted in the slowing down of the massive economic activity that moves across the international border and the movement of private citizens and of Aboriginal peoples with particular rights to cross the border.

My argument, further, is that the present US emphasis on security, or hardening, allows individual Homeland Security officers to exercise their own idiosyncratic opinions regarding the Coast Salish peoples of Canada (and their entry into the United States) in ways that had the result of denying them admission. These idiosyncratic views, however, are shaped in particular

ways. Notably, phenotype—the observable traits of a person—comes to stand in metonymically for race and political affiliation with Coast Salish historic communities. Now Homeland Security officers sometimes exercise their own stereotypic views of what Coast Salish, or any Aboriginal person, should look like. These views influence their decisions regarding whether these people can be allowed to enter or whether they should be excluded from the United States. This is not new in American policy and practice, and the allotment of lands to individuals based on readings of Native American bodily characteristics (for example, hair and feet) is one such earlier iteration.[15]

Relatedly, outsiders' emphasis on phenotype as a measure of Aboriginal identity is associated with a widespread disbelief in "Indians" as a legitimate category with legal standing and the related idea that many or all Indians are "fakes" who have been assimilated culturally and amalgamated biologically. Elizabeth Furniss, for example, described the non-Aboriginal dismissal of those who, as a result of intermarriage, are regarded as "not-real" Indians (to use the local terminology) in British Columbia and hence are the recipients of undeserved wealth and special status.[16] These fake Indians are thought to undermine the values of mainstream society and to be responsible for criminal behavior.[17] This is a particular problem for many Coast Salish people who frequently do not look like the well-known stereotype of Plains or prairie people.

In public discourse and policy, Aboriginal people are thought to constitute a race and, hence, are subject to particular forms of regimentation. Renisa Mawani documented the historical use in British Columbia of regulatory regimes based on race and the "prevailing anxieties of racial contamination" that would result from the mixing of Indian, white, and black populations.[18] Notably, these regimes included restrictions on travel. She writes further, "For the colonial regime, fears of contamination, immorality, and criminality underpinned cross-racial encounters between aboriginal and mixed-race peoples, rendering these proximities to be dangerous and in need of spatial and legal governance while also creating new markers of racial differentiation in the process."[19] These spatial practices of governance have continued and are manifested today in the regulation of Aboriginal people at the border.

Although this appears paradoxical, evidence suggests that a mainstream response to a contemporary increase in claims of treaty rights and sovereignty is a denial that Aboriginal peoples are even present. This is one means of denying treaty rights to people who previously had been unable to exercise them and appear to the mainstream population as threats to local resources and livelihoods. Jean O'Brien, for example, noted the "myth of extinction" employed in local histories in New England states as a means of erasing Indians and undermining their claims to land and rights.[20] In an earlier study, I argued that

following the judgment in what became known as the Boldt Decision (*U.S. v. Washington*), which found for the right of Coast Salish peoples of Puget Sound to receive half of the regional salmon catch, local non-Indian residents of the Skagit River valley reported being unaware of any local Indian people or tribes.[21] This is despite their considerable numbers and, in many cases, their common attendance in the school system. Aboriginal people can be simultaneously regarded as lawless, fake, and not present at all. Furniss reported that all of this commonsense racism coexists with an ideology of ethnic tolerance, equality, and a multiculturalism that condemns racism.[22]

These developments, meanwhile, take on additional salience with the widely reported increased aggressiveness of Homeland Security personnel toward those presenting themselves for entry. On May 25, 2008, for instance, the *Seattle Times* reported the revocation of Nexus passes, the "trusted traveler" program that facilitates movement through the border for program members.[23] Some Nexus program members lost their passes for criminal actions or minor violations of border rules (such as possession of an apple), even for violations by family members or co-residents of their homes. One might speculate that the increase in revocations allows Homeland Security to provide Congress with statistical evidence of vigilance against terrorists or other wrongdoers, an important issue in elections. In another instance, on March 5, 2010, the *Montreal Gazette* reported the story of a Canadian woman interrogated at the US border based on an arrest in 1991 by Toronto police, with no subsequent charge. [24] First Nations people are not alone in experiencing difficulties at the border, yet the results are distinctive and more onerous for them in that, as Coast Salish people, along with other Aboriginal peoples of North America whose historic territories have been on both sides of what is now an international border, they frequently press for the right to move freely across this imposed boundary.

Changing Perceptions of Canada

Another line of argument is that the current treatment of Coast Salish peoples at the border reflects a transformed American notion of Canada in the post-9/11 world. Prior to 9/11, American images of Canada were benign and reflected American and Canadian cooperation on a variety of security projects, including the Distant Early Warning Line (DEW Line) defense system and the construction of the American highway through the Yukon to Alaska during World War II. Long-term cooperation at the many border stations across the northern border of the continent allowed for decades of easy movement for Aboriginal and other peoples, and only in recent years has this been

constrained.[25] American public imagery has reflected this cooperation and images of frozen Canadian ponds, beavers, and genial, polite, and ineffectual neighbors have long been paramount. These are the very images deployed in the 2010 Vancouver Olympic closing ceremonies (including giant figures of beavers, ice skaters, and men in plaid), in what was reported to be an effort to overcome growing American antipathy, appeal to American sensibilities, and promote American tourism to Canada by showing Canada's ability to be self-deferential.

The fear of the outside world resulting from the unprovoked attack on the United States has pushed policy makers to create the appearance of an impenetrable border able to block the entry of foreign terrorists. As late as 2009, prominent American public figures, including Secretary of Homeland Security Janet Napolitano, continued to articulate the incorrect view that some of the 9/11 terrorists entered the United States from Canada. US media emphasize the movement of potential terrorists and illicit drugs pouring down from Canada. Meanwhile, on the US-Mexico border, new laws in the United States and hysteria around the "drug war" and illegal immigration have increased the danger for Aboriginal people crossing north, who risk being shot by the US Border Patrol or vigilantes.[26] The same outcome, increased danger, has arisen on the US-Canada border.

These new images of Canada have been conflated into a picture of contagion and threat, pushing Americans to rethink their previous good relations with Canada, and more recently, pushing Canadian authorities to create a joint border policy. Although the circumstances on the northern and southern US borders are quite distinct, Canada now is the object of American fear, as has been the case for Mexico for some time. Politicians have been unwilling to separate the quite different issues regarding the US-Mexico border from those regarding the US-Canada border. There are, for example, far fewer residents of Canada attempting to enter the United States illegally in search of employment, and there is no large-scale war between groups involved in the drug trade, which is reported to take the lives of several thousand Mexicans annually. Further, while American fears of Hispanic migration escalates and efforts are undertaken to restrict the legal rights of migrants, the population of Canada is predominantly white and non-Hispanic. Unlike Mexico, Canada remains a wealthy first-world nation with an intact public health system.

In recent American public articulations, however, Canada is a country that facilitates the movement of international terrorists through a lax immigration policy and a purported overreliance on American vigilance toward terrorists. This notion of Canadian moral laxness and permissiveness, which must be overcome by rough American vigilance, is reflected directly in the behavior of Homeland Security agents at the border. Further, American agents appear to

have internalized the notion of Canadian category confusion—that Canadians allow the illegitimate slippage of people into existing legal categories, including immigrant, refugee, and Aboriginal, which give them special rights. Prior to 9/11, US authorities complained of undocumented aliens passing into the United States from Canada. The *Seattle Times* coverage shows that concern on the US-Canada border in particular was with economic immigrants and refugees from Asia.[27]

This perspective suddenly changed and the *Seattle Times* quickly sounded the battle cry, reporting just two weeks after the 9/11 attack: "While thousands of U.S. soldiers are being shipped halfway across the globe to fight terrorism, little manpower has been focused on a problem much closer to home: Canada. Experts on both sides of the 4,000-mile border say the nation to the north is a haven for terrorists, and that the U.S.-Canada line is little more barrier than ink on a map."[28] An otherwise liberal Washington State senator made an early articulation of assigning blame to Canada for the event: "Sen. Patty Murray, D-Wash., expressed dismay that some of the terrorists involved in the Sept. 11 attacks entered the United States from Canada. 'The fact that some of these terrorists were known by our intelligence community and were not caught at our northern border is even more disturbing,' Murray told colleagues at a recent hearing of the Senate Appropriations Subcommittee on Treasury and General Government. 'They saw this weakness in our security system and exploited it for a deadly end.'"[29] The same day, the *Seattle Times* reported, "The White House has asked the U.S. Customs Service, the Immigration and Naturalization Service (INS) and the Border Patrol to devise a comprehensive counter-terrorism plan for the U.S.-Canada border. In response, Customs has requested 490 new Customs agents, 90 special agents and a significant increase in funding for bomb-detection devices, according to a congressional source. If the White House doesn't take action, Congress might move first. Efforts are under way to produce additional funding for more Customs and Border Patrol agents along the border."[30]

The *Seattle Times* noted on December 11, 2001, "There is a national consensus on the need to enhance security across the United States. Although Attorney General John Ashcroft has clearly stated that none of the Sept. 11 terrorists came across the Canada-U.S. border, there have been calls to increase security at the border—with National Guard troops, helicopters, additional INS staff and closer inspections of people and vehicular traffic."[31] Ashcroft's understanding of the absence of any Canadian role in the movement of the 9/11 terrorists was quickly forgotten in transforming the image of Canada for American political purposes. But the *Seattle Times* also took note of the economic traffic across the border, "It may surprise some to learn that Canada is our most important trading partner, accounting for 25 percent of

U.S. exports—more than Japan or Mexico. Trucks cross the border every 2.5 seconds (45,000 trucks a day), 200 million people cross every year, and that cross-border trade totals $475 billion a year—$1.3 billion per day."[32]

The new US border initiatives caught Canadian authorities off guard. The *Seattle Times* reported on December 25, 2002, "According to Canadian officials, the CIA and FBI have swamped Canadian intelligence and law enforcement authorities with requests to conduct surveillance and investigations into suspected terrorists on Canadian soil. Both U.S. agencies believe the threats are directed at the United States."[33] A *Seattle Times* piece on January 20, 2005, showed the effects of the new practices on the ground: "Dozens of people from Canada have been turned back at the U.S. border or prevented from boarding U.S.-bound airplanes in recent months because of suspected links to terrorism, sensitive U.S. government documents show."[34] These fears were not only held by the government. On October 4, 2005, the *Seattle Times* reported the creation of a vigilante squad, the Minutemen, who vowed to patrol the US-Canada border as similar groups have done on the US-Mexico border.[35]They created a center near Blaine, Washington, in historic Coast Salish territory on the saltwater.

The Summit

American fears about the border were made clear in a unique meeting entitled the "Federal, Washington State, County and Tribal Justice Summit," held January 8, 2003, at Bow, Washington (which I attended and at which I gave a keynote speech).[36] In this meeting, federal officials hoped to convince Coast Salish tribal authorities to cross-deputize their tribal police with state police so that they could respond quickly to episodes of terrorists crossing through tribal territories located on the international border into the United States. Offers of high-tech equipment to tribal police were met with interest from the tribal police chief but not from tribal chiefs and chairs, who sensed an infringement on their lands. (On August 8, 2006, the *Seattle Times* noted the continued emphasis on high-tech equipment in plans to deter terrorists during hearings held with local authorities.)[37]

A federal health official outlined a plan to inoculate all frontline health officials along the length of the northern border against smallpox brought by terrorists into the United States. This prompted one tribal chairman to ask if the smallpox would be supplied "by the U.S. War Department," a reference to the idea that contaminated blankets were once given to Indians by soldiers.[38] (This inoculation plan was put into effect but eventually was halted by criticism from the community of health professionals.) When a member of the

audience noted that American Indian communities were already suffering from epidemics of diabetes, arthritis, obesity, and other diseases, and that the diversion of funds to a hypothetical and entirely far-fetched episode of contagion overlooked these real problems, the official hung her head in apparent shame at being the bearer of such an inept message.

As I have noted, and as Mawani and Furniss have previously shown, there has long been fear of Aboriginal space going back to the early period of colonization, which in the case of the Coast Salish region was the mid-nineteenth century.[39] Initially, this was linked to fears of military opposition to colonialism and later to the creation of a "frontier myth" that opposed the values of the self-made white man to that of indolent, oversexualized Indian people. In the post-9/11 world, the mainstream imagery of Aboriginal people additionally includes a focus on the difficulties in controlling the production, distribution, and use of illegal drugs, untaxed cigarettes, and other contraband. Because to mainstream views tribal land appears to be uncontrolled and, perhaps, uncontrollable under tribal leadership, new fears emerged of the use of these lands by terrorists intent on using germ warfare.

An anomalous policy that permitted free passage of a relatively small category (Aboriginal people), combined with the notion that, as reported in the summit, terrorists were crossing the international border through Indian country, and terrorists and drug dealers were using borderland reserves and reservations to concoct and store illicit drugs and contagions that could cause epidemic disease pushed border officials to question the entry of Coast Salish and other Aboriginal people. Similar problems have arisen in other areas along the US-Canada border. Audra Simpson, writing about Mohawk territory, notes "the way in which indigeneity and sovereignty have been conflated with savagery, lawlessness, and 'smuggling' in recent history."[40]

The efforts by First Nations of Canada to obtain unobstructed passage into the United States and the efforts of American Indian tribes to do the same for passage into Canada are far from new and have emerged episodically throughout the last several decades.[41] US tribes and Canadian bands have asked for an exemption from the requirement of showing a passport for their members and have been opposed by state officials on both sides of the border. National Aboriginal organizations in both countries, including the National Congress of American Indians (NCAI) and the Assembly of First Nations (AFN), continue to keep border issues on their agendas.[42] In 2001, the AFN, for example, passed Resolution 28, the Aboriginal and Treaty Border Crossing Rights Resolution, which noted Canada's refusal to recognize border rights, in particular the failure to enact Section III of the Jay Treaty legislatively, which contains provisions for crossing the border. The AFN called on Canada to recognize these rights. In 2006, the First International Aboriginal Cross

Border Summit, with representatives of the federal governments, the AFN, and the NCAI was held to consider border issues.

The Case of Dr. Roberts

This was the overheated political environment when Dr. Peter Roberts, a Coast Salish man living in Tsawwassen, British Columbia, and a member of the Campbell River Band, attempted to cross into the United States in 2007. His green card was a particular sort that is issued to document that the bearer is a Status Indian of Canada with a minimum of 50 percent blood quantum (half descent from Indian people). These are the grounds on which Aboriginal people can pass freely into the United States without further documentation. According to his attorney, the card was an obscure, now obsolete type (SA-1), originally issued to Roberts in 1966, as opposed to the Jay Treaty green card (S-13).[43] *Seattle Times* reporter Lornet Turnbull, who covered the case of Roberts, reported to anxious Seattle residents in an article titled "Rights by blood" that "if you are a Canadian with at least 50 percent aboriginal blood" you have the right to:[44]

- Cross the U.S./Canadian border freely;
- Live and work in the United States and be eligible for public benefits such as Medicaid and Supplemental Security Income; and
- Register for college or a university in the United States as a domestic rather than foreign student.

You do not have to:

- Obtain a work permit to hold a job in the United States;
- Register for the military; and
- The U.S. government cannot keep you out of the United States or deport you.

This discourse, in this instance articulated by a reporter, transformed membership in an Aboriginal polity (or community) into an issue of commonality based on descent and referenced by the metonym *blood*. Blood quantum officially entered into US political practice during the late nineteenth century and now serves to bifurcate members of American Indian tribes into those with rights to federally funded services and those without such rights.[45] In addition, tribes that rely on blood quantum in determining membership also, in effect, differentiate access to tribal services. American federal policy further entrenched blood as a determinant of membership with the passage of the Indian Reorganization Act of 1934, which required the creation of tribal membership rolls. Since then, blood quantum has been determined from the

information recorded on these rolls. Further, INS determined that 50 percent blood quantum was necessary for passage of Aboriginal peoples of Canada into the United States. The Revised Citizenship Act of 1952 further imposed the use of the idea of blood quantum. This, says Mohawk scholar Simpson, created a racialization of identity in which descent is equated with race and means that blood quantum, thought to indicate race, takes precedence over other forms of recognition.[46]

The federally unrecognized Coast Salish Hwlitsum Band of British Columbia, for example, is composed of those acknowledged by the Crown as Status Indians and those who are not. The differences are measured by quanta of descent rather than by participation in and acceptance by the community. In any case, in effect the United States imposes its own criteria on Coast Salish communities whose membership spans the international border. Meanwhile, ideas of blood are sometimes conflated with phenotype in the practice of Homeland Security, as occurred with Dr. Roberts.

The *Seattle Times* reported on January 15, 2008, that Dr. Roberts's green treaty card was seized as he attempted to cross the border: "Peter Roberts is a Canadian citizen and a member of the Campbell River Indian Band who, until two months ago, enjoyed unrestricted access to the United States—the right to work and live here if he wanted to. The 54-year-old never has. A dentist with the fair complexion of his Ukrainian mother and the facial features of his full-blooded native dad, Roberts lives on the Tsawwassen Indian Reserve in British Columbia, just up the road from the U.S. border."[47]

Homeland Security officials, noted the *Seattle Times*, questioned Roberts's lineage and whether he had sufficient blood to qualify for passage. "I guess in their eyes I don't have status, based on how I look," Roberts said.[48] But a complicating factor is that the United States was then working on a plan to further "harden" the border by requiring everyone crossing the border to show a passport. This became policy by 2008, under the Western Hemisphere Travel Initiative, the travel implementation of Section 7209 of the Intelligence Reform and Terrorist Protection Act of 2004.

A hearing regarding Roberts's case was held in an obscure federal immigration court, known colloquially as the "Port Court," at the point of entry on the border at the Peace Arch. I attended this hearing and here will detail it, and the events around it, to indicate the ways in which the legal processes following the determination of frontline Homeland Security officers regarding admissibility have the effect of intimidating Coast Salish people crossing the border, even those with legal counsel, education, and social standing in the mainstream society. The *Seattle Times* noted, "At Roberts' hearing this Friday, attorneys for the government will ask an immigration judge to revoke all his Aboriginal rights

to the U.S. An unfavorable ruling could make it difficult—if not impossible—for him to obtain permanent residence here if he ever sought it."[49]

There were unusual characteristics to this court and the proceedings. First, Homeland Security officials attempted to bar some observers from entry to the court, an effort circumvented by telephone communication with a national official of the Department of Justice in Washington, DC, who gave instructions that the court was open to the public.[50] Second, the attorney acting for Homeland Security informed the judge that he would check through border records to see what charges could be brought against Roberts in a subsequent hearing, a practice sometimes referred to as "fishing." Questions were raised about the accuracy of Robert's and his daughter's cards issued by the Campbell River [Coast Salish] Band.

The *Seattle Times* reported on January 15, 2008, that

> By law, Canada's native people—even those with a criminal record—cannot be denied entry to the U.S., and they cannot be deported. To invoke their treaty rights at the border, they must present what's called a "blood quantum" letter from their bands detailing their lineage. The letter is often presented along with a status card, a standard, federally recognized photo ID that Canadian bands issue to their members. To document their treaty status, simplify border crossings and avoid the need to always carry blood documents, families sometimes ask the U.S. government for special treaty-linked green cards—like Roberts' family did when he was a child. But government lawyers say they have the right to revoke these cards, just as they do with regular green cards, if they believe the cards were improperly granted in the first place. "Just because you've been given one doesn't mean you were given it correctly," said Dorothy Stefan, chief counsel for U.S. Immigration and Customs Enforcement. "You need to show that you're 50 percent—and that's where it becomes tricky. If you can't prove it . . . you get a chance to go to court and prove you have status."
>
> Saunders [lawyer for the defendant] said the burden is on the government to prove Roberts is not what his blood documents show him to be—the grandson of full-blooded Campbell River Indians. "We have letters from his band detailing my client's status going back to the 1800s," Saunders said. [51]

And further,

> Roberts doesn't have a criminal record and said he never experienced border problems until last fall, when a guard at Point Roberts lectured him about the need to always show his green card when seeking entry. He challenged the guard, invoking his treaty rights—and was denied entry. After that, Roberts said, he was hassled each time—stopped, questioned at length, at times fingerprinted and at times turned away—always at Point Roberts, but never anywhere else. In November, guards finally seized the card, granting him a temporary document to travel to

> Hawaii for the holidays. "I guess it's a kind of reversed prejudice," Roberts said. "In our family, we don't go out of our way to say we're Indian. We just live our lives.[52]

Then, the *Seattle Times* reported,

> In November, U.S. Customs and Border officials, apparently not believing Roberts had enough Indian blood to qualify for it, seized his green card. Roberts said he believes the border agents were responding to the way he looks; his fair complexion comes from his mother, he said.[53]

Port Court at the Peace Arch crossing was then a second-story room immediately above the large area in which interviews are conducted with the few people who cross the border on foot and with selected travelers in cars and buses (the entire border facility is now reconstructed for greater security). The room was distinct from conventional American courtrooms; it was small, some twenty-five by forty feet, and plain, with four rows of double tables. On January 18, 2008, the immigration judge, attired in a blue sports jacket and tie, a recorder, two bailiffs, a senior attorney acting for Homeland Security, a *Seattle Times* reporter, and an attorney acting for Dr. Roberts were among those in attendance. All told, fifteen people came to participate or watch, which is a small number given the potential implications of the proceedings for Aboriginal people. Officials initially skirmished around the receipt of notice and the filing of an exhibit.[54]

Len Saunders, an immigration lawyer practicing in Blaine, Washington, a small town located directly on the border, told the court that he was not sure if pleading to the allegations brought by Homeland Security on behalf of his client was appropriate because Roberts was considered a Native of North America and not a citizen of the United States or of Canada. However, the judge's questions clarified that Roberts was born in Canada and, in the eyes of Canada, was a citizen there. No final designation regarding citizenship was made at this point. Homeland Security argued that they had evidence that Roberts did not have the minimum 50 percent blood quantum and noted that Roberts has multiple immigration files and may seek permanent residence in the United States. They will, the attorney added, search Roberts's files further to determine if he is eligible under the Immigration and Naturalization Act, Section 289. In response the judge noted that the factual issues needed an evidentiary hearing and that Homeland Security would conduct further investigations. He added that under Immigration Court procedures there is no requirement to produce documents, that is, hand copies over to the other side (the process known as discovery). At this point, Saunders had not seen the government evidence against his client. An evidentiary hearing was set for a later date. Discussion among the judge, the attorney acting for Homeland

Security, and Saunders made it clear that the government had not prepared for the hearing. Although Saunders had dropped off his sixty-three-page filing on behalf of his client with the government offices in Seattle, some ninety miles to the south of his office in Blaine, the attorney for Homeland Security had not read it.

The government however, produced a March 3, 1966, affidavit by Roberts's grandmother, which they claimed showed Roberts's blood quantum to be less than 50 percent. In response, Saunders requested an estoppel argument, which would have prevented Homeland Security from making its allegation contradicting the evidence that Roberts's blood quantum was sufficient, previously accepted as factual. The judge ruled that case law gave him limited authority to make an estoppel argument under the ruling in *Hernandez-Puente*.[53] That ruling had held that "the Board of Immigration Appeals and the Immigration judges are without authority to apply the doctrine of equitable estoppel against the Immigration and Naturalization Service so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation."[55]

Further, the judge noted that "admission to the U.S. is each time an individual evaluation," and that despite having been admitted in the past, and having been given the form I-551 showing him to be an American Indian born in Canada, and being in a category with rights to pass the border (a form issued to Roberts on June 9, 1995), these were not sufficient for Roberts to now be admitted to the United States.[56] Homeland Security was free to question his admissibility on any occasion, despite previous admissibility. As an intended immigrant (Roberts was considering this possibility at retirement) he came under additional scrutiny. The judge stated that if he did not find him to be 50 percent blood, as a Canadian, his immigration might be blocked. In addition, he observed, "The respondent has the burden to show his admissibility to the United States." Saunders took a different view and responded that "He [Roberts] has overcome this—the burden is on the federal government." To this, the judge observed, "this [form] 551 is different" and concluded, "It is not the case where to lose status the government has to show convincing evidence." All evidence, he said, will be in writing pending an upcoming hearing. The judge did, however, note that he was relying on hearsay evidence regarding the genealogy of Roberts's grandmother (hearsay refers to evidence given by nonexpert parties and is restricted to what one has heard and seen personally). He observed that her declaration was important, stating, "I don't know if she is alive. The parties need to address this."[57]

A legal assistant working for Saunders told me optimistically that he believed the judge's comment on "hearsay" evidence meant that he would not accept a document by the grandmother showing blood quantum. Saunders

observed that once a right such as border crossing is established it cannot be revisited, added "it's a fishing expedition," and provided his opinion that at the border Homeland Security thought Roberts was white and then dug around in his file to come up with a charge.[58] He observed that Aboriginal people of an earlier period sometimes obscured their own Aboriginal status because of the difficulties they faced from Indian agents and other government authorities, and that this may have influenced the information on the affidavit of Roberts's grandmother. In any case, Homeland Security information did not agree with that held by the Campbell River Band, a federally recognized Canadian First Nation.

At this point, Roberts's position was entirely precarious. He had been detained and denied entry originally on the basis of biased perception about phenotype and its relationship with indigeneity. Now the court had ruled that the burden of proof was on the defense and that the government's case could be minimal. In addition, Homeland Security was free to rummage through the files to find any other issue that might derail Roberts' case, or that of anyone else in his family. Ultimately, Roberts decided not to run the risk of the court refusing him his rights to cross the border —as an Aboriginal person with 50 percent blood quantum—and thereby possibly jeopardize a later move to the United States.

The issues regarding the case of Roberts can be understood in light of the experiences of other Coast Salish people. One Canadian Status Coast Salish man recently noted that, in his effort to present his band [identity] card and pass through the border under the rights granted Aboriginal people, the Homeland Security officer at the Peace Arch border patted his handgun in its holster on his hip and told him, "Canada gives out band cards like popcorn. Do you get my message?" This man observed that he felt that he was singled out because of his appearance. He didn't appear dark enough or have other phenotypical characteristics that non-Aboriginal people conventionally ascribe to Aboriginals. These might include long black hair, particular facial characteristics, and short limbs. This man's observations are far from unusual among those Aboriginal peoples living along the international border. The explicit threat made by the act of patting a handgun was sufficiently intimidating to the elderly Coast Salish man that he observed, "He didn't need to tell me twice. I got out of there."[59]

All of this places Coast Salish peoples in a conflicted position. The US Department of Homeland Security, an agency created in the aftermath of the events of September 11, 2001, wants US tribes to facilitate the entry of nontribal personnel onto tribal lands along the border. Further, Homeland Security hope to equip and arm the tribal police heavily, describing the Coast Salish lands as the site of drugs and terrorists. Homeland Security places US

interests above those of Aboriginal peoples; the claim made at the summit was that it must do so and tribal leaders must comply. At the same time as it demands cooperation, Homeland Security reinscribes Aboriginal peoples and lands with new and demeaning imagery.

Discussion and Conclusion

The hardening of the international border dividing the United States and Canada and, more specifically, Washington state and British Columbia is, at first blush, puzzling, in light of the larger processes of globalization, which have tended to deemphasize borders in favor of newer arrangements of free-trade zones.[60] It is more in line with developments in air travel worldwide, which now make extreme demands on passengers, requiring such measures as the examination of shoes and, even more onerous, the use of full-body scanning devices.

The hardening of the border should also be considered in light of international agreements, which grant rights to full contact among fellow members of an Aboriginal group across the border. The 1989 International Labor Organization, convention 169, part VII, calls for governments to facilitate contacts and cooperation between Aboriginal and tribal peoples across borders, including economic, social, cultural, spiritual, and environmental activities. In addition, Article 32 of the 2007 UN Declaration on the Rights of Aboriginal Peoples, now signed by Canada and the United States, maintains that Aboriginal people divided by international borders have the right to maintain and develop contacts with their own members across the borders, and that states, in consultation with the Aboriginal people, will take effective measures to ensure the implementation of this right. The draft Organization of American States Declaration on the Rights of Aboriginal Peoples similarly calls for the rights of mobility and full contact with those with whom ethnic, religious, or ethnic ties are shared.[61]

Sondra Wentzel notes the role of border guards in the management of Aboriginal peoples at remote borders: "As a consequence of the processes sketched . . . , which together lead to more presence of the state in formerly remote areas, indigenous peoples in 'borderlands' all over the world increasingly face very practical problems. These range from difficulties in maintaining social and cultural relationships with relatives and community members to serious limitations to traditional trade and newly developing opportunities for labor migration to violent harassment by border guards."[62] However, one might note that new practical problems have arisen for Aboriginal peoples on far-from-remote borders.

Further, even if US policy may appear to conform to international agreements, in practice, the intimidation and personal biases of individual border guards who may believe that they are acting in support of American policy and interests obstructs many Aboriginal people.

I have written previously of Coast Salish efforts to manage the international boundary that divides their member communities:

> Salish people are currently contesting, inverting, and reconstructing the international border in various ways in order to maintain their communities and to preserve their sense of common identity. It is clear that Native people on both sides of the border persist in thinking of the border as an intrusion and that they think of their responses to the border as efforts to gain social justice within the Canadian and American states. The difficulties of carrying out their lives and pressing their claims within two separate national legal systems remains a considerable barrier to the achievement of justice.[63]

But the current practice of Homeland Security seems to reflect efforts to manage Aboriginal people that conform to Foucauldian notions of disciplinary control. Coast Salish people who violate mainstream notions of phenotype are managed and regulated not by federal regulations that explicitly exclude them but rather by local authorities, who act to implement more localized ideas of identity. The salient question is how Coast Salish individuals and groups negotiate their own circumstances, particularly in light of inconsistencies in the state records, and the suspicion toward Aboriginal people exhibited by frontline security personnel.

In the case of Roberts, there are both too many records (including those that appear to be poorly understood by Homeland Security and court officials) and too few. In particular, the use by the Port Court of decontextualized hearsay evidence that was given a half-century ago, during a period when many Aboriginal people felt they must obscure their own identity as a matter of safety and in order to obtain employment and housing, suggests that the management and availability of archival material is a serious issue. Here, the archival materials don't appear to be available to the Coast Salish people—the records are decontextualized and unavailable. The Homeland Security department appears to have no burden of duty to share documents in order that a hearing be equitable. Meanwhile, Roberts's archival record is insufficiently complete to allow a fully contextualized understanding of his circumstances.

In the end, the cases of Roberts and the other Coast Salish people, including the elder intimidated at the border, are determined not by public policy but rather by the perceptions of the gatekeepers, who act on internalized and unexamined notions of indigeneity. In the current context of fear of contagion and of terrorism, American exceptionalism, or the willingness to act

outside of the spirit of the law, allows a hardened border to deter those Coast Salish and other Aboriginal people who ought to be allowed to cross under both national law and international agreements.

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