



# Boundary Dispute Resolution Unit (BDRU)

Findings from Research and Engagement

October 22, 2020

## Background

In the Canadian Federal budget of 2018 there was an announcement of the expansion of the First Nation Land Management programme for five years and a total investment of \$143.5 million. As part of this expansion, boundary dispute resolution within Indigenous communities was highlighted as an area to investigate. To perform this work, the Boundary Dispute Resolution Unit (BDRU) within the Surveyor General Branch of Natural Resources Canada was formed in September of 2018 and is associated with the First Nation Land Management Program. The goal of BDRU is to examine dispute resolution practices domestically and internationally, and more importantly, to engage with Indigenous organizations and communities to determine what boundary issues/disputes exist, and what is the best way forward in resolving those issues.

This report summarizes the findings to date from over 50 Engagement sessions with Indigenous Communities and organizations, Alternative Dispute Resolution (ADR) professionals, Provincial government officials, and other interested parties. In addition, existing dispute resolution models in Canada are examined.

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## A note about “Ethical Space”

For some, ethical space may not be a familiar concept. Willie Ermine articulates it as “the thought about diverse societies and the space in between them that contributes to the development of a framework for dialogue between human communities”.<sup>1</sup> When examining and discussing dispute resolution, this ethical space is critical. In general, we can describe ethical space as:

- Working to understand a perspective that is different from our own;
- Examining that new perspective to look for connections to our own perspectives/worldviews;
- Linking these worldviews in a way that does not diminish either, but honours both;
- The resulting linked worldviews, which reflects a deep understanding of varying perspectives and values, can result in an ethical space that can transform the way we work together.

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<sup>1</sup> Ermine, W. 2007. The Ethical Space of Engagement. *Indigenous Law Journal*. 6(1) p. 193

## A Guiding Principle:

Before beginning any discussion or examination of dispute resolution, it is critical to understand that there may be conflicts between existing western models of dispute resolution and Indigenous legal orders and traditions. A fundamental point is that “Indigenous laws governing lands and resources existed prior to European contact, and Canada’s Constitution...is viewed by some as a Eurocentric prescription of Aboriginal rights that does not reflect the full scope of Indigenous authority”.<sup>2</sup> Thus, a guiding principle is that Indigenous legal traditions should inform approaches to dispute resolution in the context of land and boundary disputes involving Indigenous communities. This guiding principle is echoed in UNDRIP and in recent Principles and Directives from the Government of Canada. A very brief overview:

### United Nations Declaration on the Rights of Indigenous People (UNDRIP)

Article 34 - “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”

### Principles respecting the Government of Canada’s Relationship with Indigenous Peoples (2018):

- Principle 1: Recognition and respect for the right to self-determination.
- Principle 3: Crown must act with honour, integrity, good faith and fairness in all its dealings with Indigenous peoples.
- Principle 6: Crown will look for creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together.

### Attorney General of Canada’s Directive on civil litigation involving Indigenous peoples (2019):

- Advance an approach to litigation that promotes resolution and settlement, and seeks opportunities to narrow or avoid potential litigation.
- Trust and good faith allow collaborative processes, including facilitation, mediation and negotiations, to be the primary means of resolution.
- Recognition of the inherent jurisdiction and legal orders of Indigenous nations.
- Use alternative methods of dispute resolution.

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<sup>2</sup> Askew, H., Snelgrove, C., Wrightson, K., Courturier, D., Koebel, A., Nowlan, L., & Bakker, K. (2017). Between Law and Action: Assessing the State of Knowledge on Indigenous Law, UNDRIP, and Free, Prior and Informed Consent with Reference to Fresh Water Resources. *SSHRC Knowledge Synthesis Grant Final Report*. Vancouver: West Coast Environmental Law, 16.

## What is a boundary dispute?

Broadly speaking, a 'boundary dispute' is any disagreement, argument, or simply uncertainty over the location of a limit of property, interest or jurisdiction. It is important to note that these "disputes" always have a spatial element, but that the spatial component (e.g. the surveying component) is almost never the sole factor. A few examples to illustrate:

- 1) A 'dispute' over the ownership of a road or watercourse – ownership of the road or watercourse (i.e. who holds title) will influence the spatial element (i.e. where the boundary is), but the ownership/title issue has to be resolved before the spatial component can be clarified. If needed, a survey could be performed once the ownership/title is resolved.
- 2) A 'dispute' over an estate – a person's estate and how it is divided can be a contested event. How the estate is divided may have a spatial component (e.g. subdivision of a large lot to give to family members). Resolution of the estate dispute has to be resolved before the spatial component can be clarified, and if needed, a survey could be performed.
- 3) A 'dispute' over a fenceline, hedge or other physical limits – the placement and origins of a fence or other physical limits can often be contested; most notably on the sale and transfer of a property to a new owner. Depending on the situation, the fence or other physical limit, may reflect the extent of the property, or may not. Researching the history and provenance of the fence is crucial. Only after that is known can the spatial element be reflected.

What these examples illustrate is that boundary 'disputes', while inherently spatial, generally can not be resolved through the spatial lens only. Often the issue covers an interdisciplinary mix involving a mélange of legal, social, technical and historical work.

## External versus Internal Boundaries

Another important aspect to distinguish is the difference between external and internal boundaries. External boundaries (sometimes called jurisdictional boundaries) refer to the limits of where one jurisdiction ends and another begins (e.g. First Nation Reserve boundary). Internal boundaries refer to the limits of property or other ownerships or interests internal to a community (e.g. lots, easements, Certificates of Possession, traditional holdings, etc...). Disputes around External and Internal boundaries differ in at least three important ways:

- 1) The parties involved – external boundary disputes generally involve at least three parties – a) the First Nation; b) Canada; and c) The Provincial government. In other cases a Municipality, County, District or other local government may be involved, as well as fee simple land owners, utility companies, and others who may be affected. Internal boundary disputes are generally between First Nation members, or between members and the Band. In some cases, a third party may also be involved (leaseholders, utility companies, etc...)
- 2) Legislative framework – external boundaries of First Nation Reserves exist within the framework of Federal legislation (*Indian Act, Canada Lands Surveys Act*) and pursuant to section 91(24) of the Constitution. Internal boundaries within First Nation Reserves are sometimes governed by federal legislation (e.g. *Indian Act* interests - Certificates of Possession, Designations, Permits, etc..), while in other circumstances internal boundaries might be established by internal band laws, or by community recognition.
- 3) Surveyed vs unsurveyed – in most cases external boundaries have been surveyed, and in many cases surveyed multiple times. In some circumstances, internal boundaries are surveyed and in other circumstances they are not. For instance, most Certificates of Possession and Designations are surveyed; whereas, traditional allotments, informal leases, and access agreements are frequently not surveyed.

These dramatic differences influence boundary dispute resolution. For instance, the research required for internal versus external boundaries is fundamentally different (where the information is stored, methodology for establishing authenticity of facts, etc..). Most importantly, the parties involved in external vs internal boundary disputes may differ on what manner of dispute resolution is appropriate and fits into the legislative framework, community traditions, or other factors that will influence the parties decisions.



## BDRU Findings to date

In the 2018-19 year-end report, we outlined four major findings for research and engagement, and four crucial lessons. It is worth reiterating them here:<sup>3</sup>

Four (4) Major findings:

1. There is a lot of interest in BDRU – even though it is not explicitly defined what BDRU will do in resolving boundary issues (that is a subject of ongoing discussion with communities), there is much interest in working together (partnering) to find resolution to boundary issues.
2. Boundary issues are wide ranging – the list of boundary issues brought forward in engagement sessions was varied. When asked, most suggested BDRU should help address both exterior boundary (as is the current focus in the FNLM research) and interior boundary issues.
3. Domestic research found many existing Indigenous dispute resolution mechanisms, but most do not deal with land and boundaries. Most programs assist multiple First Nations or any person that identifies as Indigenous. Most programs incorporate both traditional dispute mechanisms as well as aspects of the Canadian judicial system.
4. International research suggests six characteristics are crucial in a dispute resolution systems – i) they have a deep understanding of the customary justice mechanism being used; ii) they have a holistic approach - they are part of a wider justice system, iii) they focus on sustainability – long term view of resolution (inter-generational in some instances); iv) they are locally located, owned and run; v) they accounted for context specific situations; and vi) they were evaluated periodically to ensure accountability

Four (4) crucial lessons:

- 1) Creation of any process must be community driven:** the community must be fully engaged in the creation of any boundary dispute resolution program to ensure the resulting program reflects each community's traditions, values and priorities.<sup>4</sup> As Webber points out: "to be legitimate, the very structure of dispute resolution may have to be negotiated, either expressly or through mechanisms of consultation that result in hybrid forms, combining indigenous and non-indigenous elements".<sup>5</sup>
- 2) Resolution must involve the entire community:** the focus on community involvement is reflected in many Indigenous Justice programs which concentrate on restoring

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<sup>3</sup> For a full review – see Boundary Dispute Resolution Unit (BDRU) Year-end report 2018-19

<sup>4</sup> Couturier, D. (2018). Walking Together: Indigenous ADR in Land and Resource Disputes. James L. Thistle Q.C law essay competition. Canadian Bar Association.

<sup>5</sup> Webber, J. (2004). Commentary: Indigenous Dispute Settlement, Self-Governance, and the Second Generation of Indigenous Rights in *Intercultural Dispute Resolution in Aboriginal Contexts*. UBC Press. Vancouver.

relationships, and incorporating traditional knowledge, values, oral history and storytelling as part of the process. For example, Varis outlines four main themes as part of her review of Stó:lō Nation justice: a) Elders must be involved<sup>6</sup>; b) family ties and connections must be used; c) cultural teachings are incorporated (respect, humility, sharing, role modeling, balance, harmony, consensus building); and d) spirituality.<sup>7</sup> Victor distills it down further: “Aboriginal justice must necessarily be based on the culture of the respective First Nation community”.<sup>8</sup>

- 3) **Must provide a range of options:** many options exist for resolving boundary disputes. This may include fact-finding, restorative justice, mediation, negotiation, arbitration, and various permutations and combinations thereof. Not all of these options may be acceptable in Indigenous communities. The process, therefore, must be specific to each community- not just indigenous values in general. Each community has its own traditions, legal orders, stories, customs, and site-specific attachments. Establishing a roster of regional indigenous facilitators to work alongside BDRU staff as well as regional SGB offices when deemed prudent could help assist communities in establishing their own resolution systems and resolving boundary disputes.
- 4) **Must be free choice:** using any boundary dispute resolution process must be elective on the part of the participants and Indigenous community.

Involvement from BDRU in a boundary dispute resolution process must work within these four critical elements. Additionally, BDRU must be conscious to the broader colonial context in which a proposed boundary dispute resolution might reside. This context has the potential to influence views and suspicions of state institutions or state-sponsored initiatives (such as BDRU), and to (real or perceived) power differentials between parties (such as between the Government of Canada and an Indigenous community). Depending on the desires of the community, the involvement of BDRU could take many forms, from no involvement, to minimal involvement, to too much involvement.

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<sup>6</sup> The term **Elder** refers to someone who has attained a high degree of understanding of First Nation, Métis, or Inuit history, traditional teachings, ceremonies, and healing practices.

<sup>7</sup> Varis, M.E. (2017). Justice in the Words of Elders: Stories, Teachings and Wisdom on Unceded Coast Salish Territory. M.A. thesis. School of Criminology, Simon Fraser University.

<sup>8</sup> Victor, W. (2001). Searching for the Bone Needle. The Sto:lō Nation’s Continuing Quest for Justice. M.A. thesis. School of Criminology, Simon Fraser University.

## Sixteen (16) Specific Engagement Findings

In addition to the general findings indicated in the previous section, there were also many specific findings from the 50 some engagement sessions held to date. Some of these findings were specific to a single Indigenous communities, while others were highlighted numerous times. It also should be noted that the conversations at engagement sessions was free flowing and concentrated on any concerns that the community (or any other party attending) wished to discuss, even if this was at times outside the scope of BDRU Terms of Reference. The following is a brief summary of 16 specific findings/lessons from engagements:

- 1) The first engagement is merely an introductory chat starting an on-going conversation, meaning that “engagement” is better described as a “partnering.”
- 2) Interest in partnering with BDRU is high - there was a great deal of interest in exploring the idea of partnering together to resolve boundary disputes. Many communities wanted to continue the conversation.
- 3) ADR – alternative dispute resolution – is not an appropriate term. It connotes an inferiority to more “mainstream” Canadian judicial processes. This is not appropriate when speaking of long established Indigenous Justice systems,
- 4) BDRU should be publicized on web-sites of Indigenous institutions. This was mentioned at several engagements.
- 5) There is much diversity across communities in types of disputes and in capacity to address disputes. Capacity ranges from fully implemented Indigenous Justice systems which can deal with boundary disputes, to no mechanism at all.
- 6) Some examples of ad-hoc dispute resolution systems were voiced. These included convening panel of elders and others to hear disputes (and provide advice), community landholder meetings, and the meeting of families to hear disputes.
- 7) Boundary issues varied widely; The following is an overview of the disputes identified playing out over boundaries:
  - estate issues
  - disputes between leaseholders
  - traditional holdings
  - disputes between families
  - shared parcels
  - unregistered surveys
  - errors in surveys
  - houses straddling boundaries
  - illegal takings
  - Provincial roads/highways
  - riparian boundaries
  - flooding/damming by adjacent landowners
  - archeological sites
  - access issues
  - road widenings
  - unsurveyed roads
  - feuding parties
  - encroaching structures
  - Veteran land grants

- 8) Lands Manager, Lands Committee and Chief & Council are generally not the best forum for resolving parcel fabric disputes, given their expertise and mandate.
- 9) In some engagement sessions the focus tended to be on parcel fabric (internal property boundaries). Less emphasis was placed on exterior Reserve/jurisdictional boundaries.
- 10) A near unanimous sentiment was that both external and internal boundaries should be addressed, and concern was expressed about boundaries in traditional lands/territories as well.
- 11) Riparian boundaries were noted as being contentious, owing to erosion, flooding, dredging, access, damming and flooding.
- 12) Workshops were discussed as being ideal venues for engaging/partnering. This was mentioned by several organizations.
- 13) Ratified Land Codes might provide impetus for partnering with BDRU. Land codes have a dispute resolution section already built in.
- 14) To avoid possible conflicts of interest it was suggested that a First Nation/BDRU partnering could be used to help resolve disputes in a different First Nation community.
- 15) Sometimes a compromise boundary is best - neither of the bounds sought by the two parties. This is contrary to most resolutions, but is more in the line of restorative justice.
- 16) It was suggested an early product to guide communities, might be a Best Practices Manual (e.g. menu of resolution techniques – from fact-finding to binding arbitration – linked to type of dispute. The engagement of third parties such as utility companies, waterway authorities, Provinces, fee simple owners was emphasized.

## The importance of research

The role of research in a boundary disputes is critical. All parties should have a mutual access and understanding of the facts prior to discussing a resolution. Research on boundaries in Indigenous communities is often multi-faceted, but in general it will cover six (6) main areas:

- 1) Survey History – the survey history involves reviewing all plans of surveys, survey instructions, and field notes of the disputed boundary. The primary source for these documents is the Canada Lands Survey Records. These survey documents will help outline the extent of physical monumentation on the ground, when monuments were put in, under whose instruction, and how the physical monumentation may differ from physical occupation on the ground.
- 2) Land Registry History – the land registry history documents the recorded rights issued to parcels of land. This may include Orders-in-Council, surrenders, transfers, leases, easement agreements, and so on. The primary source for this is either the Indian Lands Registry System or the First Nation Lands Registry System
- 3) Historical Imagery – historical imagery can illustrate the history of the land mass change over a given area. For instance, it may illustrate movement of a waterbody (accretion/erosion), or the history of occupation on a parcel (land clearing, buildings, roads). The best sources for historical imagery are the National Air Photo Library and the Provincial Governments. In developed areas, historical imagery can go back as early as the 1920s.
- 4) Archival Search – archival searches generally comprise searching archival repositories such as Library and Archives Canada or a Provincial Archive. Sometimes this may include more regional or local archives and historical societies. These searches are often a good location to find correspondence between officials, preliminary maps, complaints and disputes filed, and other relevant matters.
- 5) Internal files – internal files refer to any documents that are not in public repository. The most common places to find these internal files for boundary issues will be internal government files (some of these documents may have been placed in the archives), files of surveyors who have worked in the area, files that the First Nation kept locally, or information locals in the area may have retained. These may be letters, emails, minutes, reports, etc...
- 6) Oral History – oral history is the collection of information from people having personal knowledge of the situation. In most cases for boundary issues, this would be the owners around the boundary being disputed, past owners, descendants of the owners, or other elders in the community with knowledge of the area.

Weaving the information together from all these sources can be complicated, but it is an essential step in ensuring all parties understand the boundary issue and history. The research process also puts all parties on an equal playing field in terms of access to information. An example of research into a boundary dispute is included as Appendix A.

## Dispute Resolution in the International Setting

Based on a review of international research on boundary dispute resolution with Indigenous communities, six lessons are valuable to consider for the context in Canada. The following is a short summary of these lessons:

### **1) Programs were based on research and assessments**

Successful dispute resolution programs were based on a deep understanding of the customary justice mechanisms. Assessments aimed to establish a comprehensive understanding of the political, social and cultural context, identify key areas of need, identify potential risks, prioritize actions and build consensus among key actors and agencies to facilitate coordination and avoid duplication.

### **2) Programs had a holistic approach**

Boundary dispute resolution programs that were considered as a part of a wider system and integrated the existing relations between customary justice and state justice had better results. Additionally there was strong linkages between less successful results and the absence of a holistic action plan and recognition by the state Justice system.

### **3) Programs had their focus on sustainability**

Building trust in dispute resolution programs (and the justice system as a whole) are long-term/inter-generational processes. Programs adopting a long-term strategy, aiming at modest and achievable objectives and bringing changes incrementally had better results.

### **4) Programs were locally owned**

Locally owned dispute resolution programs were more likely to respond to local needs, be perceived as legitimate and have a greater chance of impact and sustainability. However, devolution of ownership to local actors should not be overstated. Vesting ownership in customary authority may perpetuate inequalities, obstruct meaningful changes and bring unexpected or undesirable results (when, for example, local preferences are incompatible with human rights and international standards). Programs should establish clear guidelines for acceptable and unacceptable practices.

### **5) Programs developed context specific strategies**

Successful dispute resolution programs assessed and took into account contextual factors (governance issues, political issues, social and economic issues, security issues, legal culture, capacities).

### **6) Programs were evaluated**

Successful dispute resolution programs considered evaluation an integral element of program design and management. Evaluations allow programs to monitor the changes and meet the objectives. International organizations provide frameworks to evaluate customary justice mechanisms and systems.

## Dispute Resolution Models in the Canadian Legal System

This section will outline two different dispute resolution methods in Canada's judicial structure – the courts and administrative boards/tribunals.

### Courts

In most jurisdictions in Canada, there is a four level hierarchy of the courts in terms of their legal authority. The most notable exception to this hierarchy is the Federal Court, which is distinct from Provincial Courts and has a three level hierarchy. In general, each court is bound by the decisions of the courts of a higher level, but are not necessarily bound by decisions of courts at the same level.

Depending on the boundary issue, a dispute may run through a series of courts.

- 1<sup>st</sup> Supreme Court of Canada
  - 2<sup>nd</sup> Provincial/Territorial Courts of Appeals
    - 3<sup>rd</sup> Provincial/Territorial Superior Courts
      - 4<sup>th</sup> Provincial/Territorial Courts
  - 2<sup>nd</sup> Federal Court of Appeal
    - 3<sup>rd</sup> Federal Court

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• Courts are already created</li><li>• Transparent process and clear rules</li><li>• Decisions are binding and enforceable</li><li>• Appeals are possible</li><li>• Judges are considered impartial</li><li>• Decisions are based on precedent, so decisions may be more consistent</li><li>• Courts rely on professional paid staff and not volunteers</li><li>• There is a public record of decisions</li></ul>	<ul style="list-style-type: none"><li>• Part of the Canadian legal system</li><li>• Typically no role for kinship groups or community members in the court hearing process</li><li>• Judges are typically from outside the community and may lack important community knowledge</li><li>• Judges are not trained in Indigenous legal traditions</li><li>• Canadian legal system has a history of bias (real or perceived) against Indigenous laws and people (lack of trust)</li><li>• Expensive, difficult to navigate without legal council, and time consuming</li><li>• There is a public record of decisions</li></ul>

Other considerations (situation dependant) which may warrant using the courts:

- Situations of high conflict
- Situations involving safety issues of one or more parties to the dispute
- There are power imbalances between the parties
- There is a desire to create a precedent
- If one party to the dispute does not wish to comply or participate
- There is a desire for an impartial neutral decision-maker

## Administrative Boards/Tribunals

Tribunals and boards are less formal than the court system, and are separate and distinct from the courts. These boards and tribunals function much like courts in that they hear evidence and an adjudicator renders a verdict. Canadian boards/tribunals are generally set up for a specific purpose (some examples include human rights, labour laws, immigration, energy, etc...). Unlike courts, boards/tribunals may not be presided over by a judge, but often by experts in the specific field of the board or tribunal.

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• Established to deal with specific issues</li><li>• Processes and rules are more flexible than courts</li><li>• Processes are transparent and enforceable</li><li>• Can be composed of experts, community members, and non-community members (or any mix considered appropriate)</li><li>• Can incorporate community values, laws and principles because of the flexibility of the tribunal members</li><li>• Hearings generally take place in a less tense environment (in comparison to a courtroom)</li><li>• Can be less intimidating for participants</li><li>• Generally less expensive and time consuming than courts</li><li>• Decisions can create precedent</li><li>• There is a public record of decisions</li></ul>	<ul style="list-style-type: none"><li>• Takes significant resources to create</li><li>• You need authority to create a tribunal (generally a statute setting out the powers, membership and process of the tribunal)</li><li>• Can sometimes mean a partnership with the Canadian legal system (e.g. Metis Lands Settlement Tribunal)</li><li>• You may require a range of tribunal members with different expertise to sit on the tribunal depending on the issue</li><li>• You need staff to schedule hearings, disseminate information, and publish decisions.</li><li>• There is a public record of decisions</li></ul>

Other considerations (situation dependant) on building a tribunal:

- Multiple communities that share language, values, and laws want to work together on a tribunal to share the cost and effort
- The goal is to offer many processes to participants from one organization
- When you want to define your own appeal and enforcement processes
- When you want to involve experts with specific knowledge about an area of dispute



## “Alternative” Dispute Resolution Processes

Alternative dispute resolution (ADR) processes exist within the Canadian legal system landscape and are considered “alternative” because they are non-court. Some ADR processes are flexible, and despite their origins in the Canadian legal system (i.e. they are not indigenous), they can provide space for Indigenous laws and legal traditions.

It is also important to note that the use of the word “alternative” should only be applied when speaking of alternatives to the Canadian legal system. It is not appropriate when speaking of long established Indigenous legal systems (i.e. they are not “alternatives”)

## Mediation

Mediation involves the use of a neutral third party, agreed to by the participants, who helps willing parties in resolving a dispute. The mediator, however, does not make any binding decisions or judgement. The mediator's roll is to facilitate a discussion so the participants can resolve their own dispute. In some mediation contexts, the mediator can be a subject matter expert (e.g. on boundaries) and will also present options for resolutions and assist participants in creating agreements. Generally, mediators undergo professional training and certification, but do not need to have a legal education.

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• Informal and flexible</li><li>• Designed to preserve relationships, not pick winners and losers</li><li>• Legal council is not required (although not restricted either)</li><li>• Less expensive and time consuming than court or tribunal processes</li><li>• Can include community members, extended family, kinship groups and others in the process depending on the the desires of the participants</li><li>• Can incorporate Indigenous laws and traditions</li><li>• Complete control over what is discussed</li><li>• Confidential between the parties at the table and the mediator</li><li>• There is usually no public record of decisions (final decision are usually written up in a confidential report). Participants may choose to publicize or not.</li><li>• Because the participants developed the agreement, they usually leave the mediation table sastisfied with the outcome.</li></ul>	<ul style="list-style-type: none"><li>• Assumes two equal participants, so may hide gender and power imbalances</li><li>• Assumes parties are willing participants in the mediation process</li><li>• If there is a high level of conflict between participants, mediation may not work</li><li>• Outside mediator may not understand Indigenous laws and traditions (may need a co-mediator from the community agreed to by the parties)</li><li>• If one party does not agree with the outcome after the fact, enforcement can be difficult (i.e. it is not a judge's decision)</li></ul>

Other considerations (situation dependant) which may warrant using mediation:

- There is a desire for space for multiple voices
- Preservation of relationships is crucial
- Participants have a desire of an informal and private setting
- There are no significant power imbalances between the participants
- The issue is not a high conflict situation
- When the desire is to keep the resolution of the issue confidential  
*(Note: in a boundary issue, even if the issue is resolved by mediation and kept private, the resolution will be somewhat visible – i.e. a changed fence line, new survey plan, etc...)*

## Negotiation

Negotiation involves parties working together on an agreement that will resolve the dispute. This may involve the parties directly negotiation with each other, or the parties are represented at the negotiation table by a negotiator or legal counsel.

In contrast to mediation, negotiations typically do not involve a third party to facilitate discussions, nor do negotiations require the parties to be physically present together or on a set-schedule. Negotiations, for instance, could take place over a video conference or teleconference. For these reasons, negotiation is typically the most cost effective dispute resolution process.

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• Informal and flexible</li><li>• Gives participants complete control over the process</li><li>• As long as the agreement follows the law, parties can come up with any negotiated solution that is amicable.</li><li>• Legal council is not required (although not restricted either)</li><li>• Less expensive and time consuming than court or tribunal processes</li><li>• Confidential between the parties</li><li>• Can include community members, extended family, kinship groups and others in the process depending on the the desires of the participants</li><li>• There is usually no public record of a negotiated agreement, but parties may choose to publicize</li><li>• Can incorporate Indigenous laws and traditions</li><li>• As the parties developed the negotiated agreement, they are more likely to be satisfied and comply with it.</li></ul>	<ul style="list-style-type: none"><li>• Requires two willing parties to negotiate</li><li>• Assumes two equal participants, so may hide gender and power imbalances</li><li>• Given the lack of a third-party neutral, negotiations are susceptible to one party influencing the other</li><li>• Likely will not work for high-conflict situations</li><li>• If one party does not agree with the outcome after the negotiated agreement, enforcement can be difficult</li></ul>

Other considerations (situation dependant) which may warrant using negotiation:

- There is no need for a third party (neutral or decision maker) as part of the process
  - There is no need for the parties to meet face to face
  - Where privacy is a concern
- (Note: in a boundary issue, even if the issue is resolved by negotiation and kept private, the resolution will be somewhat visible – i.e. a changed fence line, new survey plan, etc...)*

## Arbitration

Arbitration, as opposed to mediation, is much closer to a courtroom. There is a person of authority accepted to make binding decisions (an adjudicator). These persons of authority are generally experts in an area of law specific to the issue being disputed. The adjudicator listens to the arguments from participants (or participants' legal counsels) and then renders a decision. Decisions of the adjudicator are then binding on the participants.

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• Not as formal as a courtroom</li><li>• Often occur in a private room with participants, legal council, any other required parties, and the adjudicator</li><li>• Adjudicator can be chosen by the participants, and adjudication can be scheduled in a more flexible manner than a court setting</li><li>• Generally less intimidating to participants than a courtroom</li><li>• Often costs less and is more efficient than court proceedings.</li><li>• Addresses power imbalances better than mediation due to the role of the adjudicator</li><li>• Participants get a clear decision</li><li>• The decision can be enforced. Generally by the courts, but it is also possible to have enforcement by agreements (e.g. with Chief and Council, Lands Office, etc...)</li><li>• An appeal process can be designed</li><li>• In most cases, there is a public record of decisions</li></ul>	<ul style="list-style-type: none"><li>• Rules and procedures are mostly fixed and not alterable by participants</li><li>• Typically more costly, especially if the arbitration is part of a full running tribunal.</li><li>• Arbitration can be run on an ad-hoc basis as well, but the rules, procedures, distributing of information, and maintenance of records required to conduct arbitrations will take an investment of time, money, and expertise.</li><li>• More staff are required for arbitration than for mediation or negotiation</li><li>• Enforcement of decisions can be cumbersome</li><li>• Is less effective at maintaining relationships</li><li>• In most cases, there is a public record of decisions</li></ul>

Other considerations (situation dependant) which may warrant considering arbitration:

- There is a desire for a third-party authority with specialized knowledge (e.g. on boundaries) to make a binding decision
- There is high degree of conflict in the issue
- There is a power balance between the participants
- There is a desire to create a precedent
- When it is suspected a participant may not abide by a negotiated or mediated agreement

## Mediation-Arbitration (Med-Arb)

Med-Arb is a hybrid process designed to help reduce the drawbacks of mediation or arbitration alone. For instance, a) mediation can end in an impasse, a prospect participants may not be willing to accept; and b) Arbitration doesn't allow participants to be involved in deciding an outcome as mediation does.

In a med-arb process, parties first reach agreement on the terms of the process itself. Typically—and unlike in most mediations—they must agree in writing that the outcome of the process will be binding.

Next, they attempt to negotiate a resolution to their dispute with the help of a mediator. As in a traditional mediation, the mediator may suggest caucusing with each party individually to discuss possible proposals in addition to bringing disputants together to air their views and brainstorm solutions.

In med-arb, if the mediation ends in an impasse, or if issues remain unresolved, the process isn't over. At this point, parties can move on to arbitration. The mediator can assume the role of arbitrator (if he or she is qualified to do so) and render a binding decision quickly based on her judgments, either on the case as a whole or on the unresolved issues. Alternatively, an arbitrator can take over the case after consulting with the mediator.

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• Can motivate participants in the mediation process so as to avoid an adjudicator making a binding decision</li><li>• Useful when there are many disputes between the participants, and only some of them can be resolved through mediation</li><li>• Can provide space for Indigenous law and tradition</li><li>• Mediated portions are generally kept confidential</li><li>• Arbitrated decisions are generally made public</li></ul>	<ul style="list-style-type: none"><li>• The mediation portion of med-arb does not cost a lot to create or maintain, but the arbitration may (see disadvantages of arbitration).</li><li>• Arbitrated decisions are generally made public</li></ul>

Other considerations (situation dependant) which may warrant considering med-arb:

- There are many areas of conflict, with only some amenable to mediation
- The conflict itself is not high, and the participants have a mutual desire to resolve through mediation
- There are resources (time and money) to support arbitration

## Two examples of Government-run Alternative dispute resolution

The following section will provide a brief overview of two government driven dispute resolution models in Canada pertaining to land. The Alberta Energy Regulator (AER) created a dispute resolution process to resolve disputes relating to energy development. The Canadian Energy regulator (CER) also created a dispute resolution mechanism to resolve issues pertaining to energy and development on federal lands. The CER's mechanism was modelled from the AER. The information in this section was gleaned from interviews in 2019.

### *Alberta Energy Regulator*

In 2001, Alberta's Energy Regulator (AER) implemented an Dispute Resolution option to resolve disputes in Alberta related to an energy development or activity, including disputes over land. The options under this are through AER staff-led mediation or independent third-party mediation. AER staff led mediation are independent from the application process, are not decision makers, or legal advisors. They can provide regulatory information as well as evaluate consultation efforts and provide feedback.

The AER process begins with the concerned party submitting a statement of concerns to the AER. The next step is to decide if the issue required mediation (non-binding decisions) or if the issues will move to a hearing commissioner (binding decisions).

The AER's involvement may include facilitation of meetings, mediation between two or more parties, or involvement of a hearing commissioner. The AER uses a qualified roster of mediators to resolve disputes. AER mediators are separate and independent from the application process.

With respect to concerns from indigenous groups regarding energy regulation in Alberta, the AER sees issues surrounding traditional lands as opposed to Reserve lands. Indigenous issues are typically resolved through hearings as opposed to mediation as there is no one with authority to make decisions at the mediations.

### *Canadian Energy Regulator*

The Canadian Energy Regulator (CER) developed an Dispute Resolution option in 2002 to resolve issues pertaining to pipelines, power lines, and imports and exports of natural gas and petroleum that cross international or provincial borders. The dispute resolution process is viewed as a collection of tools and techniques that can be used to reach a resolution on issues instead of using the CER's regulatory process. Options include negotiation, facilitation, workshops, and mediation. The CER is proactive in identifying situations that may be resolved through ADR techniques, and employs conflict management specialists to assist in the ADR process.

Canada's Energy Regulator (CER) mediates conflict between landowners and companies within Canada. A complainant must initiate a complaint process. The CER will follow up with the complainant within 10 business days and will conduct an initial analysis on the issue, including a history of the relationship between the parties. The CER will send the complaint to the company, giving the company a set amount of time to respond to the complaint. There are two options for resolving a complaint through the CER- the first is adjudication, and the second is ADR.

Under the ADR process, the CER contacts all parties involved in the dispute, and completes a pre-mediation conference to come to an agreement on costs, compensation, representation, and confidentiality. CER mediators are used for disputes unless a party requests a third party. The mediation process is flexible, and can incorporate special requirements, ceremonies, and speakers based on needs. Most of the disputes are resolved within 1-3 months of starting the complaint process. 80% of disputes are resolved or closed within the target date, with 30% of the disputes being resolved without a need for mediation, and 70% being resolved through ADR or adjudication. Approximately 97% of disputes that are addressed by ADR are resolved.

## Indigenous and Community-based Dispute Resolution Models

*In addition to the plethora of “alternative” modes of resolution are the Indigenous paradigms, which call for the rejuvenation and use of Indigenous methods of resolving disputes. Although both paradigms are currently used to address similar disputes, they are often fundamentally different from one another. They are grounded within very different worldviews and often ask very different types of questions. This does not mean that one paradigm may not at times draw from the other or that they do not share similar challenges. It does, however, require respect for differing worldviews and an acknowledgement of the ways in which colonialism impacts the development, implementation and interaction both within and between the two paradigms*

- Wenona Victor<sup>9</sup>

This section will examine existing Indigenous and community based dispute resolution models in Canada. This is by no means an exhaustive search, but does illustrate the variety of dispute resolution systems in Indigenous communities.

The examination of these models revealed that themes such as Cooperation, Family, Responsibility, Community, Respect, Discussion and Tradition are common. These themes are evident in the use of informal discussions, panels of multiple community members, mediation, and circle processes before more adversarial approaches such as tribunals or litigation. Circle processes are an alternative form of communication, based on traditional customs and healing processes of Indigenous peoples in Canada and the southwestern United States. This processes are defined by everyone in the circle being equal, decision-making by consensus, and agreeing to abide by established guidelines or shared values in order to work towards a common goal.<sup>10</sup>

Although these are suggested commonalities it is important to note there are no universal one-sized-approaches. As well, some Indigenous communities may have lost touch with their cultural dispute resolution mechanisms and this may be a way for them to reengage with their traditional forms of problem solving. Indeed, many of the themes, models, and approaches illustrated in the examples that follow may be applicable or they may not. Or can be combined and blended into many different permutations.

The following section will review dispute resolution mechanisms under three categories. The first being dispute resolution as part of a First Nations Land Code under the *First Nation Land Management Act*. The second is dispute resolution is used mainly for matrimonial real property disputes. These types of mechanisms focus exclusively on resolving issues pertaining to property shared by two people during a marriage or a common-law relationship. The third is a hybrid dispute resolution process, where the First Nation uses traditional knowledge as well as aspects of western dispute resolution processes.

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<sup>9</sup> Victor, W. 2007. Alternative Dispute Resolution (ADR) in Aboriginal Contexts: a Critical Review" (April 2007). Canadian Human Rights Commission. [http://www.chrc-ccdp.gc.ca/sites/default/files/adrred\\_en\\_1.pdf](http://www.chrc-ccdp.gc.ca/sites/default/files/adrred_en_1.pdf) (retrieved December 11, 2019)

<sup>10</sup> Naganosh. D. 2020.



## FNLM Conflict Resolution

The following four dispute resolution models were written as part of the First Nation's Land Code under the *First Nation Land Management Act (FNLMA)*. Land Codes are written by individual First Nations and provide the option to include a dispute resolution policy within them.

### Long Plain

Long Plain First Nation developed a dispute resolution mechanism to resolve land disputes under their Land Code. The resolution process begins with informal talks between parties, then can move through facilitation, appeals, and adjudication (Long Plain First Nation Land Code Draft January 2014. 38.4). The Long Plain Land Authority was developed to manage lands and also create a list of community members who are eligible voters with knowledge and experience to serve on an appeal panel for facilitation and appeals (Long Plain First Nation Land Code Draft January 2014. 39.1). Decisions by the appeal panel are binding and are "final except for review by a court of competent jurisdiction" (Long Plain First Nation Land Code Draft January 2014. 42.5).

### Haisla First Nation

The Haisla First Nation ratified their Land Code in 2014 and included a dispute resolution mechanism within the code. To resolve land related issues, community members are provided the options of informal discussion, mediation, or arbitration (Haisla Nation Land Code. 2014. S31.1). If informal discussions do not resolve the issue, then the parties can choose a mediator from the British Columbia Media Roster or move to arbitration through the British Columbia Arbitration and Mediation Institute (Haisla Nation Land Code. 2014 S.33.1 and S34.1).

### Stz-uminus First Nation

The Stz-uminus First Nation ratified their Land Code in 2014 and also included a dispute resolution mechanism. The process is similar to the Haisla Nation by employing informal discussion and then mediation and arbitration if necessary (Stz-uminus First Nation Land Code. 2013. S.42.1).

### Beausoleil Land Dispute Resolution Policy

The Beausoleil Land Dispute Resolution Policy was written in 2012 as a way to provide equitable procedures to Beausoleil First Nation members to settle land disputes. This policy has not been passed by the Beausoleil First Nation and is therefore not active at this time. Although the policy is not active, it provides an option to community members who are looking to resolve boundary disputes.

The Policy allows members to resolve land disputes by applying to the Keepers of Our Sacred Land (KOOSL) Committee. The KOOSL is a committee established to review land issues and make recommendations to Chief and Council. The KOOSL Committee would be responsible for any land related issue involving negotiation. If the issue is not resolved, then it is referred to the Land Dispute

Panel (chosen by KOOSL Committee). The Land Dispute Panel and would be comprised of six qualified individuals who have the authority to hear land disputes regarding Beausoleil First Nation lands and do not necessarily need to be community members. The Panel would settle disputes through mediation or arbitration. If neither of these options are successful, the matter can be taken to further litigation outside of the community.

## Matrimonial Real Property Dispute Resolution

Many First Nation communities enacted dispute resolution mechanisms to resolve matrimonial real property disputes. These type of disputes typically arise when there is a relationship breakdown between two people and a dispute arises over shared lands.

### Beecher Bay

In 2003, Beecher Bay First Nation enacted their matrimonial real property law which included a dispute resolution mechanism to resolve matrimonial real property disputes. Under this mechanism, parties must successfully negotiate an interspousal contract to divide property in the event of a relationship breakdown. In the event that an agreement cannot be reached, parties are to participate in mediation and choose a mediator from an approved roster of mediators. Both processes require parties to choose a mediator from the British Columbia Mediator Roster Society.

### Kitselas and Westbank First Nations

Westbank First Nation passed their family property law in 2006, which included a dispute resolution process (Westbank First Nation Law 2006-02. 2006). Kitselas First Nation passed their Family Property Law in 2009 which included a resolution process (Kitselas First Nation Law 2009-1). Both processes are quite similar, requiring that parties attempt mediation before arbitration when resolving matrimonial real property disputes. If an agreement is not reached during mediation, a report is created stating that mediation was attempted. The report can be used in court to resolve the dispute (Westbank First Nation Law 2006-02. 2006 Sections IV and V; Kitselas First Nation Law 2009-1 Sections IV and V).

### Tsawout First Nation

In 2012, the Tsawout First Nation passed their Real Property Law which enacted a dispute resolution mechanism. Parties are encouraged to resolve matrimonial real property issues through cooperative discussion, mediation, or an alternative resolution process (Section 5.1). Parties are encouraged to speak to the heads of families and elders about issues for support and guidance (Section 5.2).

### Anishinabek Nation (Union of Ontario Indians)

The Anishinabek Nation represents 40 First Nations across Ontario. Beginning in 2003, the Anishinabek Nation started their dispute resolution process through workshops and conferences within different Anishinabek communities. The dispute resolution process was designed by the communities and involves traditional values and promotes maintaining positive relationships within the communities. The

first step of the dispute resolution process is an informal discussion involving an elder or a member of the community to work with the disputing parties to resolve the issue. If this does not work, the parties can move to mediation where a trained mediator from within the community leads a voluntary mediation. If mediation does not resolve the issue, a trained, 3-person panel of community members will hear evidence from the parties. The panel is given the authority to make recommendations and decisions to resolve the issue.

### Six Nations of the Grand River

In 2012, the Six Nations of the Grand River passed “A Law Concerning Matrimonial Real Property” which included a dispute resolution process to resolve property disputes through community-based solutions. The process includes mediation where a third-party mediator is chosen from the community. If the parties cannot come to an agreement through mediation, then the Iroquois Dispute Resolution Tribunal becomes involved. The Tribunal is comprised of three impartial community members and is based on traditional approaches to dispute resolution. The hearing process will include an opening and closing prayer and will include input from elders if the matter involves culture, tradition, heritage, or language. The Tribunal will follow administrative justice applicable to Canadian Tribunals but must also comply with the “Matrimonial Real Property laws of Six Nation of the Grand River”.

### Hybrid Models

Hybrid models of dispute resolution blend traditional community knowledge and legal traditions with western alternative dispute resolution processes. A hybrid model allows for dispute resolution to be modified and adapted to a specific community, with the community taking ownership of the process.

### Aiskapimohkiiks Program

This hybrid model incorporates both Indigenous and Euro-Canadian legal traditions and was developed as a community-based justice program in order to assist Siksika Nation members to resolve disputes. The Program utilizes both mediation and formal adjudication as options for dispute resolution. These mechanisms incorporate Blackfoot traditions, values, and customs. Decision makers are made up of a three-member tribunal that includes an elder, a member of the Siksika community, and an independent chair to conduct arbitration as well as an Elders Advisory Committee.

### Treaty 4 Administrative Tribunal

The Treaty 4 Administrative Tribunal is another hybrid model that incorporates both Indigenous and Euro-Canadian legal traditions. The Tribunal is accessible to 34 First Nations within Treaty 4 Territory and can be used when disputes cannot be resolved at the community level through mediation and peacemaking. To assert jurisdiction, each First Nation that want to participate in the Tribunal must designate the Tribunal as the dispute resolution mechanism to use. Members of the Tribunal are chosen from each First Nation within Treaty 4 but members do not participate in resolving conflicts within their own community. Tribunal members are trained in First Nation community-based laws and engage in pre-hearing, hearing, decision-writing, and after the decision processes. The Tribunal does not make

binding decisions and is focussed mainly on fact-finding and settling disputes through the application of First Nation laws. The Tribunal does not deal with criminal matters or make decisions that award costs for damages.

### First Nations Custom Advisory Panels

The First Nation Custom Advisory Panel is a community-based justice program that operates in the five member First Nations in the Yellowhead Tribal Council. The recipient nations are Alexander First Nation, Alexis Nakota Sioux Nation, Enoch Cree Nation, O'Chiese First Nation, and Sunchild First Nation. The Panel is overseen by the Yellowhead Tribal Community Corrections Society and is designed to employ traditional methods of dispute resolution in a way that is transparent to members of the participating First Nations communities and other organizations that deal with these First Nation governments or institutions.

### Stó:lō Nation: Qwí:qwelstóm

Qwí:qwelstóm was created in 1999 under the Community-Based Justice Fund. Qwí:qwelstóm is the Halq'eméylem word that best describes "justice" according to the Stó:lō worldview. It reflects a "way of life" that focuses on relationships and the interconnectedness of all living beings. Qwí:qwelstóm is a means by which the Sto:lo people are given an opportunity to assert their inherent right to self-determination through justice and responsibility that focuses on maintaining family and community connections.

During dispute settlement, affected family and community members are called together to discuss what has happened and to reach an agreement on how to best repair the harm and restore balance and harmony to the disrupted relationship. Qwí:qwelstóm typically involves circle work<sup>11</sup> where those involved in the circle, discuss of the offence and how it has affected the community and its members. Each of the four themes are equally important when coming together to discuss the offence to impose a sense of responsibility upon the offender for their actions for justice to be served within the community.

Facilitators of the Qwí:qwelstóm program underwent 18 months of training that involved workshops, conferences, training on peacemaking circles, family group conferencing, Aboriginal Justice Initiatives, FAS conferences, restorative justice, and training in conflict resolution. Facilitators are trained to focus on the individual as opposed to the act or behaviour. Facilitators focus on feelings, relations, and restoring balance and harmony.

### Elsipogtog Restorative Justice Program

The Elsipogtog Restorative Justice Program (ERJP) in New Brunswick was created in 2000 with the goal of dealing with offending behaviour by "involving the victim, the offender and the community,

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<sup>11</sup> Circles typically includes members of the community- elders, offender, and victim coming together in a safe space.

empowering the parties to obtain a more in-depth and holistic appreciation of the harm done, why it may have been done, and how, while underscoring accountability to properly set things right”.<sup>12</sup> Since the creation of the ERJP, the program has expanded to include Sentencing Circles (2010) and a Healing to Wellness Court (2012). When creating these programs, Elsipogtog First Nation examined 12 Indigenous justice programs to determine what would work best in their community.<sup>13</sup> Common themes across these programs included resolving similar issues, courts on reserve leading to positive change within the community, working in a collaborative way with the Canadian justice system, need for community ownership for the program to be effective, support of Chief and Council, and collaboration with other First Nations for cost effectiveness. This program does not focus on any land or boundary issues.

### Wet’suwet’en Unlocking Aboriginal Justice Program

The Wet’suwet’en Unlocking Aboriginal Justice Program (WUAJ) was developed in 1992 and combines traditional Indigenous justice practices with practices of the Canadian justice system to hear offences within the community and also offers workshops that address culture, self-esteem, and abuse. The program is guided by an advisory board of elders and chiefs who have knowledge in traditional laws. The process for resolving offences includes both the victim and the offender and focusses on restoring the balance in the community with a focus on support and prevention. The program takes referrals from RCMP, lawyers, legal aid, Crown Council, and probation officers. This program does not focus on any land or boundary issues. One of the main arguments for this program is that it is the Wet’suwet’en approach- i.e. it is tailored for Wet’suwet’en communities. This program works in the community because it was built by, and for community members.

### Akwesasne Community Justice Program

The Mohawk Council of Akwesasne has developed an extensive justice department within the community. Programs include a Community Council, Gladue unit services, mediation services, and a community justice program. The Community Justice program was enacted in 2004 to resolve disputes and conflicts within Akwesasne territory and to provide an alternative to the Canadian judicial system. The Community Justice program does not hear any issues pertaining to lands. An Akwesasne Land Disputes Tribunal was also enacted in 2004 to hear disputes regarding land and water issues. It appears that this Tribunal is not functional as there are no members that sit on the tribunal and no cases have been heard.

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<sup>12</sup> Clairmont 2008. p6

<sup>13</sup> The programs that were examined were three courts in Alberta (Tsuu T’ina, Siksika, Alexis), Akwesasne Community Court, Hollow Water (Manitoba), Mnjikaning (Ontario), Gladue Courts (Toronto), Mi’kmaw legal support network (Nova Scotia), conventional court sitting at Eskasoni First Nation, Mental health and domestic violence courts in Saint John and Moncton, and the Whitehorse Wellness Court.

## Metis Settlements Appeal Tribunal

The Metis Settlement Appeals Tribunal (MSAT) is a well-established system that hears a wide array of disputes and has been in operation since 1990. MAST is based on Cree teachings and spirituality through a healing mediation process. The Tribunal acts as a court-like body that can rule on land, membership, and other matters. The goal of the Metis Settlements Appeal Tribunal (MSAT) is to resolve the dispute in a manner that is timely, clear, and fair. Since 2010, the MSAT has resolved 134 disputes with 36 of the disputes pertaining to lands and boundaries (approximately 27%).

## Key themes of Indigenous dispute resolution mechanisms in Canada

There are many existing Indigenous dispute resolution mechanisms in Canada but most do not deal with land and boundaries. These programs typically assist multiple First Nations or any person that identifies as Indigenous by resolving disputes through traditional dispute mechanisms as well as aspects of the Canadian judicial system.

There were four themes that were highlighted as essential within Indigenous dispute resolution mechanisms within Canada. The following four themes are compiled from a variety of Indigenous dispute resolution mechanisms that were shared with members of BDRU over the last year.

The first theme is the inclusion of Elders to bring family and community together and share knowledge. It is also important to include community facilitators, chiefs, or a community-based committee who focus on restoring balance within the community to assist in resolving disputes. Elders, facilitators and chiefs and committees must have knowledge of traditional laws within the community. The second is incorporating family by bringing the community together to connect and share stories. The third key component is for teaching respect, humility, sharing, role modeling, balance, harmony, and consensus. The fourth is to create space for spirituality and encourage and facilitate healing through traditional forms of justice. Each of these themes clearly identify that for the program to be successful, it must be tailored for the community and the community must take ownership of it.

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Appendix – Sample Boundary Report



# Report on the West Boundary of Lot 79, \_\_\_\_\_ Indian Reserve

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Report prepared by the Boundary Dispute Resolution Unit (BDRU)

October 21, 2020

Boundary Dispute Resolution Unit (BDRU)  
Surveyor General Branch, Natural Resources Canada  
5320-122 Street  
Edmonton, AB

## Overview

This report is meant as an example of research into a boundary dispute and examples of data sources that should be captured. The example itself is real, but all names and other identifying information in the report have been altered for privacy reasons.

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## Summary of facts

1. Before 1950, Francis Miller possessed an 80 ac parcel within the IR. He died on September 29, 1950. On December 3, 1953, the FIRST NATION recognized that Francis had owned a parcel described as: "80 acres, more or less, situated on the west shore of Elk Lake, between the property of John Munro on the north and Jimmie Anderson on the south as shown on the attached sketch."
2. The attached sketch showed a riparian parcel bounded:
  - On the SE side, by Elk Lake.
  - On the NE, NW and SW sides, by three rectilinear boundaries (each of which was dimensioned with distances and directions).The sketch either established new boundaries, or re-established existing boundaries.
3. The parcel was described differently in 1958. The Sketch retained the lake frontage, the orientation and the general shape. However, the NE, NW and SE boundaries were significantly different in direction. The disconnect between the 1953 and 1958 sketches – neither of which were demarcated on the ground – was that the 1958 sketch described a parcel of only 72 ac.

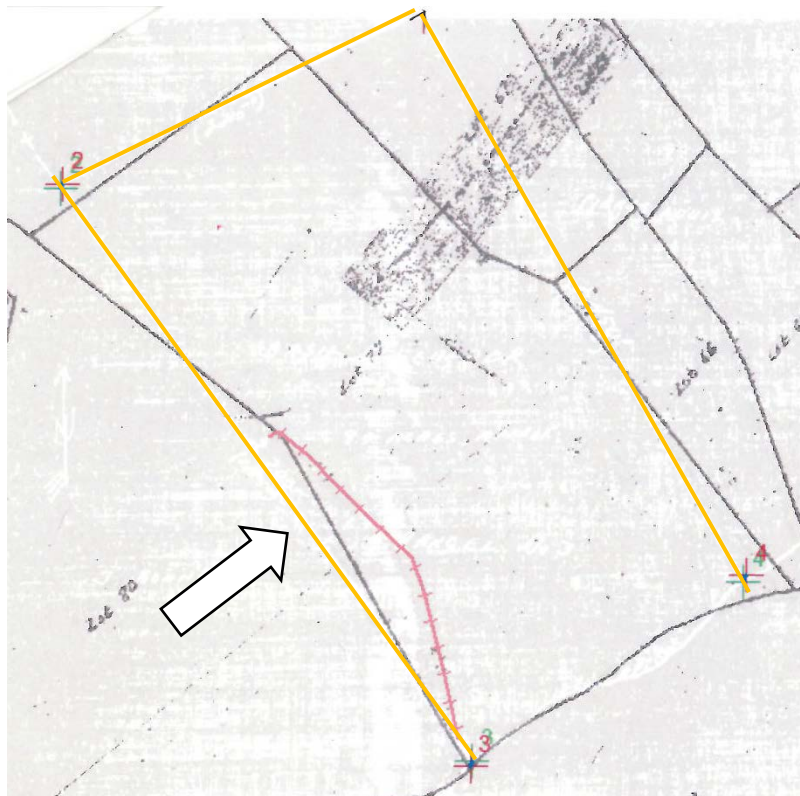


Figure 1 - 1953 parcel (orange), 1958 parcel (black), current fence (red).

4. The 1958 sketch was inconsistent with respect to occupation (e.g. fences, treelines, field edges):

- At the NW corner, the SW boundary appeared to follow a treeline and field edge; whereas
  - At the NE corner, the NE and the NW boundaries rejected treelines, field and cleared areas. Indeed, at the NE corner, the 1953 sketch better mimicked treelines, fields and cleared areas.<sup>1</sup>
5. If the 1953 description created a parcel, then the 1958 description created a different parcel.
  6. From 1950 to 1979, the parcel remained with Francis's estate. The 1953 description never reappeared. The 1958 description first appeared in 1964, when the four children of Francis and Dorothy Miller agreed to joint tenancy of Lot 79. By 1979, two of the four children had died, and Carl Miller transferred to Tom all rights in Lot 79. Thus, In October 1979, the Administrator of the Estate transferred Lot 79 to Tom Miller, described as "Lot 79, Block B – Sketch Plan 39-36"
  7. There is a suggestion that someone shifted the fence along the SW boundary away from Lot 79 and towards Lot 95. The assertion was made by Fred Anderson (possessor of Lot 95) to Davidson CLS in February 1998.<sup>2</sup> If the fence was moved to its current location, then this likely happened before 1964. Such a shift does explain the significant bend in the fence, because both the 1953 and 1958 sketches showed the SW boundary as a straight line.

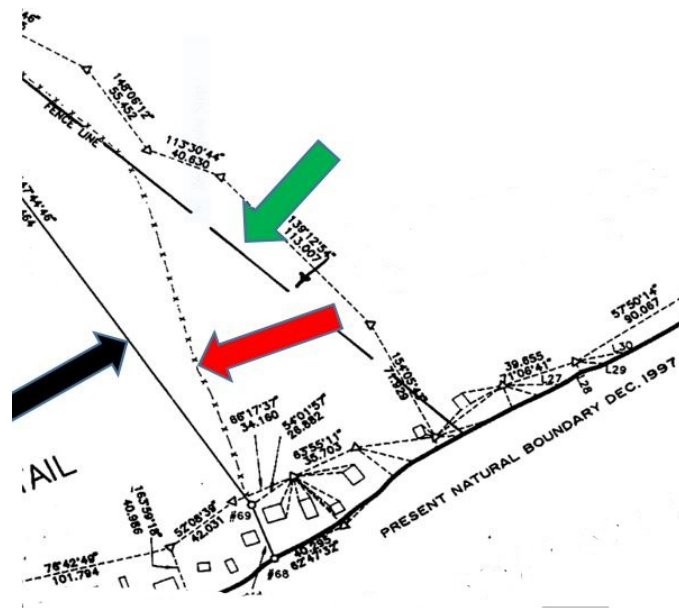


Figure 2 - Current fence (red), asserted fence (green), Davidson CLS opinion of Sketch (black).

8. Tom Miller died on April 7, 1995. On July 7, 2000 his estate (represented by one of his nieces) transferred Lot 79 to three members of the FIRST NATION: Wilma Anderson, Danny Anderson and Peter Wallace. The parcel was described as "Lot 79, Block B, ... shown on sketch Plan 643-17"

<sup>1</sup> Using a 1963 aerial photograph.

<sup>2</sup> Davidson CLS. *Survey Report & Addendum for Survey of Lots 79 & 95*. February 6, 1998.

9. If the fence can reasonably be related back to the time of the original parcel (whether 1953 or 1958), then it is the best evidence of the location of the boundary, in the absence of any other monumentation.<sup>3</sup>

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<sup>3</sup> *Nicholson v Halliday*, ONCA 0 2005; *Phillips v Keefe*, BCCA – 2012; *Morrison v Van den Tillaart*, BCCA – 2013.

## Recommended Further work

More facts are required to offer a complete opinion on the west boundary of Lot 79. Two questions still require answers:

1. By what authority did the 1958 parcel (from the Sketch) supplant the 1953 parcel (from the BCR)? The two parcels have different boundaries.
2. What is the provenance and purpose of the fence? When and where was it erected?<sup>4</sup>

**To help answer these two central questions, we have 5 additional recommendations:**

- a. Question the owner and tenants of Lot 95 about their knowledge of the fence.
- b. Question the three erstwhile transferees of Lot 79 – Wilma Anderson, Danny Anderson and Peter Wallace – about their knowledge of the fence.
- c. Question the five nieces and nephews of Tom Miller – about their knowledge of the fence.
- d. Pore through the records of Henry Davidson CLS for information about the fence.

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<sup>4</sup> Was it shifted?

## Survey History

### 1958 Sketch

The lots in question were originally documented on January 16, 1958 in a sketch titled: 'sketch of holdings Lots 1 to 90'.

The Sketch was compiled from aerial tracings, existing surveys, and aerial imagery. The sketches were completed by traverse using a Brunton compass. The lots in question are identified as Lots 67, 79, and 80 on Sketch 643-17. Currently, parcel 79 is owned by the Band, while parcels 67 and 80 are CP held.

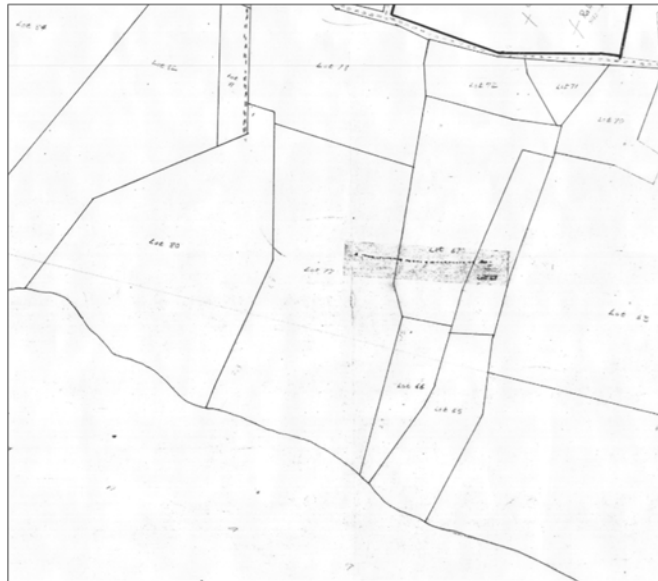


Figure 3: Snip of Sketch 643-17

How some lot lines were arrived at in the Sketch, in the absence of existing occupation in the late-1950s is unknown. Equally problematic is the lack of dimensions on the Sketch. Between the lack of physical evidence (both boundary markers, and physical occupation), and the lack of dimensional information (distances, bearings) on the Sketch, makes re-establishing the sketched boundaries very challenging. A challenge Davidson likely encountered in his survey work in 1997.



## Field Notes – 1997 - H. Davidson

In 1995, a 'Survey Services Request' was received by the Regional Office of the Surveyor General Branch for the survey of 'Lot 80'. In the summer of 1997, a contract and survey instructions were issued to H. Davidson for the survey of 'Lots 79 and 95'.

Davidson notes that the survey took place between the dates of June 18 and December 31, 1997. He also notes in his survey report that the "boundaries were established based on fences and the northeast boundary of lot 79 and lot 95 were established with a boundary similar to the Sketch, Plan 643-17." Due to lack of agreement on the boundaries shown on Davidson's survey, the survey was never filed as an official plan, and was instead filed as Field Notes in the Canada Lands Survey Records in 2009.

When overlaying the Davidson Field Notes over the Sketch, there appears to be some inconsistencies. The West boundary of the proposed Lot 79 appears to follow the Sketch boundary fairly well, whereas the northern portion of the east boundary of Lot 79 does not match the Sketch. Davidson notes on the plan that the East boundary is the "boundary from old Sketch 643-17", but gives no explanation to why the geometry differs so much.



Figure 4: Overlay of Davidson's Field Notes (white) and Sketch 643-17 (black)

## Historical Aerial Photography

Imagery of the three parcels was collected from the years 1938, 1958, 1963, 1975, 2012, and 2016. From the imagery, it can be seen that farming and clearing activities along the northeastern and southwestern boundaries of Lot 79 did not occur until after the Sketch (1958) was completed. It appears that most of the clearing took place from 1963-1975.

1938

Imagery does not indicate that any development has taken place on lots 67, 79 and 80. It does not appear that there are any cottages along the southern boundary of parcel 79 and 80. It does not appear that any farming or clearing has taken place at this time. The parcel appears to be comprised of coniferous and deciduous trees as well as fields and low-lying, marshy areas.

1958

Imagery shows some development on lots 67, 79 and 80. There still does not appear to be any cottages along the southern boundary of parcels 79 and 80. There does appear to be clearing or farming that has taken place in the northern portion of Lot 80.

1963

Imagery shows some development on lots 67, 79 and 80. It is difficult to determine if there are any cottages along the southern boundary of parcels 79 and 80. Imagery shows significant clearing and farming has been completed in the northern and southwestern areas of Lot 80. There appears to be some clearing completed on the western boundary of lot 67.

1975

Imagery shows development on lots 67, 79 and 80. Cottages are clearly shown on the southern boundary of lot 80. Clearing and farming has occurred on lot 79 and 80 (southwestern boundary of lot 79 and large portion of lot 80) with more clearing on lot 67 (southwestern boundary of lot 67).

2012

Imagery show extensive development on lots 79 and 80. On the southern boundary of Lot 80 are cottages with docks extending into Elk Lake. Significant farming has taken place on most of Lot 80 and extends into Lot 79. Lot 67 has remained cleared with some farming activities taking place.

2016

Aerial imagery from 2016 shows similar development to 2012. There are no major changes in farming, clearing, or cottages.

## Land Registry History

A review of the Indian Lands Registry System (ILRS) documents the type of instruments and charges against parcels 79, 80 and 67. The following is an overview of what documents were found in the ILRS as well as any sketches.

### *Lot 79 Evidence of Title and parcel abstract:*

Lot 79 was allocated to the estate of Francis Miller. The lot was transferred to Tom Miller in 1979. In 2000, an application for registration for 3 joint tenants (members of the Band) to hold Lot 79 was filed in the ILRS.

A 1953 BCR (filed in 1979) for Lot 79 shows a sketch of the parcel, including dimensions for the boundaries of the parcel and approximate acreage. There is no date on the sketch or signature. The BCR is signed by the Indian Agent, Chief, and four councillors. Other filed documents are transfers of the parcel to different parties. The evidence of title documents filed as NETI are in lieu of a Certificate of Possession (CP).

Year	Description	Evidence of Title	Instrument	Grantor Name	Grantee Name
1953/12/03	Lot 79 Sketch 643-17	No evidence of title issued (NETI)	BCR	Band	Estate of Francis Miller
1979/10/30	Lot 79 Sketch 643-17	Notice of Entitlement	Admin Transfer	Francis Miller	Tom Miller
2000-07-07	Lot 79 Block B Sketch 643-17	No evidence of title issued (NETI)	Admin Transfer	Tom Miller	Wilma Anderson
2000-07-07	Lot 79 Block B Sketch 643-17	No evidence of title issued (NETI)	Admin Transfer	Tom Miller	Danny Anderson
2000-07-07	Lot 79 Block B Sketch 643-17	No evidence of title issued (NETI)	Admin Transfer	Tom Miller	Wallace Stephen Parker
2005/04/19	Lot 79 Block B Sketch 643-17	Band	Quit Claim	Wilma Anderson Danny Anderson Peter Walker	Band

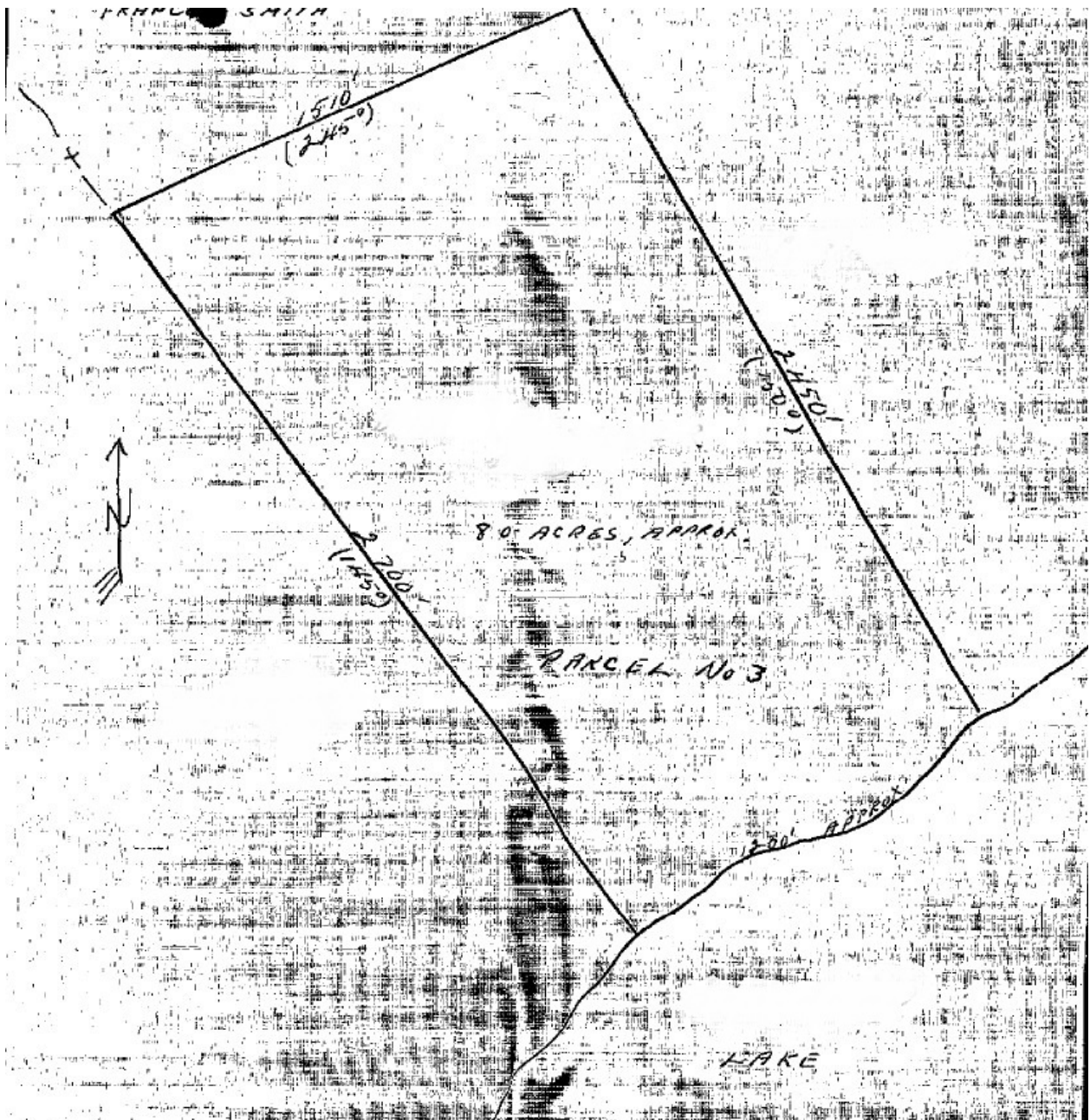


Figure 5: Sketch from 1953 BCR for Lot 79 including distances (in feet).

*Lot 80: Evidence of Title and parcel abstract*

Lot 80 belonged to Jimmie Anderson and upon his death, was divided into three parcels. A transfer of land by administrator, dated 17 October 1973 included a sketch of Lot 80 and how it was divided for three different parties. The sketch, entitled Appendix A, includes approximate lengths of boundaries for each parcel as well as the approximate size of each parcel. The sketch is signed by Fred Anderson and Wally Smith.

<b>Year</b>	<b>Description</b>	<b>Evidence of Title</b>	<b>Instrument</b>	<b>Grantor Name</b>	<b>Grantee Name</b>
1961/01/05	Lot 80 Sketch 643-17	Notice of Entitlement	BCR	Band	Jimmie Anderson
1973/10/17	Lot 80 Sketch 643-17	Notice of Entitlement	Admin Transfer	Estate of Jimmie Anderson	Tilda Anderson
1973/10/17	Lot 80 Sketch 643-17	Notice of Entitlement	Admin Transfer	Estate of Jimmie Anderson	Wally Smith
1973/10/17	Lot 80 Sketch 643-17	Notice of Entitlement	Admin Transfer	Estate of Jimmie Anderson	Fred Anderson

## Other Knowledge

### Surveyor General Branch Records

Review of SGB records (relating to Davidson Field Notes) found the following notes:

- Addendum to Field Notes: Surveyor H. Davidson met with Fred Anderson on 5 February 1998. Fred Anderson disagreed on Davidson's opinion regarding the boundary of Lots 79 and 95 between points 69-70 (see figure 7)
- Email correspondence between SGB regional office and the Band on 10 November 2005 references a letter sent from the Band to Indigenous Services Canada stating that there were issues between the North and South boundaries of Lot 79.

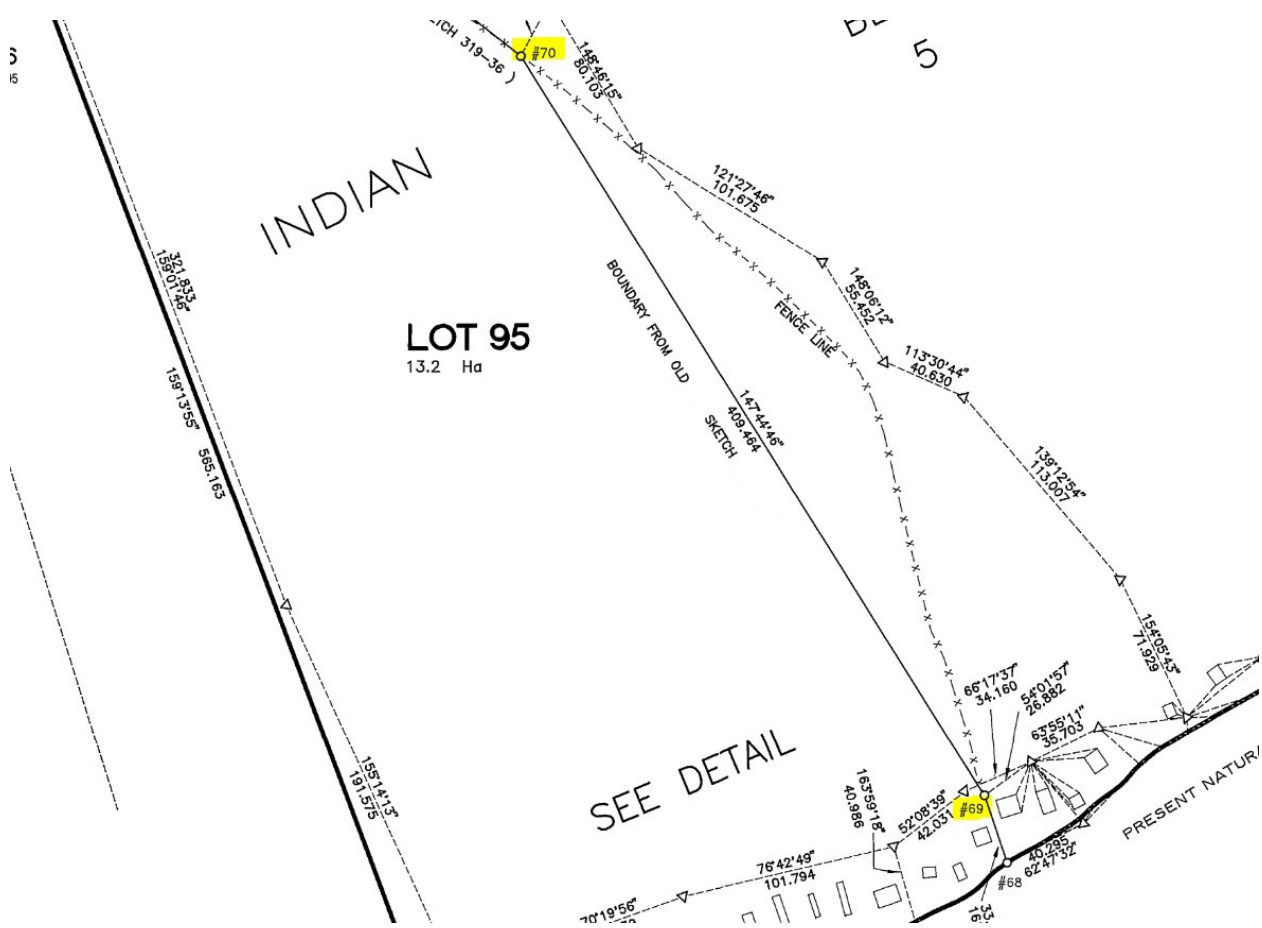


Figure 7: Snip from Davidson Field Notes showing points 69 and 70 between Lot 95 (Lot 80) and Lot 79.



## Field Research/Site Visit

A site visit was completed on 29 August 2019 to view the occupation between Lots 79 and 80 and Lots 67 and 79. The southwestern boundary between Lots 79 and 80 had a wood post and wire fence running north-south that deviated from the boundary as described in Davidson's field notes. The widest deviation of the fence line is approximately 50m different than the Sketch /Davidson Field Notes boundary. The wire fence appears to be fairly new, although it does run through some newer growth trees. Old fence posts were found near the same area. There is also a slight elevation change near the fence line. A tentative conclusion (to be discussed with the affected parties) is that the clearing and farming activities that took place on Lot 80 (likely between 1963-75) were done up to this change in elevation as opposed to the straight line on the Sketch.



Figure 8: 2016 imagery overlaid with field notes. Imagery shows farming and clearing done on Lot 80 (shown as lot 95) and 50m “bulge”.



Figure 9: Boundary between Lot 79 and 67 as shown on field notes overlaid with imagery from 2016.





Figure 10: Fence line between Lots 79 and 80 taken on 29 August 2019.



Figure 11: Walking the southwestern boundary of Lot 79 taken on 29 August 2019.





Image 12: Southwestern fence line in Lot 79 showing growth of poplar trees into fence posts and old posts taken on 29 August 2019.



Image 13: Wire fence running through trees taken on 29 August 2019.



Figure 14: Minor elevation change near fence line taken on 29 August 2019.