

To what extent does the Alberta Energy Resource Conservation Board's Alternative
Dispute Resolution Program Affect the Capacity, Opportunity and Volition of
Landowners and the Oil and Gas Industry to Resolve Conflict?

by

Vanessa Cartwright
Bachelor of Arts, Queen's University, 2003

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MASTER OF ARTS

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Supervisory Committee

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ABSTRACT

This research examines the capacity, opportunity and volition of participants of a landowner- oil and gas industry conflict in Alberta and the effect of the Alberta Energy Resource Conservation Board (ERCB) Alternative Dispute Resolution (ADR) program. It explores whether the model used by the ERCB ADR program exists in a setting where Tidwell's (1998) elements for conflict resolution are present.

Using Tidwell's (1998) theory and case study methodology (Yin, 1994) the participants discuss their experiences of the conflict and the program. The findings illustrate participants did not each possess the capacity, opportunity and volition to resolve. Despite legal confines, the program aided in improving the capacity, opportunity and volition of participants, built relationships and created resolution. The study resulted in recommendations to improve the program and suggestions for industry to minimize conflict with landowners. These findings may be applied to other industries where parties have limited rights.

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LIST OF ACRONYMS

ADR – Alternative Dispute Resolution

CRDC – Canadian Dispute Resolution Corporation

ERCB – Energy Resource Conservation Board

EUB – Energy and Utilities Board

NADRAC – National Alternative Dispute Resolution Advisory Council (Australia)

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DEDICATION

To my friends and family who supported me throughout this entire process. Mom and Dad, thank you for never questioning my decision to do this and encouraging me all the way. And to Mom, David, Michelle and Jay. Without your gentle encouragement to finish and your assistance in editing at the end, I doubt I would have ever completed it. Many hugs and endless thanks you's. Thank you to all my friends in Calgary who sent me to the coffee shop to work instead of procrastinating for another day. I finally finished!

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CHAPTER 1 – INTRODUCTION

1.1 Introduction

On October 3, 1998 Patrick Kent, an executive for KB Resources, was shot and killed by Wayne Roberts as Kent was checking on an oil well on Roberts' property. The shooting ended a three-year long dispute largely over contaminated soil on the well site near Bowden, Alberta. This was the first and only murder in the fifty-year history of Alberta's oil and gas industry (*Alexander's Gas and Oil Connections News and Trends: North America*). In 2002, Wiebo Ludwig was convicted of blowing up a gas well and encasing a wellhead in concrete. During the 1990's, after little was done to ameliorate his concerns surrounding sour gas production, Ludwig's oratory and actions became increasingly violent. He believed hydrogen sulfide emissions from sour gas wells were responsible for miscarriages suffered by family members, health complaints, and the loss of livestock (Brooke 2000). While these are extreme examples of conflict in the oil and gas industry, there are many examples everyday where conflict occurs between landowners and industry. For both Roberts and Ludwig, government regulation of the oil and gas industry did not address their concerns. The oil companies did little to resolve outstanding issues, there was a lack of information from regulators, and environmental standards for industry are less than the expectations of many landowners (*Alexander's Gas and Oil Connections News and Trends: North America*).

In recent years, conflict between landowners and the oil and gas industry in Alberta has become increasingly heated and sometimes violent. While most conflicts are resolved between parties without third party assistance, occasionally, assistance is required. In 2007, the Energy and Utilities Board (EUB) (now the Energy Resource Conservation

Board (ERCB)), which regulates oil and gas development in Alberta, received over 42,800 applications, of which only 1881 involved disputes that could not be resolved by the parties (EUB 2007). However, instances of unresolved and escalating conflict were becoming more common and the EUB believed that the situation necessitated a new approach to resolving issues between parties. As a result, the EUB Alternative Dispute Resolution (ADR) Program was established to manage conflict. In December 1999, the Canadian Dispute Resolution Corporation (CRDC) EUB Dispute Resolution Consulting Team was assembled. Its mandate was to design a EUB system that incorporated mediation and a collaborative approach to dispute resolution (Canadian Dispute Resolution Corporation 2000, 3). The steering committee, which was instrumental in designing the EUB ADR program, was comprised of individuals representing industry, landowners groups, the Surface Rights Board, independent mediation firms, and the EUB (p.62).

The committee designed the ADR program under the assumption that conflict “is a part of our lives that we must deal with on a daily basis” (p. 3). This assumption led the committee to design a process that allows parties to reconcile their differences through the assistance of third party facilitators and mediators. The ADR program that was eventually established achieved a resolution rate of ninety two percent in 2007 (EUB 2007). In these cases, objections to development were remedied. The aim of this research is to determine whether the program goes beyond reconciling immediate issues to create a lasting resolution between parties and build positive relationships between industry and landowners.

1.2 Purpose and Focus of Research

Currently, the ERCB ADR program is the sole quasi-government run dispute resolution program for Alberta's oil and gas industry. To date, little research exists on whether this model of dispute resolution is appropriate for the type of disputes that occur in Alberta's oil and gas industry between landowners and industry. Given its design principles, which are discussed below, the ERCB ADR program has the ability to manage conflict if the participants both desire to resolve it. However, there are structural issues inherent within the regulatory and legal frameworks that may prevent the program from fully empowering participants to achieve long lasting resolution. This research will explore this context by asking the question: *Does the principled negotiation model used by the ERCB ADR program exist in a setting where Tidwell's (1998) elements for conflict resolution are present?*

1.3 Research Objectives

The objective of the research is to examine whether alternative dispute resolution programs and principled negotiation methods are appropriate for resolving conflict in Alberta's oil and gas industry. Second, this research aims to provide recommendations to industry and the ERCB to limit conflict escalation and improve the resolution process. Third, this research will contribute to the literature on the use of principled negotiation modeled ADR programs within Alberta's oil and gas industry. Providing research into the effectiveness of this program will remain relevant far into the future as issues of landowner-industry conflict like those of Ludwig and Roberts are increasingly prevalent and intense (Canadian Dispute Resolution Corporation 2000, 3).

This aim of this paper is to examine the success of the ERCB ADR program beyond its immediate results. The ERCB has been very successful in creating a program where clients are satisfied with their experience and disputes are resolved to the extent that development can occur within parameters satisfactory to all parties. However, this research attempts to discover whether the program is appropriate for the context in which it exists and whether positive relationships are formed between the parties, allowing them to carry on future relationships without third party assistance.

1.4 Thesis outline

This thesis is broken into six further chapters: Chapter II reviews current literature pertaining to ADR theory and practice, principled negotiation theory and a summary of Alan Tidwell's (1998) theory of opportunity, volition and capacity for conflict resolution. Chapter III provides the context of the oil and gas industry in Alberta and the role of the ERCB in regulating development. Chapter IV discusses the methodology used in the research design, an explanation of the participant selection process, ethical considerations of the research and research implications. Chapter V provides an analysis of the interviews. Chapter VI discusses the research findings as they pertain to the research question and the limitations of the study. Finally, Chapter VII provides recommendations to improve conflict mitigation in Alberta and recommendations for further study. The following six chapters explore the literature and research results as they relate to the research question. The following chapter explores the literature pertaining to alternative dispute resolution, principled negotiation and Tidwell's (1998) theory of conflict resolution.

CHAPTER II – REVIEW OF LITERATURE

2.1 Introduction

The ERCB ADR program is rooted in alternative dispute resolution practices and principled negotiation. The program represents a shift from the traditional adjudicative model to resolve landowner-industry disputes. This chapter discusses the history of ADR, its uses and tenets in order to situate the ERCB ADR program and its application to conflict. Second, the chapter discusses Tidwell's (1998) theory of conflict resolution to situate the research question.

2.2 Alternative Dispute Resolution – Theory and Practice

Alternative dispute resolution (ADR) is not a new phenomenon. Negotiation and arbitration have been used for the past sixty years in the American justice system (Goldberg et al 2007, 7). By the 1970s, interest in ADR increased and it emerged as a field of study in the United States (Pirie 2000, 6). ADR grew out of a need to reduce the costs and delays of court action, a desire to increase access to justice and simultaneously empower disputing parties to create solutions to their problems (p. 6). The system created two benefits. First, it proved to be less expensive, quicker and more competitive than the courts; second, results were seen to be better than the court as it embraced a move away from the win-lose system of the courts (p. 11). The early focus of ADR was on forms of consensual decision making such as negotiation and mediation, with processes drawn from labour relations, international affairs and religious practices (p.6). Proponents of ADR programs argue it is less expensive than the judicial system, it is more suited to the needs of parties, it has the capability to transform relationships, and it leads to higher user satisfaction and reduces the expenses and time of parties (Goldberg et al 2007, 8).

In his discussion paper regarding the quality of dispute resolution processes and outcomes, Bush (1988-1989) argues there are six quality goals or standards that encompass all forms of dispute resolution. He identifies these goals as individual satisfaction, individual autonomy, social control (where “...the control of public and private institutions, and the interests they represent, over exploitable groups and over possible sources of social change or unrest...”), social justice, social solidarity, and personal transformation (p. 348). He states that these goals are what we desire “to be achieved through the handling of disputes.” If the process meets these goals, then the dispute resolution process has been successful (p. 347).

2.3 The Alternative Dispute Resolution Continuum

ADR is not a single process, but several different approaches to conflict resolution that occurs on a continuum. While these processes are shown as individual alternatives, they are not mutually exclusive and they may be blended to create new alternatives to resolve a dispute (Alternative Dispute Resolution 1992, 11). On a continuum of processes, where parties have most control over the outcome to processes with the least amount of control, the processes would sit in the following order: negotiation, facilitation, mediation, arbitration, and adjudication (Gattinger 2005, 274). The continuum is shown in Figure 2.3.1.

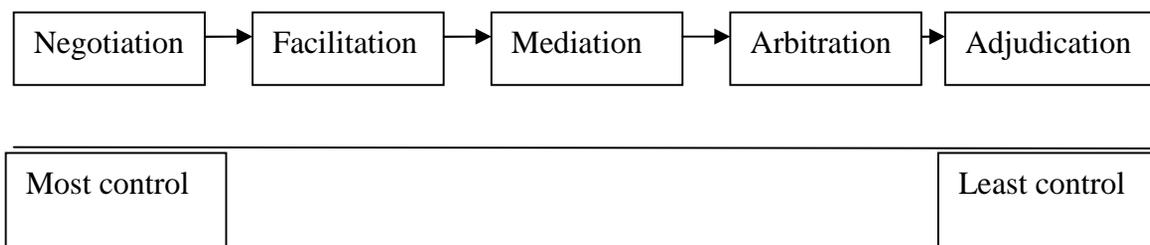


Figure 2.3.1 Alternative dispute resolution continuum

Two of these processes, facilitation and mediation, are commonly used in ADR programs. These processes are discussed to gain an understanding of their theoretical basis. National Alternative Dispute Resolution Advisory Council (NADRAC) (1997) defines facilitation as:

...a process in which the parties (usually a group), with the assistance of a neutral third party (the facilitator), identify problems to be resolved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour (sic) to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation (p. 8).

Facilitated negotiation is a process where parties to a negotiation have identified disputed issues and employ a neutral third party to facilitate the negotiation. In facilitated negotiation, the facilitator may not advise parties on the content of negotiated matters or determine the outcome. Their sole role is to advise or determine the process of the negotiation (p. 8).

On the ADR continuum, the next step from facilitation is mediation, where the mediator is given more influence in directing the conversation and resolution options.

The central quality of mediation is its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and disposition toward one another (Pirie 2000, 7).

In mediation, the role of the third party is to identify areas of agreement and disagreement for the parties and assist negotiation and settlement by suggesting options (Katz 1988, 578). The role of the mediator is not to impose a settlement on disputing parties, but to assist the parties in developing their own settlement. While mediation involves components such as “identifying the disputed issues, developing options,

considering alternatives and endeavouring (sic) to reach agreement”, mediation does not necessarily involve each component nor are these steps sequential (NADRAC 1997, p. 5).

NADRAC identifies four elements as being essential to mediation: consensual participation, confidentiality, flexibility of procedures, and the neutrality of the mediator (Shub et al. 1997, 36). Consensus to participate is identified as necessary because mediation rests on the tenet that resolution can only be met if all parties have willingly agreed to participate (p. 36). The second element, confidentiality, is fundamental to mediation on two levels. First, any information disclosed during a session is confidential. Second, confidential information is disclosed to a third party only in the case of litigation or criminal proceedings (p. 36). The process should be flexible and adaptable to meet the needs of the disputing parties (p. 37). The participants must be willing to cooperate and participate in the processes, identify and communicate disputed issues, develop options and consider alternatives, and finally, reach an agreement (p. 39). Finally, it is imperative that the mediation embraces third party neutrality. This means the mediator is free from personal bias and an absence of any prior relationship with disputing parties exists. The mediator should be impartial and objective and avoid any display of favoritism (p. 37).

Examining the criticisms of dispute resolution processes is important as these criticisms reveal reasons why ADR programs may be unsatisfactory in resolving certain disputes. ADR has been criticized on several fronts in academic literature. Critics argue that ADR represents a shift from a rights based approach to an interest based approach. This shift characterizes a move away from settlements based on legal rights to a settlement based on the interests of the parties. This may be detrimental to the least

powerful members of society and can actually perpetrate systematic inequalities by not focusing on the rights of all parties (Pirie 2000, 12-13). In the judicial system, settlement is determined on the legal rights of parties. During ADR, settlement is developed through a discussion of interests, not legal rights. Further, the private processes of ADR

...deliver a skewed brand of justice that flouts structural safeguards, commercializes dispute resolution, exploits inequality of bargaining power, and ultimately fails to provide adequate remedies for weaker parties, such as women, minorities, and those with less economic power (Reuben 1997, 584-585).

Reuben argues that ADR can fail to address inequalities between disputing parties, creating an imbalance of power not seen in the courts. This imbalance occurs from a variety of sources, such as unskilled mediators, lack of application of rule of law, and the bias of mediators or arbitrators in their subsequent perception and handling of disputes (p. 584-589).

While ADR carries inherent risks such as those described above, proponents argue that the benefits of ADR outweigh the risks. Unlike traditional litigation, participants are able to select the process most apt to resolve their conflict, thereby increasing the likelihood of satisfactory resolution. ADR programs are an alternative for disputants because they do not give up their right to pursue litigation. Should participants think that the risks of ADR outweigh the benefits, generally they may pursue resolution through litigation (McLaren et al 1995, 3). Finally, perhaps the greatest benefit to ADR is “evidence that people who reach agreements themselves are more likely to abide by it than when they are told what to do” (Singer 1990, 11).

The ADR continuum illustrates several processes that are used to resolve disputes. This discussion has focused primarily on the tenets of facilitation and mediation as these

mechanisms are favored by the ERCB in its ADR program. These two processes require the use of third party assistance but allow participants control over developing options and determining outcomes. While facilitation and mediation are commonly used, other forms of ADR may be more appropriate for certain conflicts. Each of these processes requires a structure for negotiations to proceed. A commonly used method is principled negotiation. Here, solutions for resolution are found through a discussion of the interests of the parties and finding common ground.

2.4 Principled Negotiation

Principled negotiation is used within processes of the ADR continuum as a method of negotiation. As the theoretical basis of the ERCB's ADR program, it is important to discuss the history and tenets of principled negotiation. Principled negotiation views conflict as the "divergence in the objectives, beliefs and values among individuals and groups of individuals, where the conflict in any particular situation is an expression of these underlying factors" (Grzybowski 2001, 7). Further, conflict can exist among individuals or groups of individuals without impairing positive and constructive interaction. Conflict is "a point at which expectations, goals or objectives diverge" (Chicanot and Sloan 2003, 4). It is omnipresent and can be latent, emergent or manifest (p. 4). As a manifestation of conflict, disputes exist where underlying objectives, beliefs and values clash in real world situations and the parties are intent on achieving mutually exclusive results (Grzybowski and Owen, 2001, 7).

In principled negotiation, or the problem solving approach, conflict is viewed as something requiring resolution. In other words, "a problem exists because of a real or apparent incompatibility of needs or interests that makes satisfaction of needs impossible

for one or more of the parties” (Folger and Bush 1994, 9). In order to solve the problem, an integrative and collaborative approach is ideal (p. 9). Rubin (1999) argues that there has been a recent shift from conflict resolution to conflict settlement in order to generate a possibility of future attitude changes that would enable conflict resolution (p. 3). In order for settlement to occur, ‘enlightened self interest’ is required. Each party has personal interest in mind and they are “enlightened” to acknowledge that it is possible for both parties to do well in negotiations without helping or hindering the other party (p. 4).

Critics of the problem solving approach argue it is rooted in an individualist ideology which “...views the human world as made up of radically separate individual beings, of equal worth but with different desires (i.e. perceived needs), whose nature is to seek satisfaction of those individual needs and desires” (Folger and Bush 1994, 13). Here, society serves as a “neutral facilitator” in the process of individual satisfaction. They argue that the problem solving method is so appealing to the conflict resolution field because “[i]t is a view of conflict that expresses the deeply rooted individualist ideological premises of the society as a whole” (p. 13).

The problem solving approach to conflict resolution is directly aligned with individualistic ideology about human nature and social interaction and as such operates in a Western cultural paradigm. Folger and Bush (1994) argue that problem solving

...as an orientation to conflict... embodies the view that conflicts represent problems faced by autonomous individuals in achieving mutual needs satisfaction. Further, it reflects the view that conflict resolution can and should involve finding solutions that maximize the satisfaction of every individual involved (p. 13).

Until the 1980s, theoretical approaches to bargaining and negotiation were based on game theory (Rangarajan 1985, 7). In recent years, negotiation theory has made a shift

from the competitive nature of game theory and positional bargaining to theory based on cooperation (Rubin 1999, 10-11). Theoretically, game theory provides a perfect, mathematical equation for all negotiations. However, it has significant flaws in making it operational in real negotiations, primarily because, “[a] fundamental assumption of game theory is that all bargaining takes place between people who behave strictly rationally, an assumption we know not to be true in real life (p. 7).” As such, a shift from game theory and positional bargaining to principled negotiation represented a new thinking in conflict theory and a move from competition to cooperation (Rubin 1999, 10-11).

The shift from positional bargaining to principled negotiation has been gradual over the past three decades. From the adversarial approach of game theory, negotiation became a means of conflict resolution where people attempt resolution through a deliberate and consensual problem solving process (Chicanot and Sloan 2003, 13). The process is either a dialogue or a conversation, with the aim to bridge differences through consensual settlement (p. 13). Negotiation is about communication and building understanding of differences within a voluntary and reciprocal process (p. 14). Principled negotiation is used in negotiation, facilitation, mediation and arbitration.

In *Getting to yes: Negotiating agreement without giving in* (1991), Fisher, Ury and Patton discuss the method of principled negotiation. They state the goal of principled negotiation is to produce wise agreements where the legitimate interests of each party are met to the greatest extent possible. The agreement should be fair and durable and account for the interests of the community. Negotiations should be efficient and should ultimately improve the relationship between disputing parties (p. 4). They maintain that principled negotiations are based on four points: people, interests, options and criteria (p. 10-11). By

following these guidelines, “Interest based negotiation will expand potential solution options beyond those suggested by extreme positions” (Chicanot and Sloan 2003, 15).

Pruitt and Carnevale (1993) argue that there are three ways to construct win-win agreements, or agreements where the interests of both parties are met. First, the parties can increase the available resources so all parties can get what they want or expand the pie. Second, parties can exchange concessions where each party yields on issues that are low priority to themselves but high priority to others (p. 36). Third, the parties can solve underlying concerns. These concerns can involve values, goals, or principles (p. 37). They are related to process, substance, appearance or hierarchical concerns (p. 39). If they rise to the surface, it becomes possible for the parties to resolve them. Occasionally, there is the need to meet only one party’s concerns, as the other side will accept their demands. Win-win solutions are created by examining both sides underlying concerns and creating new options (p. 38).

During the first meeting of a mediation where principled negotiation is used, mediators will look for the issues to be solved from the opening stories of the parties and then address whether they think sufficient common ground exists for a mutually acceptable solution to be developed. The goal of the mediator is to excavate the underlying interests of the parties (Folger and Bush 1994, 10). Mediators will use selective facilitation, reframing, reformulation and directive questioning to gear discussion towards agreement between parties. The agreements that are generated become evidence that a solution has been created (p. 11). In this process, mediators are future-oriented in order to move discussion from relational issues toward identification and focus on tangible interests (p. 12). However, Grzybowski and Owen (2001) point out

that not all negotiations will result in full consensus of all issues. Success of interest-based negotiations depends on the collective will of participants and on the time, resources, information and support dedicated to the negotiation (p. 16).

When developing options for resolution, objective criteria is developed by looking for fair standards such as market value, scientific judgment, precedent, professional standards, costs, and court decisions, for example. Objective standards need to be separate of the will of each side and should be legitimate and practical and should apply to all parties (Fisher et al 1991, 85).

When the other side has a stronger bargaining position, Fisher, Ury and Patton (1991) argue parties should protect themselves against accepting an agreement that they should reject. Second, they should make the most of the assets they do have so any agreement will satisfy their interests (p. 97). They argue that all parties should develop a best alternative to a negotiated agreement (BATNA) prior to negotiations. These become the standard against which all proposed agreements are measured (p. 100). When negotiating, each party should consider what the other side's BATNA may be as this allows them to gain insight on what to expect from the negotiation. If both sides have good BATNA's, it is possible that the best outcome from negotiation is not reaching agreement (p. 105).

While principled and interest based negotiation offer a mutually beneficial means of resolving conflict, there has been criticism of its design and there are limitations to its success. Rubin (1999) argues that negotiated settlements are devised by and directed to the "white, Western, male, and upper middle class" (p. 6). He argues that these ideas "may be limited in their applicability and generalizability. Other societies – indeed, other

people within our own society – may not always “play the conflict game” by the set of rules that scholars and researchers have deduced on the basis of American paradigms” (p. 6).

Tidwell (1998), in *Conflict resolved*, argues when dealing with subjective matters, like emotions, objective criteria may not be available (p. 26). He maintains that one has to focus on the people because sometimes the people are the problem. He debates the idea of whether it is beneficial to transfer meaning from emotion to interests and what psychological and social ramification occur from this. This shift may in actuality create a new, third party enemy (p. 2). Interest based negotiation emphasizes persuasion to change views about the conflict (p. 26) and does “...nothing to contribute to an understanding of the dynamics of the conflict” (p. 27). In conclusion, he offers Cope and Kalantzis’ (1997) critique of interest based mediation.

The win-win discourse expresses superficial niceness while papering over differences and creating sublimated frustration. When people differ, the outcomes will almost invariably be asymmetrical, or variations on win-lose or degrees of lose-lose. Indeed, agreeing to differ may be the optimal outcome, even the most productive one. The best negotiation will not be forced to end with win-win (p. 27).

The ADR continuum and interest based negotiation have been applied to conflict in many fields. In recent years it has been applied to environmental conflict between stakeholders and industry.

2.5 Environmental Conflict and the Energy Industry

Environmental conflict occurs when citizens, regulators and industry disagree over what constitutes proper use of the land and resources (Blackburn 1995, 1). This type of conflict usually occurs between a development applicant and the parties affected by the proposal (Gattinger 2005, 285). Environmental conflict carries elements such as multiple

forums for dispute resolution, an unequal power and resource distribution, multiple parties with multiple issues, they are technically complex and scientifically uncertain, and are often resolved in public or political arenas. A "...crucial feature of environmental disputes is that they typically involve decisions concerning fundamental and irreversible alterations to the physical environment..." where a few individuals and the environment pay high costs for others to make modest gains (O'Leary 1995, 19).

As an alternative to litigation, environmental mediation has become popular in resolving these types of disputes. Here, private and public stakeholders attempt to reach consensus on issues regarding land use, resource management and other environmental issues using ADR (Pirie 2000, 288). ADR programs designed to mitigate environmental conflict need to incorporate the "...needs, interests and responsibilities of the actors and institutions..." involved (Gattinger 2005, 280). Within the program design, participants should have access to legal counsel, be permitted to access and present scientific studies, and third party advocates should be permitted to participate (p. 281). ADR programs handling environmental disputes should not stand in for the consultation process, but incorporated into it. A primary function of the program should be to address 'hotspots' that arise during the consultation process (p. 283).

ADR in environmental conflict has both advocates and critics. Advocates argue that its benefits include a reduction in costs compared to litigation, shortened timelines, and improved communication and relationships between parties (Gattinger 2005, 274). The process also creates benefits often not seen in litigation. The information flow between parties is improved, flexible solutions are created and there is a lesser chance parties will attempt to wear the other out in an effort to meet their goals (Lock 2007). These

processes empower participants as they have a greater role in decision-making. Because participants were part of the process of developing solutions, results are seen with more legitimacy than those handed down by a court or tribunal (Lucas 2004, 199-202).

Critics argue that despite these benefits, there are costs to using ADR programs for resolving environmental conflicts. Of great concern to critics of these processes is conflict is moved from the public sphere and into the private where third parties cannot participate in the process. When this occurs, third parties, such as environmental non-governmental organizations (NGO), no longer have the ability to participate in the process and public involvement is removed. Second, ADR processes are rarely transparent and open, where the public is not permitted to view the process or participate in it, thereby negatively affecting the public interest (Gattinger 2005, 284-287).

When contemplating the use of ADR programs in environmental disputes, disputants must consider whether the benefits of these programs outweigh the costs. When approaching conflict resolution, Tidwell (1998) argues that participants to a conflict must also possess the opportunity, volition and capacity to resolve.

2.6 Tidwell's Theory of Opportunity, Volition and Capacity as Components Necessary to Conflict Resolution

Tidwell (1998) has criticized interest based negotiation and offers an alternative means of resolving conflict. He argues that for participants to resolve conflict, they require the opportunity, volition and capacity to do so. This section examines what these elements are. Finally, this study aims to discern whether the participants of the case study possessed these elements.

In *Conflict Resolved? A Critical assessment of Conflict Resolution* (1998), Tidwell theorizes about the nature of conflict, and how, when and why conflict should be

resolved. He argues that in order to resolve conflict, conflicting parties must have the capacity, the volition and the opportunity to create resolution. These elements are not addressed in most ADR programs. Further, he argues that power to resolve is affected by both communication and history of the conflict and the parties. Tidwell's theory of conflict and conflict resolution forms the theoretical basis of the questions posed to interview participants and the information being elicited from them in this research.

Figure 2.6.1 illustrates Tidwell's (1998) view of conflict resolution as a cyclical process.

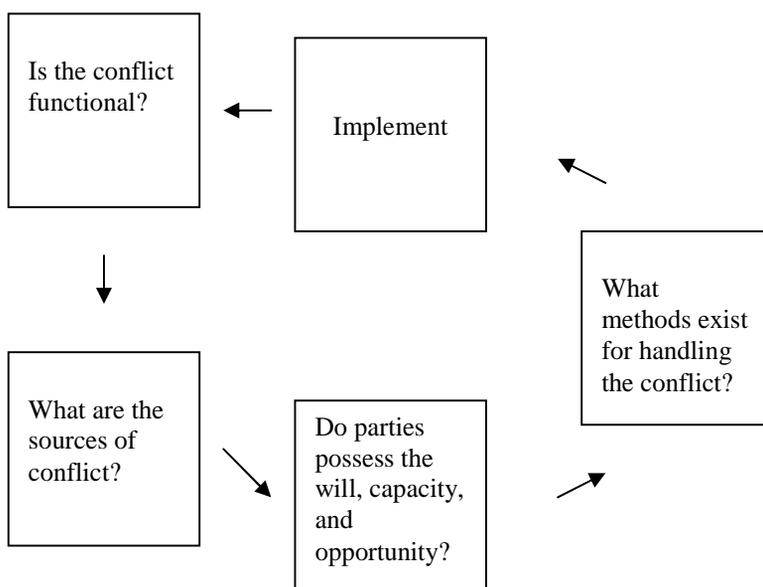


Figure 2.6.1 Conflict resolution seen as a cyclical process (Tidwell 1998, 3)

Tidwell (1998) lays out a five-stage process for conflict resolution. Here parties will ask, “[w]hat are the sources of this conflict that I need to know about so that I can resolve it” (p. 4)? Next, parties need to consider if the conditions to facilitate resolution exist. These conditions, he argues, are capacity, opportunity, and volition. For resolution to occur there must be the opportunity to resolve, those involved must have the ability or capacity to resolve (p. 4), and parties must have the will or volition to resolve (p. 5). Tidwell argues that if the capacity, opportunity and volition to resolve do not exist, the

following events may happen: First, resolution may be attempted, but without success. Alternatively, those trying to resolve the conflict will quit, or, finally, remedial action occurs to create opportunity, capacity or volition to resolve through means from moral persuasion to violence (p. 5).

In Tidwell's theory, the final stage in conflict resolution is a return to evaluating whether a conflict is functional or non-functional. Functional conflict refers to conflicts that are "...valuable, profitable, useful, justifiable and so on" (Tidwell 1998, 3). Tidwell has noted that a relationship exists between process control and participant satisfaction. Participants with high levels of control over process generally report higher levels of satisfaction than those who possess low levels of control (p. 23). Tidwell (1998) argues that often "processes for conflict are superimposed upon the context. For example, rather than examining the needs of the context, mediation is applied to a whole range of conflicts without due consideration of its appropriateness" (p. 6).

Tidwell argues that in many conflicts the problem lies with the people involved, not their interests. This can stem from an inability to communicate or historical injustices incurred by one or all parties (p. 2). Hamad (2005) concurs with Tidwell's argument that before addressing interests or positions of a conflict, resolution efforts should be directed at people-oriented issues first (p. 8).

Tidwell (1998) defines capacity as parties having the ability to resolve conflict. He argues that an actor's level of education or knowledge to talk about a conflict impacts the participant's capacity to participate in conflict resolution. Structural factors such as power imbalances or social inequalities, which are often mired in history, also affect the capacity of participants. Overcoming this history can be a long and arduous process.

Tidwell (1998) argues that creating capacity “may require educating several generations... [u]nfortunately, most conflict resolution efforts seem to focus almost exclusively upon changing the capacity of individuals, rather than focusing on a whole range of factors” (P. 172).

Opportunity refers to the actor’s possessing the chance to resolve. There are many factors that prevent all actors from having this opportunity such as time, structural factors (such as the caste system in India which prevents different castes from speaking with one another), and history (p. 172-173). History allows parties to believe the other side will not offer the opportunity for resolution. It is common for disputing sides refrain from communication because they believe the other side will not budge from their position due to the historical relationship. Tidwell states,

[h]istory and belief serve to create symbolic blocks to the creation of opportunity... One of the difficulties of creating such opportunities is that often one party or another has a vested interest in maintaining the social structure the way it is. Creating an opportunity to resolve may put at jeopardy profitable social structures (p. 173).

Finally, creating the will to resolve or volition is one of the most difficult tasks in conflict resolution. There is little one can do to influence the will to resolve. One way of encouraging participants to want resolution is to have them ‘cost’ out the conflict. Here, participants are encouraged to compare the costs of resolving the conflict versus it remaining unresolved (Burton 1986, 338). However, parties err when rationalizing their current position. History can also be a barrier to creating volition to resolve. It justifies current behavior. Coercion, threats, and power are limited means of forcing volition and tend towards inefficiency (Tidwell 1998, 173). “Creating the will to resolve means more

simply bringing parties together to talk; it means bringing parties together so that they may enter into a real conflict resolution dialogue” (p. 173-174).

Tidwell’s (1998) definition of conflict directly relates to his theory of conflict resolution. Should a conflict be at a state where parties wish to resolve it, how it is resolved is tied directly to an individual’s beliefs, values and cultures (p. 6). This definition is very different from that of the framework of principled negotiation where conflict must be resolved.

Tidwell shifts his argument from process to a discussion of the role of communication and history. He argues that each of these in their own right greatly effect the conflict resolution process and can determine its success. Tidwell (1998) argues that communication is a major component to conflict and conflict resolution. It is the exchange of meaning, and at its core, symbolization. Communication is an ongoing and a “...continuous process of simultaneous and seamless inputs and outputs” (p. 89). It creates or resolves conflict and is the basis for the distribution of power (p. 86). The interaction between perception and language “...impacts upon conflict in ways that may not be obvious to the casual observer” (p. 86-87). He states that communication is the means for continuing and gaining supporters for a conflict but at the same time can be at the heart of any conflict resolution process (p. 87). Much of conflict resolution is clarifying perceptions of communication (p. 92). While resolution requires good communication, good communication does not equate to conflict resolution (p. 87).

Tidwell argues that “[u]nderlying communication is the disposition of the parties; without the right disposition no amount of communication will suffice. Those disposed to resolving a conflict, or possessing the will to resolve, benefit more from and generate

better communication than those who are of a competitive disposition” (p. 87). There can be no conflict without communication and no resolution without communication (p. 105).

Equally important as communication in conflict resolution is history. History plays a central role in every conflict. “For a third party, such as a mediator, ignoring history in conflict is like ignoring a fault line running through the centre of a city: you can build on it, the city might even last for a while, but eventually it will fall down” (p. 107). Tidwell (1998) defines history as “...a perceived version of the past; it is an explanation of how things were, and why things today are as they are” (p. 109). It is value laden and biased towards the writer. History, including myth and story, guides and explains action and provide conflict analysts insight into a conflict (p. 109). Tidwell (1998) argues that history provides direction and explanations for motivations (p. 107). History can also limit the vision of conflict participants of future events. It has power over thoughts, feelings and actions (p. 108). Within a historical context, communication is drawn on by social actors for information, guidance and justification (p. 117). Conflict requires at minimum two contending histories from which all behaviour follows (p. 117). This history explains why a conflict cannot be resolved (p. 111). Without due attention to history, conflict resolution is bound to fail (p. 124). Ultimately, Tidwell states that without acknowledging history a conflict will not be resolved or understood. History and communication affects the ability of participants of any conflict to form the capacity, opportunity and volition to resolve a conflict. Communication empowers or dis-empowers a party’s ability to resolve the conflict. Structural factors such as power imbalances and social inequalities may also affect the capacity to resolve (p. 171).

Several scholars have reviewed *Conflict resolved: A critical assessment of conflict resolution* (1998) and offered their critique of Tidwell's work. At the forefront of these reviews are commentary on how the book addresses gaps in the ADR literature and its shortcomings. Alexander (1999), Reeve (1999) and Zartman (2000) each contend the greatest shortfall of the book is the broad ideas Tidwell presents without elaborating on them or supporting them. Zartman (2000) contends that Tidwell picks apart conflict resolution theory with a "British deliciousness" without providing substantiated reasoning for his argument.

Alexander (1999) and Reeve (1999) focus more on the positive contributions of the book to the ADR field. Alexander (1999) argues that ADR practitioners should consider Tidwell's proposition that not all conflicts are necessarily capable of being resolved. Instead, practitioners should be asking not how a conflict is to be resolved but whether that conflict should be resolved (p. 1). Alexander (1999) states that Tidwell contributes to the ADR field by contemplating the function of conflict in society (p.1). Last, Reeve (1999) argues that Tidwell provides a realistic approach to conflict resolution in contrast to the evangelist theories that have dominated the conflict resolution field (p. 223). Despite these critiques, there was little criticizing Tidwell's argument that participants to conflict were required to possess the opportunity, capacity and volition to resolve if they wish to attain resolution.

2.7 Conclusion

This review of literature offered a survey of theoretical and practical foundations of the ERCB's ADR program. This survey was given to provide the reader with an understanding of the context the program is situated in and the rules under which it

operates. Finally, a discussion of Tidwell's theory of conflict and conflict resolution provides the framework of the research.

CHAPTER III – LANDOWNER-INDUSTRY CONFLICT IN THE OIL AND GAS INDUSTRY IN ALBERTA

3.1 Introduction

This chapter discusses the roots of conflict in Alberta between the oil and gas industry and landowners. Much of this conflict stems from the history of land ownership in Alberta and the division of mineral¹ and surface rights, environmental impacts of oil and gas development and the health implications of this development. Second, this chapter examines the role of the ERCB in regulating the oil and gas industry. Finally, it analyzes the ERCB Appropriate Dispute Resolution program, its goals, processes and success rate.

3.2 Oil and Gas in Alberta

Oil and natural gas exploitation is vital to the Alberta economy. Currently, it employs one in six Albertans or the equivalent of 275,000 jobs. In the 2006/07 fiscal year, non-renewable resource revenue accounted for over \$12 billion dollars of provincial revenue (Alberta Energy, Our Business). In global terms, Alberta's crude oil reserves are second only to Saudi Arabia and Canada's natural gas reserves are the third largest in the world (CAPP, Alberta's oil and natural gas industry). Alberta produces seventy percent of Canada's crude oil and eighty percent of its natural gas (ERCB, Public Zone). Oil and natural gas production accounts for seventy percent of Alberta's exports and approximately forty percent of its GDP (Centre for Energy, Oil and natural gas – fast facts).

¹ Alberta Mines and Minerals Act defines minerals as meaning "... all naturally occurring minerals, and without restricting the generality of the foregoing, includes... gold, silver, uranium, platinum, pitchblende, radium, precious stones, copper, iron, tin, zinc, asbestos, salts, sulphur, petroleum, oil, asphalt, bituminous sands, oil sands, natural gas, coal, anhydrite, barite, bauxite, bentonite, diatomite, dolomite, epsomite, granite, gypsum, limestone, marble, mica, mirabilite, potash, quartz rock, rock phosphate, sandstone, serpentine, shale, slate, talc, thenardite, trona, volcanic ash, sand, gravel, clay and marl..."

Oil and natural gas reserves are located across the province of Alberta, encompassing both crown and private land. The map (Figure 3.1.1) below illustrates the location of reserves, with the oil sands in the northern portion of the province and conventional crude and natural gas spread throughout the province within the Western Canadian Sedimentary basin.

Figure 3.2.1 Oil and gas reserves in Alberta (CAPP, Alberta's oil and natural gas industry)

The Province of Alberta depends on the revenues from oil and gas exploitation to fuel its economy. The world depends on Alberta as one of its largest producers of oil and natural gas.

3.3 Conflict Between Landowners and Industry in Alberta's Oil and Gas Industry

Due to the province wide distribution of petroleum and natural gas in Alberta, it is inevitable that development occurs on privately held (freehold) land. Because development occurs on freehold land, conflict between landowners and industry is

common. Most disputes between landowners and industry are resolved between the parties, but occasionally, there is need for third party intervention. In 2007, there were over 42,000 applications for development to the EUB. Of these applications, only 1,881 faced objections to the development by stakeholders. Of these 1,881, 239 required the assistance of the EUB to reach settlement, which was accomplished through facilitation, mediation, or a hearing (EUB 2007).

There are several reasons for conflict between landowners and the oil and gas industry including land ownership rights, surface impacts from development and health concerns. Alberta's land titles system sets the stage for conflict because mineral and surface ownership rights are divided. In 1670, the English Monarchy granted the Hudson Bay Company ownership and governmental control of all land from Winnipeg west to the Rocky Mountains (which was known as Rupert's Land). In 1867, the Hudson Bay Company surrendered Rupert's Land to the Dominion of Canada in exchange for one twentieth of the land in the fertile belt (generally considered the land south of the North Saskatchewan River). Coinciding with this transaction, Rupert's Land was surveyed according to the Dominion Land Survey, which divides land into townships, which are comprised of thirty-six sections (640 acres) and is further divided into quarter sections. The Hudson Bay Company chose section 8 of the southeast, southwest, and northwest quarters of section 26 as its compensation for surrendering its ownership and control of Rupert's Land. Simultaneously, the government of the newly formed Dominion of Canada was trying to settle and develop the west. In an effort to do so, it granted undivided land ownership to both settlers and railway companies to encourage settlement and construction. Prior to 1887, land mineral and surface ownership was conveyed in a

single transaction. In 1887, this practice was halted and the government retained mineral rights for itself, only transferring the title to surface rights when granting land ownership. In 1905, Alberta became a province but the right to grant land was retained by the federal government. By 1930, the federal government transferred the right to grant the surface and mineral rights of crown land to the Government of Alberta. Since 1930, the government of Alberta has maintained a policy of retaining all mineral rights ownership on Crown lands. As such, rights to develop subsurface minerals are acquired by private interests by leasing these rights from the government in exchange for royalties on produced minerals (Service Alberta, 4).

Mineral rights owners and lessees have “the right to explore for and produce oil, gas and other minerals” while surface rights owners have “control of the land’s surface and the right to work it” (Alberta Energy, Frequently asked questions). Currently, the Province owns eighty-one percent of the mineral rights in Alberta, but only forty percent of the surface rights, the remainder being freehold title (Alberta Energy, Frequently asked questions). This division in title creates conflict over access because surface owners cannot prevent a mineral holder from being on their land to access subsurface minerals except in instances where the landowner can prove adverse effect. Surface landowners are compensated for allowing access to mineral rights through an annual rental payment. The annual rental is determined by calculating the loss of use of land suffered by the landowner and estimating the adverse effect they may suffer. However, industry must adhere to strict regulations established by the ERCB and the Surface Rights Act, conduct operations in an environmentally and technically acceptable manner, comply with government regulated standards, and cause the least possible interference to the

landowner (ERCB, Enerfaq 7). Conflict stems from a variety of factors, such as location of well sites, pipelines and roads; the occurrence of flaring, incinerating and venting; the potential for odor from sour gas wells, noise (from the drilling, gas compressors, separators, vehicles) and traffic concerns; landowner and community concerns over environmental issues such as water, soil and visual aspects; and the effects on livestock (ERCB, Enerfaq 7). Also, conflict can occur from the use of land agents. Land agents are used by exploration companies to negotiate surface and mineral leases with landowners. In most instances, it is not economically viable for land agents to be kept on staff. As a result, consultants are used as land agents and they are given information on a 'need to know' basis only. Using land agents may result in conflict as they are not always able to address the needs of the landowner due to the agent's lack of knowledge or lack of ability to negotiate certain issues.

Among the most contentious issues between landowners and industry are surface impacts from development. Marr-Liang and Severson-Baker (1999) have identified three types of surface impacts that become contentious. First, "[t]he contamination of surface water and soil as a result of spills and leaks of oil and produced fluids, and the impacts on ecosystem habitat caused by linear disturbances" (p. 8). There is the potential for ground water contamination from oil and gas activity. Potential sources could be leaks from wells, facilities and pipelines; seismic exploration; and drilling sumps (the pit where drilling waste is disposed of) (p. 10-11). Each of these situations could pose serious harmful impacts on humans, livestock, wildlife, and the environment.

Second, conflict between the public and industry also occurs over health concerns. One of the greatest risks to humans and animals from the industry is exposure to

hydrogen sulfide (H₂S). At only 0.0-0.3 parts per million, H₂S is toxic. At 1,000 parts per million H₂S becomes instantly fatal. Among the greatest concerns is “[s]hould there be an uncontrolled release of H₂S coupled with the company’s inability to ensure that potentially affected individuals would be evacuated before they were exposed to H₂S” (p. 12). Exposure occurs during the “drilling and testing of wells, laying of pipelines, and the flaring of solution gas,” affecting the health of humans, crops and livestock (p. 3).

Third, conflict between industry and landowners is rooted in the history of land ownership, in the impacts on the physical environment from development and in the health concerns posed by this development. Each of these factors contributes to the conflict that is manifested on a daily basis between landowners and industry. The role of the ERCB is to address this conflict by implementing regulations which industry must adhere to and create a forum for inevitable disputes to be resolved.

3.4 The Energy Resource Conservation Board Process

The ERCB regulates the development of the Province of Alberta’s energy resources. This includes the development of “oil, natural gas, oil sands, coal, and electrical energy, as well as the pipeline and transmission lines required to move these resources to market” (ERCB Directive 29, 2). The ERCB is the latest regulatory body in a long line established by the Alberta government, the first of which was formed in 1938. It is the result of a realignment of the Alberta Energy and Utilities Board that occurred on January 1, 2008 (ERCB Enerfaq 1). The mission of the ERCB is “[t]o ensure that the discovery, development and delivery of Alberta’s energy resources take place in a manner that is fair, responsible and in the public interest” (ERCB, About the ERCB).

The ERCB process allows stakeholders in the oil and gas development process the opportunity to resolve conflicts and disputes. However, should the relationship between the party's break down or the parties themselves not be able to resolve the disputes independently, the ERCB provides several assisted options for the parties to achieve resolution.

The ERCB process to gain approval for development is like a road map. Should the road be hazard free, one will travel a direct route to the destination. However, like most long roads, one must navigate many roadblocks and hazards. For companies proposing an energy project, the route through the ERCB process is long and fraught with obstacles. Prior to initiating any energy project² that may have an impact on “public land use, environment, conservation and equity”, the proposing company must gain the approval of the ERCB through the acceptance of an Energy and Utility Development Application³ (p. 3).

The first step in the application process is public consultation. Here, any persons or organization who may be directly and adversely affected by a proposed energy project have a right to be notified, be provided all the details of proposed project, and be given the opportunity to voice any concerns or objections to the proposed project. At this stage, the company would approach landowners to negotiate a contract for access to land, be it a surface lease for a well site and access road or a pipeline right-of-way agreement. Surface leases and pipeline right-of-ways are legally required to ensure a company's interest in

² These activities include “drilling a well, constructing a pipeline or a facility, and initiating a significant depletion plan, such as enhanced recovery or reduced spacing” (ERCB Directive 29, 3).

³ A completed application includes “a description of the approval, permit or license applied for; the grounds on which the application is made; a reference to the act and section under which the application is made; a description of the facts relevant to the application; a description of the public consultation process; any other information necessary to provide the EUB with a full and complete understanding of the application; and whether there are any outstanding landowner/resident concerns” (ERCB Directive 29, 3).

the land (ERCB, Enerfaq 7). Among the most important items negotiated are the location of wells, roads, and pipelines; how soil is to be protected, weed management, waste disposal and compensation⁴ (Environmental Law Centre (Alberta) Society, 4). Until these agreements have been negotiated, signed, and the first year's compensation paid, the company may not enter the property (Alberta Agriculture and Rural Development, Negotiating Surface Rights). If the landowner/resident and the company cannot agree on a location for a well, facility, pipeline, or access road, either party may request the ERCB assist in resolving outstanding issues. The ERCB staff can assist negotiations by facilitating discussions, engaging a third party to mediate negotiations, or, should these options fail, assist in the formal hearing process (ERCB, Enerfaq 7).

Prior to the applicant submitting their application, they must address and attempt to resolve any outstanding concerns and objections to the proposed development. Should they not be able to resolve all concerns and objections, these objections must be noted on the final application (p. 3). If there are no objections to the application, the ERCB finds it to be technically sound, public safety and environmental protection are ensured, the application will be processed and approved (p. 3). However, if an application states that there are outstanding concerns between the company and landowners/residents or if the ERCB wants to ensure no concerns exist, a notice of application⁵ is mailed to all local parties and an ad may be placed in the local paper and the Calgary and Edmonton newspapers (p. 4). Should any party feel that they are directly adversely affected by the

⁴ Compensation is provided as financial reimbursement for loss of use of land and for adverse effect suffered by a landowner.

⁵ "A notice of application briefly describes the subject matter of the application; provides the date by which statements in support of or opposition (objection) to the application must be filed; explains that the EUB may grant the application without a hearing if no objections are filed by persons considered by the EUB to be directly and adversely affected by the proposed project; provides information for contacting the applicant and explains where and when you may view or obtain a copy of the application, if you do not already have one; and contains any other necessary information" (ERCB Directive 29, 4).

proposed development, they may file their concerns, in writing, to the ERCB and the applicant (p. 6).

It is at this stage that the ERCB staff becomes available to all parties of the application to assist in dispute resolution and explain the hearing process. ERCB staff are available to “facilitate resolution of outstanding differences” (p. 6). This process is informal and “designed to enhance communication, identify common interests, and explore possible solutions” (p. 6). Should participants wish, at this stage, they may turn to the ERCB ADR program to attempt resolution of outstanding issues. The ERCB has encompassed the ADR continuum in the design of its process. Participants have the choice of five processes to in resolving disputes: informal discussion and problem solving, direct negotiation, facilitation, mediation, and board hearing. These options incorporate the philosophy of offering participants a range of control over the process – from informal discussion and problem solving, where participants have full control, to a board hearing, where participants have very little or no control over process design, development of options, and control over outcome. By utilizing this service, parties do not hinder access to an ERCB hearing (p. 6). This is important as it guarantees parties access to an alternate path to settlement.

If a person or organization is able to prove, through written submission to the Board, that they are adversely affected by a proposed development and have not been able to resolve outstanding issues with the applicant through negotiations, they may trigger a hearing. In order to trigger a hearing the party must show to the Board “that it has rights that may be directly adversely affected by the Board’s decision on the application” (p. 7). If the Board decides a hearing is necessary, it issues a notice of hearing to all parties “directly and adversely affected” and a notice of public hearing is

placed in the local newspaper. The aim of this process is to allow all persons or organizations who may be directly adversely affected to file a submission (p. 8).⁶

Prior to a hearing, a prehearing meeting is held where procedural matters are addressed, interveners are informed of complex issues, and applicants present their views on issues to be raised at the hearing. Both sides are provided the opportunity to present their position on the issues to be addressed at the hearing (p. 13). Both the prehearing meeting and the hearing are formal, legal procedures, like any court process. The hearing is open to the general public for observation. At the formal hearing, both sides present their support or opposition to the proposed development and are given the opportunity to cross-examine. The hearings are generally held in a public hall near the proposed development site. The panel, which over-see the hearing, consists of three members of the Board⁷. The role of the panel is to hear all evidence and conduct a fair process. Within 90 days of the hearing, the panel releases a written decision and distributes it to all participants. While the Panel's decision is final, the Board may review it and reverse the decision. Should a party wish to appeal the Board's decision, the appeal must be made to the Alberta Court of Appeal "and be based on questions of jurisdiction and law" (p. 20). Any decision of the Alberta Court of Appeal may be appealed to the Supreme Court of Canada (p. 20).

⁶ The Board takes into account the following factors, on a case-by-case basis, when examining each submission for a Board hearing: "Does the proposed project have the potential to affect safety or economic or property rights? Examples of such impacts include negative effects from contaminants in water, air or soil or from noise; negative interference with livelihood or commercial activity on the land; damage to property; and concerns for the safety of persons or animals. Are you affected in a different way or to a greater degree than members of the general public? Are you able to show a reasonable and direct connection between the activity complained of and the rights or interests you believe to be affected?" (p. 7).

⁷ The ERCB board is comprised of seven members, two Queen's court lawyers, two professional engineers, a geologist, a retired civil servant, and a landowner.

The ERCB process is adversarial and litigious and does not focus on building relationships between parties or reaching mutually agreeable solutions. As a result, in December 1999 the EUB commissioned the Canadian Dispute Resolution Corporation to design a dispute resolution program that utilized the ADR continuum, providing those affected by energy development disputes with a variety of options to resolve disputes.

3.5 The Energy Resource Conservation Board Alternative Dispute Resolution Program

In December 1999, the Canadian Dispute Resolution Corporation (CDRC) convened to assist the Alberta Energy and Utilities Board⁸ (EUB) in designing and introducing a mediation option into the EUB application process. When the resulting report was prepared in 2007, roughly 5% of proposed development applications within the EUB's mandate involved unresolved conflicts. The EUB and the CDRC developed a program where these disputes are managed in a variety of ways, ranging from the very informal, where disputing parties engage in informal negotiation to resolve their dispute, to formal arrangements, such as an ERCB Board formal hearing (Canadian Dispute Resolution Corporation 1999, 3). The ERCB ADR program encompasses a conflict resolution continuum which ranges from negotiation, facilitation, mediation, arbitration, and finally to formal hearings (Hill 2006).

ADR is a set of practices that provide an alternative to dispute resolution than that offered by the courts, or in the case of the ERCB, the Board Hearing process. While disputes are legitimately resolved by the Board, ADR allows parties to avoid litigation (Lieberman and Henry 1986, 426). ADR is a move away from the judicial system towards a process whereby parties have increasing control over the process used to

⁸ The Alberta Energy and Utilities Board (EUB) is now the Energy Resource Conservation Board (ERCB), a result of a realignment in January of 2008 (ERCB, Enerfaq 1)

facilitate resolution to their dispute (Pirie 2000, 29). This move away from the courts and towards participant control is embraced by the ERCB in an effort to resolve energy development disputes between stakeholders. The program allows participants to create the process used in attempting resolution. A board hearing has become a resort for participants who chose to pursue the ADR route. Essentially, the ADR program is a move away from the zero-sum result of Board hearings to a collaborative approach where parties create resolution together.

On January 8, 2001, the EUB's ADR program was announced to the public. The intent of the program was to "directly involve decision-makers in an interest-based, collaborative approach to develop a clear understanding of concerns and issues, discuss their interests, and then develop options for resolution" (IL-2001-01, 3). The objective of the ERCB ADR program is "to improve the tools available to EUB staff to facilitate the early resolution of application disputes using a flexible ADR process resulting in: "improved efficiency and meeting of stakeholders needs; "better use of time and other resources"; "improved land owner-industry and industry-industry relationships" (Canadian Dispute Resolution Corporation 1999, 3). The ERCB's ADR program is designed to operate on an interest-based model (IL-2001-01).

3.6 Conclusion

Studying the ERCB ADR program is particularly relevant at this time. Currently, it is the only ADR program in Alberta's oil and gas industry. In an industry permeated with conflict, it is important to critically analyze the program in order to discern its problematic aspects and its environment to further its effort to manage conflict between landowners and industry. This chapter provides the context in which the program is situated and an overview of the ERCB process. The ERCB ADR program provides an

alternative to the ERCB hearing process to resolve conflict that arises from oil and gas development.

CHAPTER IV – METHODOLOGY

4.1 Introduction

The purpose of this chapter is to discuss the rationale for and implementation of the research of the ERCB's ADR program. I have been reflecting on stakeholder conflict, especially between landowners and industry, since I began working in the oil and gas industry six years ago. I have always held the hope that an alternative exists to the contentious—and often litigious—relationship between stakeholders and industry. Over the past few years, I have wondered how the legal and social environment in Alberta relates to the ability of disputing parties to achieve long-term conflict resolution.

The ERCB ADR program provides one of the few alternatives to litigation for disputing parties in Alberta's oil and gas industry. The aim of this research was to determine if participants of the program were able to achieve lasting conflict resolution. The intent of this research is not to provide the basis for generalizations about the program's success; nevertheless, the research suggests that changes to regulation, relationships, and the implementation of the ADR program could reduce conflict between landowners and industry. The goal of this research design was to create results that described one case and how or if conflict was resolved.

4.2 Approach to Research

My research question is: *Does the principled negotiation model used by the ERCB ADR program exist in a setting where Tidwell's (1998) elements for conflict resolution are present?* In order to answer this question, I selected instrumental case study as my methodology. Using case study created an opportunity for the participants' experience with the ERCB ADR program to be critically analyzed and understood. From a broad

perspective, Yin (1994) describes a case study as “an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident.” Further, “[t]he case study inquiry... relies on multiple sources of evidence, with data needing to converge in a triangulating fashion, and as another result benefits from the prior development of theoretical propositions to guide data collection and analysis” (Yin 1994, 13).

Instrumental case study is the study of a particular case(s) to understand a broader question (Stake 1995, 3). Instrumental case study is used when there is “a need for general understanding, and feel[s] that we may get insight into the question by studying a particular case” (Stake 1995, 3).

4.3 Research Design and Participant Recruitment

My method of collecting data for this research was to conduct three standardized open-ended interviews, which were recorded with a digital voice recorder. This style of interviewing was chosen because of the strengths it offers to the style of research conducted. In this style of interviewing, all participants are asked exactly the same questions in the same order (Patton 2002, 349). During the interviews, participants were asked a total of sixteen questions. The questions asked are shown in Appendix II to this paper.

A case that has been resolved in the previous twelve months was selected for two reasons. First, so participants could provide feedback on the entire process and secondly, so participants would be able to more accurately recall their experience than if a long period of time had lapsed. Once the names and contact information of participants were provided, dates and locations for the interviews were arranged with each participant,

according to the preference of the participant. Stake (1995) argues that when selecting a case using instrumental case study, there should be easy access, the participants should be receptive to inquiry, and the case does not need to be typical of the organization (p. 4). The ERCB selected the case based on the willingness of the participants to be interviewed. Each case handled by the ERCB ADR program is unique and contains its own set of challenges. The case was selected with the understanding that 'typical' cases do not exist.

The ERCB ADR program director selected a case for my research that was facilitated within the last year and was between a landowner and industry. The participant selection process was the lengthiest process of the research project. Due to the confidential nature of the ERCB ADR program, it fell to the ERCB to contact the participants of the program to find individuals willing to take part in the study. Originally, I requested to have access to the participants of a mediation conducted through the program. However, due to the very limited number of participants and the contentious nature of the proceedings, five months passed without the ERCB being able to find a mediated settlement where all participants were willing to be interviewed. In January of 2009, I spoke with the program director and we agreed to adjust the parameters of the case study group to include facilitations conducted by the ERCB. By expanding the parameters of possible participants, I hoped to improve my opportunity of finding a group willing to share their experience with me. By adjusting the parameters of the case study group, participants were found almost immediately. The ERCB provided assistance in making first contact with participants and obtaining verbal consent to participate. Using a recently resolved case is beneficial as participants will be able to

more accurately recall the details of their experience than if an older case was used. The case's principled negotiation design provided the framework for the study. It was bounded and was size appropriate for the scope of this research. Finally, the case incorporated many of the issues currently disputed in oil and gas in Alberta.

4.4 Data collection

The study relied on two sources of data: document analysis and interviews of case participants. Patton (2002) argues that "document analysis provides a behind-the-scenes look at the program that may not be directly observable and about which the interviewer might not ask appropriate questions without the leads provided through documents" (p. 307). Documents are valuable for two reasons: First, information is gleaned from documents that cannot be acquired from interviews or observation. Second, these documents are used as "a stimulus for paths of inquiry that can be pursued only through direct observation and interviewing" (p. 294). Documents pertaining to the case came from a variety of sources including ERCB public documents, published articles and provincial legislation. These documents were analyzed to determine their relevance to the case and data was extracted to further the understanding of the capacity of the program to create lasting conflict resolution.

The second data collection method was interviews with the conflicting parties and the mediator. Interviewing is a valuable data collection method in that it allows access to that which is not directly observable (such as "feelings, thoughts, and intentions") (Patton 2002, p. 341) through qualitative research methods. They are used to gain insight into previous situations, how people create meaning, and their perspectives (Patton 2002). "Qualitative interviewing begins with the assumption that the perspective of others is

meaningful, knowable, and able to find out what is in and on someone else's mind, to gather their stories" (Patton 2002, 341). The goal of participant interviews was to collect data on perceptions of landowner rights, industry rights, and the participants' experiences of the conflict and of the ERCB ADR program.

In standardized, open-ended interviews, all participants are asked exactly the same questions in the same order (Patton 2002, 349). This style requires each question to be carefully and fully worded (Patton 2002, p. 345). I chose this method because of its consistency across interviews; this method guards against variations when interviewing more than one person, keeps the interview on topic with highly focused questions, and makes the analysis easier as respondent's answers are easy to find and organize (Patton 2002, p. 346). The main weakness of this approach is that it does not permit perusal of topics that were unanticipated when writing the interview questions. Consequently, topics that are brought forward during an interview by participants cannot be further explored by the researcher. This may result in a portion of the participant's experience not being shared and valuable information not being provided to the researcher.

Interviews ranged in length of time from 30 minutes to 90 minutes in which interviewees answered 16 standardized questions (see *Appendix 1*). Three interviews were conducted in total, one with the landowner, one with the company representative who was present at the facilitation and one with the ERCB facilitator that directed the facilitation. These three parties represented the participants of the facilitation. No information about the location of the participant, their age, or employment information has been included in this study in order to protect the identity of the participant.

The sixteen interview questions, which encompassed the topics of what lead to the conflict, conflict process, and participant experience in the ADR program, yielded rich and plentiful data. After conducting the three interviews and transcribing them, I then coded the transcripts using open coding. Once immersed in the data, I began to generate codes from the text that reflected the content of the data (Elo 2008, 109). This process resulted in 345 codes, twenty-five categories, five themes, and two meta-themes being generated from the text.

4.5 Data analysis

Content analysis was used to for this study to analyze the data. Content analysis is used “when existing theory or research literature on a phenomenon is limited” (Hsieh 2005, 1279). The outcome of content analysis is “...concepts or categories describing the phenomenon” (Elo 2008, 108). These concepts or categories then build a model or conceptual map (*ibid*). Content analysis is concerned with “meanings, intentions, consequences and context” (p. 109) and allows for flexible research designs and for the development of “the meaning of communication” (p. 108). Elo (2008) argue that content analysis occurs in three stages: “preparation, organizing and reporting” (p. 109). Weber (1990) further breaks down the process of content analysis into eight categories: define the unit of analysis; define the categories, test coding on a sample of text; assess accuracy or reliability of coding; revise the coding rules, return to testing the coding; code all text; assess the reliability of text (p. 21-24).

When carrying out the analysis stage I chose to use the inductive method, in which “...inductive data moves from the specific to the general, so that particular instances are observed and then combined into a larger whole or general statement” (Elo

2008, 109). Because the transcriptions contained many sentences that contained more than one idea, I used sentences and sentence fragments as my unit of analysis. My next step was to code the text as I read it. This type of “open coding” allows the researcher to create categories and abstraction (*ibid*). During the analysis phase, I test coded one page of text to get an understanding of pulling codes from the data. I then worked through the transcriptions of each interview using open coding. This step was repeated twice to ensure validity and reliability of the codes. Once the text was coded, the codes were organized and sorted. During this process, codes were placed into categories that were derived using a method recommended by Holsti (1969 p. 95-100). Holsti (1969) argues that categories are constructed through trial and error, testing the categories and modifying them in light of the data. In order to construct the categories, he suggests consideration of the following questions: What is the communication about? Were the categories developed for a problem at hand? Once the categories were developed, a conceptual system was drawn from them and then analyzed for results.

4.6 Limitations, Generalization and Validity

Stake (1995) identifies some limitations to using case study. It is subjective, can result in very little effect on social practice, carries high ethical risks and can have high time and financial costs (p. 45). In an effort to have an effect on social practice, the research will be provided to the ERCB upon completion. Ethical risks were mitigated by closely following the University’s ethics requirements. High financial costs did not occur due to the limited scope of the study. However, time delays were experienced as there was an eight-month period between initial contact with the ERCB and the interviews. Yin (1994) further expands on these limitation by adding that case study allows “little basis

for scientific generalization” (p.15). Stake (1995), however, argues that generalizations are made about the case itself and “[g]rand generalizations also can be modified by case study” (p. 7). The goal of this study was not to make generalizations about the program itself, but to provide insight into one case managed by the ERCB ADR program. Further research can expand on the results of this study and make generalizations to the industry and the field.

In order to recruit participants for this study, I originally contacted the ERCB’s ADR Coordinator to ask if the ERCB would be willing to participate in this study. Once consent was granted, I applied for approval from the Human Research Ethics Board at the University of Victoria. At this stage, I considered the ramifications of my study on the participants and the wider implications of the study beyond my own interest. In designing the study, I ensured the anonymity of the participants would be protected and risks to them minimized. The primary risk considered was the emotional impact discussing the case would have on the landowner. To mitigate this risk, the landowner was informed he would be able to halt the interview at any time or withdraw from the study with no ramifications.

Once ethics approval was granted, I was able to contact the ERCB to begin the participant selection process. Once the study participants had been selected they were informed of their right to withdraw from the study at any time for any reason without need of explanation or consequence. Participants were also informed that at any time they may decline to answer any question without explanation or consequence. Prior to the interviews, participants were informed that their anonymity would be protected. At no point would any identifying features be revealed; I would be the sole person to listen to

the interviews, transcripts of the interviews would be password protected and stored solely on my personal computer. Participants would be identified by their role in the final thesis. All of the participants agreed to participate in the research, signed the consent forms and indicated that they understood what they had signed.

Triangulation of the research data was used to build validity of the research. The premise of triangulation is that “no single method ever adequately solves the problem of rival explanations. By triangulating the research, its reliability and credibility increases. Because each method reveals different aspects of empirical reality, multiple methods of data collection and analysis provide more grist for the research mill” (Patton 2002, 555-556). Triangulation adds credibility to research and prevents vulnerability to error. There are four means of triangulation: method triangulation and analyst triangulation. Method triangulation assumes a compatibility of methods. It compares and integrates data collected through various methods (Patton 2002, 556). It compares observations with interviews, what people say in public versus what they say in private, compares the perspectives of various people interviewed, it checks for consistency in what people say over time, and it checks interviews against documents (Patton 2002, 559). In this study, interviews were compared to each other to highlight areas of convergence and divergence of experience. Initially, I intended to conduct an analysis of documents pertaining to the case, but participants did not provide any as they argued all relevant information could be conveyed through interviews. Instead, the participants and the researcher agreed necessary information was conveyed through the interviews. Nevertheless, publications such as the ADR Annual Reports and other information about the program published by the ERCB were utilized in setting the context for the ERCB ADR program. This

information plays an important role in answering the research question as it identifies the program's background and operating principles. This information played a fundamental role in understanding the results and in making recommendations for the development of the program.

Multiple-analyst triangulation has “two or more persons independently analyze the same qualitative data and compare their findings” (Patton 2002, 560). For this study, only one analyst was used due to the nature of the study. In order to ensure the accuracy, transcripts were thoroughly edited and data was coded multiple times.

4.7 Conclusion

Case study was chosen as the method for this research. While the results of case study cannot be generalized, case study allows the researcher to understand the full experience of the participants. Standardized open-ended interviews were used to collect data and gain an in depth understanding of the experiences of the participants. These interviews resulted in rich data to which content analysis was applied. Content analysis allowed the data to be sorted and organized so that meaningful results could be gleaned from the text. The study provides an in depth analysis of the experience of the participants of a facilitation conducted by the ERCB ADR Program in order to answer the research question. The following chapter provides a discussion of the interview findings and the data that emerged from them.

CHAPTER V – FINDINGS AND RESULTS

5.1 Introduction

This chapter discusses the findings and results of the interviews. It begins with a summary of the case followed by an analysis of the themes and categories that emerged from the interviews. An analysis of the findings is conducted in order to answer the research question. The interviews were coded, organized into meta-themes, themes and categories.

5.2 Case Summary

In March 2009, I conducted interviews with the three participants of an ERCB ADR facilitation that occurred from 2007-2008. The facilitation was an effort to resolve a conflict between a landowner and an exploration company that began in 2001. When the exploration company drilled a well on the landowner's property, the landowner allowed the exploration company to use a temporary access road with the understanding that if the well was proven to be a producer, the exploration company would construct a permanent road in consultation with the landowner. Due to miscommunication within the company, a permanent road was not built and use of the temporary access road continued. Subsequently, a land agent contracted by the company approached the landowner with plans to drill over twenty wells on his property and build the associated pipelines and access roads. The landowner was not receptive to the plans presented by the land agent. He was against development in principle and his prior experiences with oil and gas development were not positive. However, he had come to the understanding that there was very little he could do to prevent development. He had several concerns pertaining to the locations of wellheads, access roads and pipelines, land value, and the effect on

agricultural operations. The land agent did not have the authority to negotiate the locations of the projects and as such was unable to address the landowner's concerns. When the landowner raised objections that the land agent could not address, the company chose not to pursue development and the conflict remained latent. Six years later, the company opted to attempt to pursue development on the landowner's property. Again, a land agent was contracted to negotiate the surface access with the landowner. When this proved unsuccessful, the company requested the assistance of the ERCB ADR program. The landowner agreed to the ADR approach as a venue to voice his concerns.

The participants chose to utilize the facilitation services of the ERCB ADR program. The facilitation was conducted by an ERCB employee who is trained in principled negotiation, facilitation and mediation. She conducted the facilitation using the principled negotiation model. Over the course of a year, the participants were able to develop mutually agreeable solutions to outstanding issues and they constructed a working relationship from which they now conduct business. They are now able to discuss ongoing and occurring concerns themselves without the assistance of a third party. By November 2008, the parties had reached mutually agreeable resolution. The company and the landowner were able to place well sites, access roads, and pipelines in locations that were satisfactory to both parties and agree on locations for future development should the need arise. Both the company and the landowner indicated that should they be in a similar situation in the future, they would use the ERCB ADR program again.

5.3 Summary of Interviews

These interviews were conducted with the intent of understanding the experience and the beliefs of the participants with regard to oil and gas development and the ERCB ADR program. As discussed in the methodology section, each of the participants was asked identical questions. The questions revolved around the themes of the background of the conflict, their experience with the other party, their experience of with the ERCB ADR program, and the results of the program. The landowner provided the most detailed response to the interview questions. He indicated that he welcomed the opportunity to share his experience both with oil and gas development and with the ERCB ADR program. This may have contributed to his willingness to share his experience in such detail. Underlying his responses to questions concerning his experience with oil and gas development was the theme of his inability to prevent development and his continued attempts to empower surface owners in Alberta. He conveyed his resignation to oil and gas development and his redirected efforts to make it the least intrusive as possible to current and future generations. The most significant of his objections to development were the impact it would have on agricultural operations and land value. The landowner provided detailed explanations of the sources of conflict and his inherent beliefs regarding the governmental and legal paradigms in Alberta. These are discussed further in this chapter. When asked about his experience with the ERCB ADR program, the landowner praised the program and his experience. He believes that not only were his concerns addressed, he was able to build a relationship with the company where he is considered a member of the team.

The facilitator and the company representative both provided concise answers to the questions in contrast to the expansive responses of the landowner. When asked about her experience with the case, the company representative indicated she had handled the case since it entered the ERCB ADR program and that it was of value to the company to have positive relationships with landowners. She emphasized the importance the company placed on resolving landowner concerns in a manner that builds positive relationships, despite economic costs. She indicated that landowner concerns are addressed by moving locations of roads, pipelines and well sites. Often these changes come with increased expenses for the company. When asked about her experience with the ERCB ADR program, the company representative also expressed positive experiences. She believed that the program was able to bring disputing parties together by having an independent party educate disputing parties and lead discussions.

The facilitator offered very little information regarding the background of the conflict but provided the most in depth responses to questions regarding the ERCB process. She offered significant detail about the facilitation process and its application in this case. She too believed that each party walked away from the table satisfied with the outcome of the facilitation and the relationship that was developed. The interview with the facilitator showed that the facilitation occurred according to the process described in the ERCB literature. When explaining how the facilitation was conducted, she described the principled negotiation model of Fisher, Ury and Patton (1991).

This case is an example of conflict between the oil and gas industry in Alberta over surface access for development purposes. The landowner was adamantly against development on his land but believed that he had no choice but to allow it. While

resigned to development, he pursued every means available to him to ensure that the development occurred on terms that were as unobtrusive as possible. The exploration company approached the conflict with the intention of building a positive working relationship with landowner. The ERCB ADR program was able to facilitate a relationship between parties where their goals were met. The remainder of this chapter discusses the results of the interviews.

5.4 Overview of Interviews

The interviews of the participants of this facilitation resulted in rich and abundant data. This and the remaining sections of this chapter describe the meta-themes, themes and categories that were generated from the analysis. After transcribing and immersing myself in the data, I generated twenty-five categories (personal beliefs as reason for conflict escalation, intangible external reasons for conflict escalation, landowner non-tangible objections, personal attributes of individuals, compensation for development on land, disputed issues – tangibles, Alberta societal influences , role of the Alberta government, whole ownership of property, development process, land ownership rights, changing the law, effect of historical land grants, ERCB process, disputed issues (land value, compensation, ownership) , what is discussed in ADR, what occurs during ADR, requirements for ADR, ADR process, program access, advantages of ADR, why use ADR, satisfaction and suggested changes to program, relationship development, and results of ADR), five themes (intangible factors influencing the conflict, tangible factors influencing the conflict, external factors influencing the conflict, process of ADR, and results of the program) and two meta-themes (factors that influenced the conflict and

ERCB ADR Program effect on the conflict). The results are discussed in detail in the remainder of this chapter.

When analyzing the data, two meta-themes emerged – factors that influenced the conflict and how the ERCB ADR program affected the conflict. Figure 5.4.1 outlines the meta-themes and themes from which they emerged.

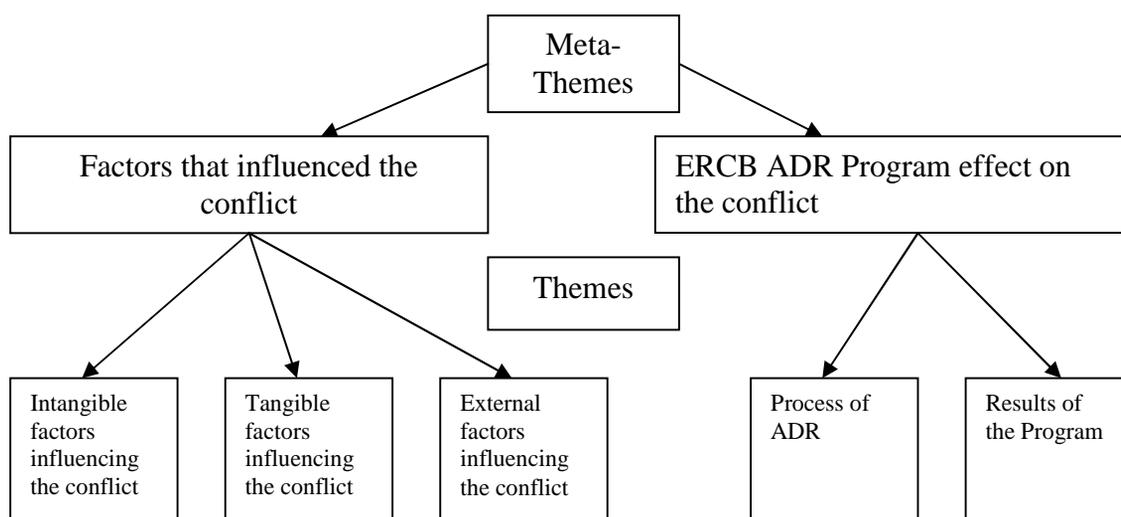


Figure 5.4.1 Meta-themes and themes

The meta-theme of ‘factors that influenced the conflict’ emerged from three themes – intangible factors influencing the conflict, tangible factors influencing the conflict and external factors influencing the conflict. Each of these themes related to underlying causes of the conflict and causes that exacerbated the conflict. These factors originated from several venues: the worldviews of the participants, the personalities of participants, issues directly related to the effects of development, and the social and legal context in Alberta. Each of these themes and categories share the characteristic of being a source of the conflict.

The second meta-theme that emerged from the data was the effect of the ERCB ADR program on the conflict. The ERCB ADR program transformed the relationship between the disputing parties. Prior to engaging the program, the landowner and the company were unable to discuss development on the landowner's property due to history and communication patterns. The facilitation created a shift in the relationship between the parties by creating a venue where interests were discussed and knowledge shared. The second meta-theme is comprised of two themes, the process of ADR and results of ADR. When examined from combined perspective, they illustrate the process, the transformation to the relationship, and the satisfaction that resulted from ADR.

The two meta-themes interplay each other. The participants indicated that the process of the ERCB ADR program and its results flow from the factors influencing the conflict from various levels. The issues and interests of the parties dictated what was discussed and what was resolved during the facilitation.

Underlying the two meta-themes are five themes and twenty-five categories. These themes and categories are illustrated in Table 5.4.1:

Table 5.4.1 Themes and categories resulting from interviews

| Meta-theme Factors that influenced the conflict | |
|--|--|
| Theme | Categories |
| Intangible factors | <ul style="list-style-type: none"> • Personal beliefs as reason for conflict escalation • Intangible external reasons for conflict escalation • Landowner non-tangible objections • Personal attributes of individuals |
| Tangible factors | <ul style="list-style-type: none"> • Compensation for development on land • Disputed issues – tangibles |

| | |
|---|---|
| External factors | <ul style="list-style-type: none"> • Alberta societal influences • Role of the Alberta government • Whole ownership of property • Development process • Land ownership rights • Changing the law • Effect of historical land grants • ERCB process • Disputed issues - land value, compensation, ownership |
| Meta-theme ERCB ADR program effect on the conflict | |
| Theme | Categories |
| Process of ADR | <ul style="list-style-type: none"> • What is discussed in ADR • What occurs during ADR • Requirements for ADR • ADR process • Program access • Advantages of ADR • Why use ADR • Satisfaction and suggested changes to program |
| Results of the program | <ul style="list-style-type: none"> • Relationship development • Results of ADR |

The remainder of this chapter will describe the themes and categories generated from the text of the interviews. Each of the themes represents significant topics that emerged from each of the interviews. The participants commented on these themes from different perspectives. The themes were developed from the initial 345 codes, which were sorted into 25 categories. Many of the codes came from the perspective of one participant. The landowner in particular, gave a very rich interview and discussed topics not addressed by either the facilitator or the company representative. However, after sorting the codes into categories, I found that the categories contained responses from at least two of the participants, allowing conclusions to be drawn.

Below, each theme is discussed in detail with the sub-categories as the basis of analysis. Each participant is identified according to their role – landowner, facilitator, and company representative. This analysis is the basis of the findings discussed in the following chapter. The first three themes relate to the sources of the conflict, how they affected it, and the relationship of the participants.

5.5 Meta-theme 1: Factors that Influenced the Conflict

The meta-theme of ‘factors that influenced the conflict’ contains the underlying sources of the conflict and the factors that influenced the conflict. Second, it illustrates how these sources and factors affected the capacity, opportunity and volition of the participants to resolve the conflict. The interviews revealed three themes related to the meta-theme of ‘factors that influenced the conflict’ which are discussed in the following sub-sections: Intangible factors, tangible factors, and external factors.

5.5.1 Intangible Factors

The participants identified many intangible factors that were sources of the conflict and how they influenced its progression. Intangible factors refer to those factors that neither possess monetary value nor are corporeal. These factors are classified as personal beliefs as reasons for conflict escalation, intangible external reasons for conflict escalation, landowner non-tangible objections, and personal attributes of individuals involved in the conflict.

Participants associated personal beliefs as factors that led to the escalation of the conflict. The facilitator linked landowner objection to oil and gas development on their land as a major factor in conflict escalation. Often, the financial benefit of development to landowners outweighs their personal objection to development. However, in this case,

it was a contentious issue. The company representative elaborated on this theme when she stated: “A lot of times when landowners really don’t want, don’t want to be engaged, using the land agent is not the best solution.” Here, she highlighted that often landowners do not want to be engaged in the development process. The landowner indicated that he did not want development on his property. Where development was going to occur, the landowner wanted the ability to state where well sites, access roads, and pipelines were going to be located in order for the least possible interference to occur. Second, he believed that development would detract from the value of his land, which was not an issue addressed by the company. While the landowner wanted development to cause the least possible interference on his land and the smallest impact on property value, the exploration company had plans for development with economic considerations at the forefront. The landowner’s belief were a major source of conflict between the parties and the company and land agent did not acknowledge this as a legitimate concern until the parties were engaged in the ADR process. Personal beliefs of the landowner and the reaction of the company was a source of the conflict. The landowner’s negative beliefs pertaining to development became a barrier for the company to overcome before it could proceed. The company’s failure to acknowledge the legitimacy of the concern exacerbated the issue.

Second, intangible external factors for conflict escalation emerged from the data. Central to this category are the issues of capacity to negotiate, development of the relationship between the parties, the ability to make decisions, communication patterns and a lack of understanding of issues. The theme of capacity to negotiate came up in all three interviews, particularly surrounding the issue of exploration companies using land

agents to negotiate surface access for them. The landowner argued that land agents lack capacity to negotiate when the landowner stated:

They need to have people there that can make decisions and ah, you know, the system of having some agent come out and say that this is the way that it is, you don't like it, then well, too bad. That doesn't really work at all. It is sort of an impossible model. The minute you move to a system where you have people, and if, because they have, it's not just that they have power to make a decision, they actually know why the decision is going to be made.

The role of land agents was expanded upon by the company representative: "We had an agent, a land agent, working with him that wasn't able to probably give him what he needed because he always had to come back to (participant company) to talk about what [the landowner] needed..." She further discussed this: "[the landowner] had concerns about some of our operations and that was being fed back through the agent and then the agent was running it back to [participant company]." Each of the interviews indicated that the land agent lacked the capacity to negotiate with the landowner. This occurs because the land agent does not have the ability to alter the location of the well sites, access roads or pipelines, they can only negotiate compensation for development based on the surveys they are provided. In this case, the land agent lacked the capacity to negotiate the criteria that was most important to the landowner. The landowner became frustrated with the land agent's inability to negotiate all issues.

Each of the participants briefly described the relationship between the conflicting parties prior to entering the ERCB ADR program. The company representative discussed the relationship: "There was no opportunity to move forward..." The landowner described the latent state of the conflict on very similar lines:

We weren't going their way so you know they sort of quit and the guys knew they weren't getting anywhere so both sides really walked away.

Nobody I guess from our side, we knew that we eventually had to deal with it, from [participant company]'s side, they knew they eventually wanted to deal with it. So you know, nobody really said well, we're just not going to do that, so forget it. People just sort of backed off and just let it sit for six months or nine months or whatever it is that it takes.

Not having people with the ability to make decisions present was a theme raised several times in each interview. Each participant argued not until the dispute went to the ERCB ADR program that people with the ability to make decisions were present. For the first time in the relationship, the landowner was at a table with individuals who were able to make decisions regarding disputed issues. Prior to this point, he had dealt solely with front line staff with little understanding of the disputed issues. The landowner identified the requirement to have decision makers at the table when he stated: "...you need somebody higher up to say that this is our long term plan and this is what we want to do."

Third, communication patterns were identified by the participants as being central to the escalation of the conflict. Interests were not communicated to the other party, positions were taken, and attempts to communicate interests were lost in the chain of command. The facilitator illustrates this when she states:

I believe the landowner wanted input into the project as far as he wanted input into the location of the wells, and locations of the roads and the pipelines, and I feel that he wasn't being heard before, that he wasn't um, that they weren't understanding his need to be involved in the project.

The final intangible external factor that led to conflict escalation identified by participants was a lack of understanding of issues. Primarily, this was raised from the perspective that the company did not understand the issues the landowner was objecting to and was not making an effort to understand them. The landowner believed that they only wanted to get the surface leases signed, not address his issues: "... they keep trying to make it work and so the people that they are trying to use have no appreciation of the

issues at all, they just sort of want to deliver the document...” This theme emerged throughout the interview regarding many different issues, from land ownership rules, locations of pipelines and wells, and locations of access roads. One of the most important issues to the landowner was long term planning of development in order to have the least possible impact on land value and agricultural operations. According to the landowner, the company did not understand his objections until they were involved in the ERCB ADR program. It was not until mediation that the landowner was able to discuss these issues with an individual that understood the geology, engineering, and economics behind the project. Prior to this, he was able to discuss the issue with individuals who knew the details of the project but not the rationale behind them.

Each of the participants conveyed that there were intangible issues pertaining directly to the landowner’s beliefs that led to an escalation of the conflict. These factors emerged as two themes, the landowner’s lack of faith in the current process and resignation, and the landowner’s resistance to development. The landowner’s lack of faith in process was illustrated when he stated: “I had very little or no faith in what we call process in both ERCB law and Surface Rights Board law, you know...” The landowner raised his frustration when describing his experience with the development process:

... you’re dealing with the ERCB and, ah, both the ERCB and the Surface Rights Board, are really more about what is called process. In other words, yeah the land owner is entitled to a hearing, so hey, let’s give him a hearing, and we will apply our rules at the end of the day and put our rubber stamp on the bottom of it, it’s done.

The landowner stated his resignation:

So it becomes, you know, do I say I’ve had enough of all this fun, um, I will just sign on the dotted line and take the money they are offering

because that's probably anything more than that is really a long shot cause standards under which the system is established are pretty well set in stone...

Throughout the interview, the landowner provided many examples of his unhappiness with the current development process and his desire to change it coupled with his resignation to work within the current system because change seemed so difficult to achieve.

The final category of this theme is the personal attributes of the individuals. Each of the respondents reflected on how personal attributes impacted the conflict. The landowner, described as a "very detailed person" by the facilitator, allowed him to articulate and convey his concerns to the participant company in a manner that they could respond to. The landowner and the facilitator both noted that the company's representatives were very receptive to actively addressing the landowner's concerns.

The landowner and the company both praised the facilitator's personal attributes in assisting with de-escalation of the conflict. As the landowner stated: "...you have good people and you have bad people and you will have one you like and another one, but, my experience, especially with (facilitator), you know, she is extremely level headed..." The facilitator commented on how her personal attributes allowed her to be successful in her position, contributing much of it to her experience and her love of her job: "...and so because of my background and my experience with the ERCB, I've worked in most departments of the ERCB, it really helps with my questioning, I find as a mediator. And I've always loved helping people so it's the perfect job for me."

The personal attributes of each of the participants influenced the progression of the conflict. The landowner's lack of faith in the process and his resignation contributed to

both the escalation and de-escalation of the conflict, the company's desire to deal with landowners in a respectful manner allowed, in part, for the successful outcome of the case and the experience of the facilitator and her enthusiasm for her job was noted by all parties as a reason for the success of the case.

The results of the data showed how intangible factors influenced the conflict. These factors included how the use of land agents to gain surface access rights from landowners can negatively affect a relationship, how development halts when there is no opportunity to move forward in a relationship, and the necessity of having people with the capacity to negotiate at the table. A lack of understanding of the issues led to conflict escalation.

5.5.2 Tangible Factors

The second theme that emerged from the data was tangible factors influencing the conflict. Tangible factors are those that have a physical existence and/or a monetary value. This theme is comprised of two categories: compensation for development on land and tangible disputed issues. In this case, the landowner believed the model for landowner compensation for oil and gas development needs to be modified:

... I might take one more kick at changing the principles under which, again there are two parts of compensation you can deal with, the simple number at the bottom of the page, or you can start to deal with the way in which that number is calculated... the heft of damages, the adverse effect, that sort of thing.

While all parties acknowledged that compensation was not a disputed issue in this case, each acknowledged that often it is a major point of conflict in access negotiations between landowners and industry. The landowner iterated this: "For a lot of landowners, they could care less what happens as long as the money is at the max." He acknowledged

that negotiating compensation may require a significant time period. Drawing out this process creates a huge advantage for the landowner; he said:

...the slowness gives you a huge advantage, the slowness costs them money way faster than it costs you money, as a matter of fact, it makes you money if you are looking at the ultimate compensation, it's going to make you money, but also, ah, the slowness makes you assemble information and knowledge you might need.

The second category pertains to tangible factors that became disputed issues. These encompassed five issues: extent of development, the route of access roads, well site locations, pipeline locations, and concerns regarding the maintenance of the water table. For the landowner, the most significant concern he had surrounded careful planning of current and future development. He emphasized this at the beginning of the interview: "I'm absolutely determined that we are going to organize the locations and wells and roads, so, they are by no means perfect, but in my view they sort of satisfy the best long term interests of both parties" . He expanded on this theme:

I said look, we aren't going to do this ad hoc, and you're going to say we want these three wells and we sort of arrange them so they look good and then you come along, oh, we want four more over here and we want five more over here and keep, and so, so look, get everything you want to drill and we will take a systematic approach to how we are going to physically organize, physically organize the pipelines and physically organize the roads...

The landowner's need to have input into development was noted by the facilitator:

I believe the landowner wanted input into the project as far as he wanted input into the location of the wells and locations of the roads and the pipelines, and I feel that he wasn't feeling he was being heard before...

The location of access roads on the landowner's property became the catalyst that escalated the conflict according to the participant company:

[Participant Company], I am going to say, earlier this decade, about 2001, 2002, drilled a well on [landowner]'s land. They came up with the idea that if the well was a proven producer we would build an access road as he specified but in the interim he allowed us to use a shorter access on a temporary basis for the drilling and completion of the well. Well, the well was drilled and was deemed capable of production, but [participant company] communication internally was somewhat flawed because we continued to use that temporary access as if it was the permanent access which was of great concern with [landowner].

The location of the well sites was of primary concern to the landowner: "I'm not wanting to let too many secrets out, but my take on that situation was that it was more important to me that I get the wellheads located at this stage, so let's do that". The landowner conveyed that the area where he owns land is primarily coal bed methane (cbm) development and with that comes water protection issues. He identified two issues in particular – protection from gas seepage into water formations and protecting water formations when fracturing wells⁹ using nitrogen. These issues were in facilitation by determining water-testing requirements that satisfy the landowner's concerns. The locations of the pipelines was also a disputed factor. Like the wellheads and access roads, the landowner wanted them to have the least possible interference with agricultural operations today and in the future. The company presented plans to the landowner that took into consideration economics before landowner preference. During the ADR process these issues were collaboratively resolved.

These subcategories—road, pipeline and wellhead locations, along with water concerns and development planning—formed the tangible issues pertaining to the conflict. The landowner summarized this when he states:

Anyway, just to summarize, what we sorted out to this stage is the location of the wells, of the pipelines, and access roads. That's what we dealt with, and to me, that was the most important because that is sort of what I'm

⁹ When fracturing a well, a fracture is created in the geological formation from which production is desired.

leaving to future people going forward. You know, every five years they can go in and fight about how much money they get¹⁰.

5.5.3 External Factors

External factors that influenced the conflict are those that were not disputed issues in the conflict but still influenced it. There are two categories which emerged as external factors affecting the conflict – the landowner’s view of the position of the Alberta government and the boards it has set up to regulate oil and gas development and the landowner’s view on land ownership and compensation. While these factors did not directly influence the conflict as negotiated issues, they do form the worldviews of the landowner and determine the issues important to him. The company representative did not discuss this issue in relation to the company’s stance on these issues. It is assumed that its stance affected the conflict as well.

The landowner strongly believes that consensus among Albertans is that development is necessary at any cost and this is a notion backed by the government. He argues that Albertans believe, “...you need development come hell or high water and the government has to make the rules so we get it.” He stated several times throughout the interview that the Government of Alberta is pro-development. The landowner emphasized this belief at the close of the interview:

...number one, all of these people, whether it’s the Surface Rights Board or the ERCB, are actually working for the Alberta government, and I don’t think we should be confused about which side the Alberta government is on, on this thing. You know, they live and die by how fast they can collect oil royalties in this province, it’s what they live for and they’ve bought into the whole, I hate to use the term, a, environment but it summarizes the Alberta government’s attitude. And the whole develop, develop, develop you know, we are totally into this. Uh, and they tend to see themselves through really

¹⁰ According to the Alberta Surface Rights Act, every five years the surface compensation (for the well site, access road and surface facilities) must be reviewed and mutually agreed to by the landowner and lessee (Agriculture and Rural Development).

nice blue glasses...But ah, they see themselves as the last frontiers fighting for, you know, entrepreneurial spirit and all that sort of thing and the free market...

The landowner's belief in the pro-development nature of the Alberta government contradicts with his belief that development occurs only after careful planning and consideration of long-term impacts. While the company did not speak directly to this issue, how they initially approached development with the landowner is indicative of their pro-development stance. According to the landowner, development plans were originally presented with economics as the major consideration in design. The landowner's preference for location and long term effects on land value and agricultural operations were secondary.

Throughout the interview, the landowner illustrated his strong opinions regarding landownership and compensation for oil and gas development. He noted that compensation for development is currently determined by two factors, loss of use of land and adverse effect suffered by the landowners. He argues that the current system prevents the landowner from whole ownership:

...I can't sell them four acres and go buy four acres back. So there is, perhaps, a lack of wholeness there, and then there is the whole thing of why do people own agricultural lands? Are they primarily interested in day to day production or are they interested in day to day production plus long term, um, value appreciation?

Each of the participants commented on split land ownership rights in Alberta and how it affects oil and gas development. The landowner gave a brief history of land ownership rights in Alberta, specifically mentioning the land rights granted to the Canadian Pacific Railway.

...[CPR] sold the fee simple for agricultural development but held then they held the minerals and now they are, you know, over the course of many,

many years, developing the minerals so, and one of the things it does is it changes the economic development criteria if they don't have to pay royalty to anybody, the royalty is actually part of your return.

Both the company and the landowner stated that splitting the ownership rights created a situation for non-consensual development. The company representative stated, "If we control the minerals we have access to the land in the constitution." The landowner re-enforced this by stating, "Well, I own farm land where they want to drill wells where they hold the mineral rights and so it's not really a consensual arrangement at all." He argued the only advantage the surface owner has is the route of the road:

...somewhere, long ago, the surface owners in Alberta were given control of the route of the roadway...so you have to negotiate conditions and then suddenly you can push the well, otherwise you can make the road go around the field three times...

The facilitator agreed with the argument that mineral rights owners have a right to access the land. She did argue that the landowner could prevent exploitation of those minerals by proving adverse effect or requiring the mineral rights owner to prove the need for the development. During the course of the interview, the landowner gave several examples of his attempts to change the interpretation of compensation laws in order to make the landowner whole, specifically by changing land value calculations by capitalizing land values.

The categories of the ERCB process and the development process elicited the theme that the process polarizes landowners and oil and gas companies. This category refers to the participant's experience of the process of oil and gas development and the participants' experiences with the ERCB process. The landowner elaborated on the theme of the development process as being pro-industry. Unfortunately, neither the company representative nor the facilitator commented on this belief. The landowner argued that the

industry is in “spin mode” or always promoting the necessity and benefits of development. He extended this to the belief that the government-funded boards, such as the ERCB, are also pro-industry.

Once a landowner states an objection to a development, the parties enter the ERCB process. The company representative responded that this process, especially if participants end up at hearing, greatly affects relationships.

One of the things is when you go to a hearing and you get your decision. That's one thing. The next thing is now you need to try to build a relationship with that individual and it depends how the hearing was handled that relationship was probably or likely not good going into the hearing. It could be even more polarized subsequent to the hearing decision.

Both the facilitator and the landowner stated that one of the positive aspects of the ADR program is that it attempts to build relationships while it builds solutions to conflicting interests.

While these categories are indirectly related to the conflict, they frame the worldview of the participants to the conflict, especially the landowner. These views shape how he thinks development should occur and how the development process and the ERCB process are going to affect him. Because many of the intangible concerns that led to the escalation of the conflict rest with the landowner they were not issues of immediate concern to the company representatives or the facilitator. This impacted the conflict because the company representatives and land agents tried to resolve the issues they believed were important or contentious, not those of the landowner.

5.6 Meta-theme 2: ERCB ADR Program Effect on the Conflict

The meta-theme of the ‘ERCB ADR Program Effect on the Conflict’ comprises the data that relates to the process of the ERCB ADR program, the effect of the program

on the conflict and the evolution of the relationship between the parties while engaged in the program. It illustrates how participants felt the program transformed their relationship and communication patterns and became a venue to discuss interests. The interviews revealed two themes related to the meta-theme of the ERCB ADR program effect on the conflict: Process of ADR and the results of the program. These themes are discussed in the following two sections.

5.6.1 The Process of ADR

The theme of the process of ADR entails a description of the process of the facilitation as experienced by the participants and their satisfaction with it. The aim of several of the interview questions was to discern whether the participants believe the ERCB ADR program resolved the conflict in which they were involved. To achieve this, questions were asked regarding the process and satisfaction. From the answers to these questions, categories pertaining to the process of ADR, its advantages and results emerged. These themes emerged from eight categories, all pertaining directly to the ADR process.

Two categories that emerged were “what is discussed in ADR?” and “what occurs during ADR?” During ADR, discussions revolve primarily around the interests of the parties. The facilitator to this case described her role as facilitating the discussion:

...you have to ask, and I ask, as a facilitator, so tell me about that, what is it about that proposed well or facility or pipeline that you don't want it on your land? So they might say, “well, I'm concerned about the flaring, I'm concerned regarding my water well”, and through discussion, because the company, I'll ask the company to bring an expert on water, or I may even bring an ERCB expert on water, right, to talk about that and once they understand that they have to use surface casing and they have to cement, and that the formation that they, they are producing from is way below the ground water and that there are strict regulations on protecting the water, that they say, oh, okay, I'm okay about that. So now they are okay with the

project. Sometimes it is just about education and understanding, and with dealing with concerns so they can switch from “I don’t want the well” to “I’m okay with the well.”

The facilitator went into further detail about what is discussed during ADR. Once issues are communicated, she facilitates a discussion around options to reconcile them and develop an implementation plan. The company representative indicated that ADR became a means for communication between the company and the landowner:

...we saw this as an opportunity to engage the landowner and hopefully understand what his concerns were with our operations and give us a venue to hear what he had to say about our operations and his concerns about it as well as an opportunity for us to share with him our future plans and perhaps we could find some common ground between the two.

Three themes emerged from the findings pertaining to what occurred during ADR: ADR became a venue to share interests, to educate one another, and became a place where reconciliation was possible. As quoted above, the company representative believed that ADR provided a venue for each party to communicate its interests to the other. It also became a venue to educate the other party as to why one wanted to do something the way one did. The company representative provided an example where educating the landowner allowed the relationship to move forward:

Even with ADR there were a lot of questions that were brought up that we didn’t have the answers for right there but we took those questions, worked with our internal groups and got the answers for [landowner]. So we started to build on providing information to him, which I believe was very beneficial to the relationship proceeding the way it did.

Finally, participants agreed to resolution and implementation plans during ADR. The facilitator described the process that occurs during ADR to reach resolution and develop an implementation plan:

When we get to options in these types of meetings we talk about, okay what are the options and then how are you going to follow through and ensure that those are met and if they aren't, then what kind of steps...

Important to the development of an implementation plan is parties commit only to plans that they are able to carry out. The facilitator strongly emphasized that during ADR:

...the worst thing is to agree to something you can't commit to because that will make it even worse... I tell the parties that the commitments that are made have to be followed through on, don't just say it to resolve it.

The three themes of sharing interests, educating each other, and reconciling interests illustrate what emerged from the data. When describing the process of ADR, each of the participants responded with information pertaining to requirements for ADR. Two categories emerged as components necessary for ADR to be successful: a desire to resolve and the need have the right people at the table. The facilitator noted this case was successful in part, "...because both the company and the landowner wanted to resolve and wanted to work with each other..." Second, each participant referred to the necessity of having people at the ADR table who were both informed and able to make decisions. The landowner summarized this necessity when he stated:

One of the rules for these things... is that if the landowner is going to be there and can make a decision on the part of his organization then [participant company] or whoever it is needs to be in the same position.

Each party indicated that these two factors greatly contributed to the success of their facilitation.

Each of the participants was asked to describe the process of the ERCB ADR facilitation. They each responded similarly, however the facilitator was able to sum up the process concisely:

...so basically we have introductions, and talk about confidentiality, about without prejudice, we talk about my role as the facilitator, how I will be facilitating the conversation, but I won't be coming up with decisions for them, that it will be up to them to come up with decisions they can live with and support and um, we um, talk about authority to settle, to make sure we have the right people in the room, we talk about breaks, we talk about cell phones off, and so just, yeah, basically we talk about what the process is going to look like and then of course the second stage is setting an agenda so I ask both parties what they would like to resolve um at that meeting, and uh, we make an agenda and then of course the third stage is finding out what the interests are so like what's behind the concerns that the landowner had, and then we have a discussion around that, and then of course looking at any options that are available that meet the needs.

The other two participants described this process in their own words, but not as concisely. The landowner also noted that the process was very long. To reach resolution required multiple meetings held over the course of more than a year. The facilitator indicated that it is typical for the ADR process to be time consuming and drawn out.

The issue of program access emerged from both the interview with both the facilitator and the landowner. The landowner noted he was not aware the program existed and he could access it. When asked what changes should be made to the program, the facilitator suggested: "...one thing we could do better is we need to get out there more, like talking to companies and talking to them to say that we do exist, because I think there is a lack of understanding out there that this program is available to them..." In this case, the company representative had used the program before on behalf of her company and they were the ones to move the case to the ERCB ADR program.

The interviews revealed that the participants saw many advantages to the ADR process that assisted in creating resolution. ADR was noted to be a "fair process" (company representative), and its design allows relationships to be built and is a setting where participants can get "reason to prevail" (landowner). The facilitator outlined

several of the advantages of ADR: the program is free to participants, the presence of a facilitator benefits the parties, and there is a huge advantage in that all of the facilitators are trained mediators but are also knowledgeable in ERCB requirements and the oil and gas industry. The facilitator noted that because of these advantages, the participant company is "...actually a big proponent of the program, they've used us in the past and we've had a lot of success with them."

The respondents gave four reasons for using the program: the parties were unable to resolve the issues themselves, conflict had reached a point where the parties could not resolve the issues, parties have more faith in mediation than in the ERCB hearing process, and it may assist in finding common ground. The facilitator also mentioned that some companies use the program because of public pressure: "I would say there is the odd company that feels like they shouldn't do it. They might not necessarily want to do it but they feel that they should and if they end up at a hearing it wouldn't look good."

When asked if the parties thought the program was successful in resolving conflict, all participants responded positively. The landowner was full of praise, the company representative stated that, "it's a really good result" and the facilitator noted that the case, "went really well." When asked if the program resulted in satisfied clients the facilitator responded: "...I would say in most cases they are satisfied and 90% of the time they would do it again."

After discussing the satisfaction of the participants with the ADR program, the participants were asked if there are any components of the program they would change. While the landowner said he would not change the program, both the facilitator and the company representative suggested that the program be made mandatory when an

objection to a development could not be resolved by the parties. The facilitator justified this change when she stated:

... I think that everyone should give it a try, because it is very successful, we have a high resolution rate, and I think that even if we don't resolve they can always go to hearing so maybe even if they could, ah, meet it would improve their relationship and give a better understanding of each other on the different positions, so even if they did go to hearing maybe they would go with a better understanding and a relationship.

The company representative justified it by stating:

There needs to be more opportunity for the parties to resolve all the issues, but, one, first you understand what the issues are, truly, because a lot of the times there has not been another venue or opportunity for communication or process for communication. Maybe you can't solve all the concerns but maybe you can solve a lot of the concerns, so instead of going to a hearing on two concerns rather than seven concerns. That's how, if possible, I think that would be a good idea, a really good idea, to make it part of the hearing process.

Overall, the participants of this case were satisfied with the program and the results it produced. The only change they would make to the program was to make it mandatory when an objection could not be resolved by the parties.

According to the respondents, the ERCB ADR process has many advantages and each of them walked away from the program satisfied. In this case, the program and its design assisted in the participants achieving resolution of their conflict and built a relationship to move forward.

5.6.2 Results of the Program

Finally, the theme of results of the program discusses how the ERCB ADR program influenced the conflict. Each respondent was asked to comment on whether they thought the program was successful and why. Each participant responded that the program was successful. They indicated that one of the primary benefits of the program was it

succeeded in building a positive working relationship. The facilitator commented that the result of ADR was a shift in the relationship:

I think there has been a real shift, which I like to see that, that they are really sort of talking to each other, um, and ah, I think there has been a really good understanding on both sides of you know, for the landowner, of what [participant company] wants to do and I think [participant company] has a good understanding of who he is and what his needs are.

The landowner commented on this shift in the relationship as well: “It worked...

You develop a personal relationship with people that can make some decisions at least and will listen to your arguments ...” Finally, the company representative commented as well to the development of the relationship between the parties:

What we’re trying to do is not make that relationship with one individual and [landowner]. He’s had the opportunity to work with the entire team. Like, the people that do the well site spotting, construction on his land, people who do the drilling, the completions, move in and do the pipelines. He’s been working with our environmental advisor on aspects of pipeline reclamation and some studies that she wants to do in relation to the pipeline work we are doing on his land. So it’s become sort of like a defacto team maybe. He’s part of it. Yeah, he’s very much part of it. So it’s a really good result, a really, really, good result.

The case began as conflict where neither party could work together to achieve their respective interests. The company wanted to pursue a development program and the landowner desired no development to occur on his land. By using the ERCB ADR program they were able to create a resolution resulting in a good working relationship with a positive future. The company was able to address the interests of the landowner in a manner that resulted in him being satisfied with the outcome. While he could not prevent development, his concerns about development were addressed. The facilitator attributes the program success to several factors:

I think it’s been a really successful program. I think one of the keys is that we have people on the team that are really passionate about conflict

resolution, that we all really enjoy working with people, and that we all have some oil and gas background that, um, you know, I think that we are really passionate for this work, so we, and we feel really fortunate that we have a job that we love. I think that is part of the satisfaction of our program, that we have the right people for the job. And I also think that you know landowners and companies are finding it a useful process.

5.7 Conclusion

The interview data resulted in two meta-themes (factors that influenced the conflict and how the ERCB ADR program affected the conflict) and five themes: intangible factors influencing the conflict, tangible factors influencing the conflict, the ADR process, its advantages and results, and the results of the ADR program. The factors that influenced the conflict illustrate the various sources of tension between landowners and exploration companies. When examined from a closer level, the themes shed light on the causes of the conflict and the capacity, opportunity and volition of the participants to resolve. The second meta-theme, the effect of the ERCB ADR program on the conflict, illustrates the parties' positive response to the program. The program offered participants an alternative course to the litigious board hearing. While the landowner could not prevent development, his concerns were addressed in as much as they could be if development was to occur. The interviews provided data illustrating how the conflict was resolved and the relationship of the parties subsequent to the ADR process. Each party found the process a positive experience and would use the ERCB process again if the need arose.

CHAPTER VI – Discussion

6.1 Introduction

Chapter VI examines this analysis in relation to the research question. It summarizes the findings of the research and discusses whether the participants of this case had the capacity, opportunity and volition to resolve conflict. Finally, the limitations of the research are discussed.

This chapter discusses the research findings as they relate to the research question: *Does the principled negotiation model used by the ERCB ADR program exist in a setting where Tidwell's (1998) elements for conflict resolution are present?* Each of the interviews provided rich data that contributes to answering this question. This chapter discusses the research question in connection with the data that resulted from the three interviews and the information regarding ADR and the ERCB program presented in Chapter III. The chapter will also review the findings in relation to Tidwell's (2004) elements of conflict resolution, the limitations of the study, and the transferability and veracity of the findings.

6.2 Evaluation of the ERCB ADR Program

The ERCB ADR program operates according to the ADR continuum and uses principled negotiation as a means to obtain resolution. Figure 6.2.1 shows where, on the ADR continuum, the studied case fell.

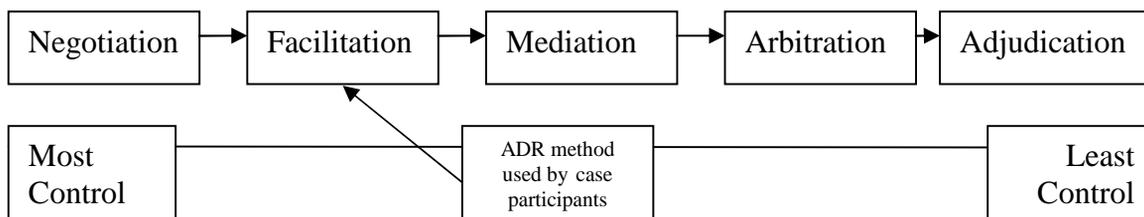


Figure 6.2.1 The alternative dispute resolution continuum

The participants chose to use the facilitation services of the ERCB to resolve the conflict. Shub et al. (1997) argues there are four elements that are essential to conflict resolution: consensual participation, confidentiality, flexibility of procedures, and the neutrality of the mediator (p. 36). In this case, each of the participants indicated moving the case to facilitation was consensual. Second, each party was instructed to respect the confidentiality of the facilitation and did so. Third, the facilitator designed a process that was flexible where all issues were discussed and where the needs of the participants were acknowledged and met. Finally, the neutrality of the facilitator was not discussed in the interviews. However, because she represents a government body that regulates oil and gas development, her neutrality is questionable. Her responses indicate a belief in development as long as the tangible interests of the parties could be met.

The ERCB ADR program provided a facilitator to guide the participants through the four stages of the principled negotiation process. Parties identified interests, developed options, agreed to solutions and developed an implementation plan. The case followed the guidelines established by Fisher et al. (1991) where facilitations using principled negotiation are to focus on people, identify interests, and develop options based on objective criteria (p.10-11). The mediator in this case used many of the skills outlined by Bush and Folger (1994). She used the stories of the participants to identify what the issues were and whether there was sufficient common ground for reconciliation to be achieved (p. 10). Secondly, once relational issues were identified and discussed, the negotiations were moved from relational issues to tangible issues (p. 11). The program touts a success rate of over 90% (EUB 2007, ADR report for 2007) and the participants of this case indicated they were satisfied with the outcome. However, the landowner was

unable to achieve what he initially wanted—prevention of development on his property. The Alberta legal system provides few options for a landowner to prevent development; landowners must either prove development will cause severe adverse effect or require the company to prove the need for the development. In this case, the landowner could do neither and was faced with having to decide which issues were most important to him and attempt to be heard on those matters. The ERCB ADR program provided a venue for the landowner's voice. Finally, each of the participants argued the most beneficial aspect of ADR was the relationship it created between the parties. Should the landowner have opted out of the ADR program, his only other legal recourse was an ERCB board hearing. In this case study, the landowner would have had no say in the outcome and would have been unable to negotiate terms most important to him. In ADR, the landowner was able to work with the company to develop locations of well sites, pipelines and access roads. At a board hearing, the landowner would not have had this opportunity.

Bush (1988-89) stated there are six goals for any dispute resolution process to achieve: individual satisfaction, individual autonomy, social control, social justice, social solidarity, and personal transformation (p. 347-348). When analyzing the results of the case, it appears some of these goals were met by the facilitation. Individual satisfaction was achieved by the company – it was able to proceed with development and the objections of the landowner were removed. However, the landowner was satisfied only to the extent that he achieved what he believed was the best possible outcome within the legal parameters. The program was unable to address many of the legal issues and intangible factors that led to the conflict escalating. The results indicate there is some

level of social control emerging from the program. In this case, the program exerted influence that allowed development to occur peacefully. The nature of the conflict and the legal structure of land ownership rights did not allow social justice or social solidarity to occur. Legally, the landowner is constrained in challenging development and the private and confidential nature of the program prevents landowner solidarity. Finally, neither party experienced personal transformation, nor is that the goal of principled negotiation. Principled negotiation is a very pragmatic methodology where consensus is reached around issues, not by transforming participant's beliefs. In this case, the landowner resigned himself to development and used the program to meet his interests where possible.

One of the main criticisms of ADR is that it enables the structural safeguards of the law to be skirted. In this case, the landowner's rights, as far as oil and gas development, remained protected. Regardless of how agreement for surface access is achieved, industry must adhere to the guidelines established by the ERCB and other provincial and federal regulations. Second, ADR can create or exacerbate an imbalance of power between parties. As Chapter III indicates, an imbalance of power exists between landowners and industry in the Alberta legal system. The findings of this study suggest the ADR program cannot change this legal imbalance. As the facilitator indicated, one of the primary roles of the program is education of parties. She stated that experts are engaged, at no cost to the parties, to educate both sides on disputed issues. This has the effect of remediating imbalances of knowledge between parties.

While the ADR program and the principled negotiation model did not allow the landowner to prevent development, it allowed him more influence than any other venue

for resolution available. The findings suggest that when looking at the initial objectives of the landowner, the results of the ADR program were win-lose. However, in light of Alberta's legal paradigm, the program was more successful than any other option that may have been available to the landowner. By using the ADR program, the landowner was able to voice his concerns to the company regarding tangible and intangible issues in a venue where they could be discussed. Second, he was able to participate in a collaborative process to develop options for resolving contentious issues. His two other options, granting consent or pursuing a Board hearing, would not have allowed him to voice his concerns to the company in a venue where they would be addressed or play a role in developing options for resolution.

6.3 Tidwell's Elements for Conflict Resolution and the ERCB ADR Program

Tidwell (2004) argues that in order to move forward towards conflict resolution, three conditions must exist for all parties: the capacity to resolve, the opportunity to resolve and the volition to resolve (p. 4). During the interview process, I asked the participants questions that would indirectly provide insight into their capacity, volition and opportunity to resolve. I also attempted to glean whether they thought these conditions existed for everyone in Alberta and whether the ERCB ADR program assisted in creating these conditions. This section discusses the findings in relation to the capacity, opportunity and volition to resolve of the participants.

The ERCB ADR facilitation case studied offered insight into whether or not Tidwell's (2004) elements for conflict resolution were present for the landowner and the exploration company at various stages of the conflict. Figure 6.3.1 illustrates the

opportunity, capacity, and volition of the company and the landowner at various stages of the conflict.

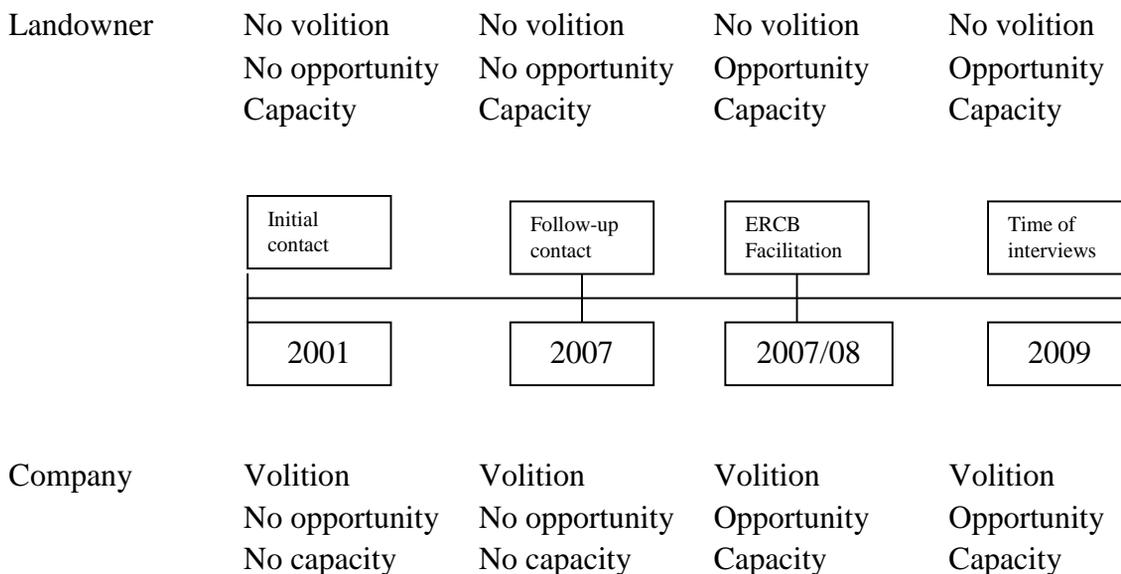


Figure 6.3.1 Timeline of the conflict and capacity, opportunity and volition

During initial contact with the landowner in 2001 the research illustrated that the landowner possessed neither the opportunity nor the volition to resolve the conflict. At this point it was not a priority for the company to resolve and the conflict remained in a latent stage. Tidwell (1998) argues that "...the decision to 'resolve' a conflict is a value choice, and is subjective" (p. 3). At this stage, the company chose not to pursue resolution. In the fall of 2007, the company again approached the landowner to pursue development and was met with resistance. Instead of allowing the conflict to remain latent, the company possessed the desire to resolve and the case moved to the ERCB ADR program. Over the next year the case was facilitated. During this period, the capacity and opportunity to resolve developed for both the landowner and the company. Part of the process was reconciling perceived past injustices felt by the landowner. Tidwell (1998) argues that "people in conflict have a past orientation... and are often

concerned with past injustices or events that led to present day conditions” (p. 37). Perceived past injustices needed to be addressed in order to build a positive future relationship (p. 37). While the landowner did not want to resolve the conflict, he felt the program would provide the most advantageous outcome and willingly participated. Here many of his concerns about past development projects and fears about future development were addressed. At the time of the interviews in March of 2009, the participants indicated they believed the program was instrumental in building the capacity and opportunity for all parties to resolve the conflict.

The following subsections further discuss the results as they relate to the capacity, opportunity and volition of participants.

6.3.1 Capacity

Tidwell (2004) defines capacity to resolve as having “...the ability to resolve; that is, they must possess the skills and resources required for resolution” (p.4-5). The ERCB provides the means for disputing parties to achieve resolution to conflict through the ERCB Board hearing process. However, as illustrated in Chapter III, this process is litigious and does little to build relationships between parties. Often the results are not satisfactory to one or both parties. The ERCB ADR program provides an alternative to this course of resolution, and attempts to ensure that all parties have the capacity to negotiate a satisfactory resolution at a facilitation or mediation table using principled negotiation methods. Once the case reaches the ERCB, either the ADR program or the hearing process, the participants should have the capacity to resolve the conflict. However, this case illustrates that throughout the history of the conflict, parties did not possess capacity to resolve at each stage.

One of the central problems in this case was that the land agents engaged by the company to acquire surface takings from the landowner did not have the capacity, skills, or knowledge to negotiate with the landowner. One primary problem with using a land agent was the lack of ability to alter the development plans to meet the needs of the landowner. The land agent's sole means of negotiation was compensation. However, compensation was not a high priority for the landowner. As the landowner understood that he could not prevent development, he wanted to ensure the location of well sites, access roads, and pipelines had minimal long-term effect on land value and agricultural operations. Due to the land agent's lack of capacity to negotiate around these issues, negotiations between the land agent and the landowner reached a standstill and there was no opportunity to move forward. This problem persisted when the frontline staff of the company attempted to reach resolution with the landowner as they did not have full understanding of the issues or the ability to meet his needs.

The data was rich in details regarding the tangible reasons for the dispute. These included the extent of development, long term planning, and the location of pipelines, wellheads, and access road. The landowner attempted to convey to the land agents and frontline staff his need to be involved in the planning of current and future development. However, the land agents and frontline staff were unable to respond in a manner that could address the landowner's concerns. Because the land agent was unable to negotiate the issues important to the landowner, the landowner and the land agent lacked the capacity to resolve the conflict. It was not until the dispute entered the ERCB ADR program that the landowner was able to discuss his concerns with individuals regarding past development, current development and future development. Once these individuals

with decision-making abilities were at the table, all parties had the capacity to negotiate. The facilitator also played a role in increasing the capacity of the parties to reach resolution as she was able to facilitate a discussion where parties could share their interests and discuss them in a moderated, safe environment.

Two important roles of the ERCB ADR program emerged from the data regarding the capacity of parties to resolve conflict. First, the program requires that each party be represented at the table by individuals with the ability to make decisions on behalf of their organization. Second, it facilitates the education of all parties on topics pertaining to disputed issues. The program will bring in experts on water protection, flaring, or any other disputed matter so each participant will have the same level of knowledge and resources to resolve the conflict. This role equalizes parties and enhances their capacity to negotiate.

The findings illustrate that prior to entering the ERCB ADR program, the parties did not have the capacity to negotiate a resolution. If one assumes that the parties were willingly at the negotiating table to negotiate the terms of development, then the data suggests that the ERCB ADR program created capacity for each party by ensuring individuals with authority were at the table and that each party had the skills, resources, and knowledge to negotiate a resolution. However, the ADR program did nothing to allow the landowner to prevent development, nor could it.

6.3.2 Opportunity

The second element necessary to facilitate resolution is opportunity. Tidwell (2004) defines opportunity as "...possessing the chance to resolve" (p. 172). When determining if the parties have the opportunity to resolve, Tidwell (2004) asks two questions: "Do

people have enough time to resolve conflict? Are they able to interact?” (p. 172). He also argues that history and belief “...serve to create symbolic blocks to the creation of opportunity” (p. 172). In this particular case, it does not appear that either party lacked time or ability to interact. However, the findings show that the landowner, in particular, was affected by prior experiences with oil and gas development, and his strong beliefs regarding oil and gas development law and process and land compensation law negatively influenced the opportunity of the parties to negotiate. The landowner entered negotiations affected by his historical relationship with oil and gas exploration companies. He had assumptions and beliefs regarding how he would be treated and what the impact to his land would be that he carried into negotiations. As Tidwell (1998) argues, history impacts the feelings, actions and thought processes of individuals (p. 108), and this case bears out Tidwell’s assertion.

The landowner vividly described his beliefs surrounding land compensation and long term planning of development. It was very important to him that the “wholeness” of a landowner is preserved. The idea of wholeness is that the property is kept intact. In essence, if the landowner owns 640 acres, the landowner believes that he should have 640 acres at his disposal for agricultural purposes. The landowner described this as being essential to agricultural operations and land value. He argued that oil and gas development detracts from both of these principles. Well sites and access roads often create a maze for landowners to navigate when farming and the land utilized for these purpose becomes useless for agricultural operations. If development affects wholeness, then landowners should be adequately compensated, which current regulations do not provide for. It was very important to the landowner that when planning development, the

impact on future generations and their rationale for going into agriculture is considered. This removed some opportunity to negotiate as the landowner was not willing to negotiate along the lines of currently accepted practices nor were his concerns adequately conveyed to appropriate parties so they could be addressed. The company also suffered from internal communication problems; the landowner's concerns were not conveyed to appropriate people and addressed. Therefore, the company did not have the opportunity to discuss them.

Alberta land ownership law and the ERCB process require both exploration companies and landowners to engage in discussions surrounding development. In doing so, these same laws and regulations remove the parties' option to not engage in discussions. As such, opportunity is always present but not necessarily desired. The ERCB ADR program provides an opportunity and the least contentious space for parties to engage in discussions of resolution.

The ADR program provided a venue for the parties to interact with each other and for their beliefs to be heard and addressed. The program also provided a facilitator – part of her role was to book meetings each party was required to attend, thereby creating the time to resolve. She also created an agenda for meetings, which provided the guidelines of the interaction between parties. Primary to her role was to lead and moderate the conversation so each party had equal opportunity to discuss interests, develop options for resolution and develop an implementation plan. The method she used for facilitating the case followed very closely that prescribed by Bush and Folger (1994). She facilitated the conversation to focus on the interests of the parties and used reframing, questioning and education to gain agreement among parties (p. 11).

In the case studied, opportunity for resolution was present, it was a matter of one party having a need to resolve that prompted discussions to begin. At no time was the landowner unwilling to discuss issues. He was, however, content to leave the conflict in a latent stage as long as required.

6.3.3 Volition

The final element required for conflict resolution to be facilitated is volition, or the “...desire to engage in resolution” (p. 5). In this particular case, each of the parties indicated that by the time the conflict had been moved to the ERCB ADR program, each party had the desire to resolve. However, in each of the interviews the topic of lack of volition to resolve was discussed. The landowner stated that he negotiated because he knew he had no choice and resolved out of resignation rather than volition. When discussing landowners who did not want to resolve, a company representative indicated that in most cases, the only means the landowners had to prevent development was to prove adverse effect that could not be addressed by the company. This was echoed by the facilitator who argued that a landowner’s means to preventing development was to prove adverse effect. There are few to no legal means for a landowner to prevent oil and gas development in Alberta solely because they do not want it on their land. This fact must influence the landowner’s volition to resolve. The landowner in this case stated, “...I think I am going to get further that way [with ADR] than I am with the [hearing] process...” This study did not directly address this issue, but it could certainly affect the volition of landowners to resolve conflict with industry.

In the instance of oil and gas development, the company initiates any of relationship with landowners as it did in this case. The company is required to have a relationship

with landowners if it wants to pursue development. As such, they have two options when conflicting with landowners. First, they may resolve disputed issues with the landowner or, if they have the option, they can move the site of surface development to a neighboring property where the landowner is more receptive. Of the two parties, the company has more volition to resolve as it requires development to achieve its mandate. The landowner is often forced to resolve conflict regarding development issues, even if the landowner objects object in principle to development. The ERCB ADR facilitator addressed the issue of landowners who were against development of any kind on their land. She indicated that often, through discussion, she is able to create volition to resolve on part of landowners. She argued that often she goes through the process of educating landowners about oil and gas development. Through informing landowners about the process, she is able to address preconceptions and hence change their stance on development. From that point, she brings in the company and begins facilitation around identified issues.

As it is, industry initiates a relationship with landowners for access to land, so companies have volition to resolve conflict. Landowners do not always want to negotiate with industry but are legally compelled to do so. The ERCB attempts to create volition to resolve on part of the landowner. Alberta's land ownership laws, the pro-development nature of the province, and the environmental and health issues associated with oil and gas development create an environment that often leads to conflict between landowners and industry. Very few of these disputes are not resolved between parties themselves, but those that are not, have the option of utilizing the ERCB ADR program.

This case is a good example of environmental conflict. Here, a citizen and a company disagreed over the best use of land and resources. Gattinger (2005) states that an environmental conflict is one where an unequal power and resource distribution exist, and it is scientifically and technically complex. Finally, instrumental to environmental conflict is individuals and the environment paying a high cost for a small gain on part of industry (p. 285). In this case, an unequal power distribution existed between the landowner and the company as the landowner could not prevent development on his land. Secondly, many of the issues raised were both scientifically and technically complex. These issues required experts to be called in to the facilitation so all parties make educated choices when discussing options for resolution. Finally, the company was able to gain access for its well site, access roads and pipelines for a financial cost. While the landowner will receive financial compensation for this infrastructure, he lost the right to determine how his land is developed and when.

This research showed that the ERCB ADR program was limited in its scope to provide lasting conflict resolution as all participants did not possess the capacity, opportunity and volition to resolve the conflict. The results of the study also indicate that it is highly unlikely that the legal context of Alberta's land ownership or the relationship between industry and landowners allow for the elements of capacity, opportunity, and volition to exist equally for all parties. This research illustrated that the participants, particularly the landowner, did not have the volition to resolve, but was resigned to resolution. The ERCB ADR program provided means for the landowner to voice his concerns, but not prevent development. Despite these limitations, the program did provide a mechanism for the parties to build a relationship where development could

occur without confrontation or violence. The company was able to proceed with development with consent of the landowner and while the landowner could not prevent development, the program allowed him to negotiate terms for development that he found acceptable.

6.4 Limitations of the Research

The findings of this research are subject to three limitations. First, it is not known whether this case is typical of the ERCB ADR program as the case summaries and results resolved by the program are not publicly available. In this case the landowner entered the program seeking resolution to the conflict after the company initiated its use. The findings did not reveal if this is standard among participants or if there is pressure for them to participate.

Second, the data represents only one snap shot in time. The responses of the participants may have been very different during, immediately after, or five years after the ADR process than they were at the time of the interview or even the time of the conflict. Time affects memory and emotion, it is not known what the response of participants would be at another time. Finally, participants' attitudes about the development may change after the development is constructed. Until the wells, roads and pipelines are constructed, participants can only assume what the impacts will be. The test of time will tell us whether the resolution of the conflict and the positive relationship constructed by the participants will stand.

Third, the design of standardized, open-ended interviews dictates that participants are asked exactly the same questions. The opportunity to ask for further information from responses was limited. The design prohibited going back to participants for further

information at a later date and time. After analyzing the data, I had additional questions that I would have liked to be able to ask the participants. Despite these limitations, the interviews resulted in rich data that supplied a deep understanding of the conflict.

6.5 Transferability and Veracity

I cannot generalize the findings of this case and apply them to all other cases of the ERCB ADR program or similar programs. However, the methodology allowed me to examine one case in depth and know it well. In order for the findings to be transferred, multiple cases would need to be studied and compared. The study allowed me to make tentative conclusions about the program as it pertained to this case. By coding the text and analyzing the data multiple times, veracity of the study has been achieved.

6.6 Conclusion

This study illustrated that the ERCB ADR program created or improved the capacity, opportunity and volition of the parties to facilitate conflict resolution. The program created capacity to resolve by bringing together individuals with the ability to alter development plans to meet the needs of the landowner. The program created the opportunity for participants to discuss the outstanding issues in a structured environment with experts to speak to issues. Finally, the program facilitator attempted to create volition to resolve on part of the landowner by informing him of the development process.

In this case, all parties agree that they now have a solid foundation to move forward without the assistance of the facilitator. Each party was satisfied with the outcome of the facilitation, and the landowner now has a strong relationship with the company. Each

participant stated that one of the most important outcomes of the facilitation was that they can now communicate their concerns to one another and effectively address them.

CHAPTER VII - RECOMMENDATIONS AND CONCLUSION

7.1 Introduction

One aim of this research is to provide recommendations for improving the relationship between landowners and the oil and gas industry in Alberta. These recommendations encompass both changes to the ERCB ADR program and to the development process. There are changes industry can make to reduce instances of conflict. Finally, this chapter provides suggestions for further research into the topic of conflict resolution between the oil and gas industry and landowners.

7.2 Recommendations

This study has shown that the ERCB ADR program created conflict resolution between the disputing parties. As well, the study shed light on many issues that exacerbate the conflict and areas where the program could be improved.

I have worked in the oil and gas industry in Alberta for several years and was not aware of the ERCB ADR program prior to conducting this study, which I think is very unfortunate. There have been times in my professional past where I could have used the program to build relationships with landowners. I think that my lack of awareness of the program's existence is common in the industry among landowners and industry. After seeing the results of this study, I have become a proponent of the program's use, not only to resolve conflict, but to build relationships. No program, including the ERCB ADR program, has the ability to change surface rights in Alberta at this time. Consequently, any program is limited in its ability to assist in creating the volition to resolve in landowners who do not want development to occur on their land. At best, landowners may be persuaded or coerced into resolution (Tidwell 1998, 5). This program attempts to

resolve conflict within the confines of the legal structure in which it operates. However, this study suggests there are changes that could increase the capacity, opportunity and volition of the parties involved in oil and gas conflict in the province of Alberta and the ERCB ADR Program.

The ERCB ADR program offers an alternative path to Board hearings for disputing parties to reach resolution. The participants in this study were satisfied with the outcomes of the facilitation. Nevertheless, the study also resulted in suggested changes to the program that emerged from the findings. The facilitator and the company representative both indicated that one of the shortcomings of the program was its public visibility. They both said that within industry the program is not well known or well utilized. With the aim of improving resolution outside of the hearing process between landowners and industry, the ERCB could pursue a public relations campaign promoting the program to both industry and landowners affected by development.. This study illustrated that one of the main advantages of the program was its ability to build the opportunity and capacity of parties to reach resolution. The study suggests that, by increasing utilization of the ERCB's ADR program, it is possible to improve the capacity and opportunity to resolve of conflicting parties and thereby reduce the number of board hearings. Second, parties are able to play a role in developing resolution and are more likely to be satisfied with the outcome.

Finally, both the facilitator and the representative of the company recommended making the ADR program a mandatory component of the ERCB process when an objection to a development application is filed. However, Tidwell (1998) argues that in order for ADR to be successful, participants must attend on their own volition. This

suggests they have a desire to resolve the conflict and build a positive relationship. If participants have no interest in resolving, how successful would the program be? When the participants reach the stage where they either proceed to a Board hearing or to the ERCB ADR program, it may be beneficial to require disputing parties to hold an initial meeting where participants meet with a facilitator and discuss whether the program would be of interest to participants. The findings suggest it would be worthwhile for the ERCB to investigate the viability of making the program mandatory, the financial cost of having the program mandatory, and exploring the receptiveness of industry and landowner alike.

Second, the findings suggest there are several avenues for the oil and gas industry to pursue to reduce conflict with landowners and improve the capacity, volition and opportunity of all parties. This case illustrated that conflict can arise through an exploration company's use of land agents who are not able to negotiate the issues important to landowners. As shown in Chapter 3, less than five percent of development applications face landowner objections. Therefore, it seems unnecessary to eliminate the role of land agents. However, where landowner objections arise, this study suggests companies should have staff trained in interest based negotiation available to respond immediately to landowner objections before the conflict escalates. It is important these staff members have the ability to negotiate according to issues raised by the landowner. Second, they must have the knowledge, ability, access to information and capacity to alter the original development plans to correspond to any agreement developed between the company and the landowner. Industry needs to consider involving individuals with

decision- making ability in the negotiation process as soon as there are issues hindering development. These individuals have more capacity to resolve than land agents do.

This study offers two recommendations to rectify this problem. First, companies could train employees in principled negotiation methods. When issues arise with a landowner, this trained individual could lead negotiations with the landowner and have the support of the exploration team (engineering, geology and land). This team support would empower the company representative to discuss issues relevant to the landowner and make changes to plans. Second, instead of sending a land agent out with set development plans, plans could be developed collaboratively with the landowner. This would include requesting the input of landowners for the locations of roads, well sites and pipelines. Here, issues of importance to the landowners may be collaboratively addressed by the company and the landowner, thereby building the opportunity to resolve of both parties. If the landowner is included from the first stage, he or she may be more receptive to development and fewer contentious issues would arise. The aim of these suggestions is to address potential conflict before it escalates to a stage where third party intervention is required.

7.3 Suggestions for further research

The scope of this study encompassed the experiences of the participants of a single facilitation of the ERCB ADR program. As such, the study cannot convey the experiences of all participants of the program or generalize the results. The participants of this case were keen to participate in the ADR program to resolve the conflict. It would be interesting to follow up this study with one that incorporates all participants of the program. A study that poses similar questions to all participants may result in further

recommendations to improve the capacity, opportunity and volition of participants in Alberta's oil and gas industry. Second, it may discern whether landowners and companies willingly participate in the program. The results of these studies could be used to make further recommendations to both the program coordinator and to the ERCB on how it regulates the development process and adjusts the ERCB ADR program. Third, this information could be of great use to understand what drives participants to use the program in the first place or what factors drive those involved in a conflict over oil and gas development to follow the hearing process instead of using the program. Fourth, it may result in suggestions to industry to change how it initially approaches landowners and reduce instances conflict stemming from initial contact. This study and future studies may be used when examining similar programs situated in environmental conflicts such as water or mining disputes where industry-landowner conflict is prevalent. It may be of use to discern whether ADR modeled programs are successful in reconciling divergent interests in these disputes.

7.5 Conclusion

By conducting a case study of the three participants of a facilitation conducted by the ERCB ADR program, I was able to answer my research question of: *Does the principled negotiation model used by the ERCB ADR program exist in a setting where Tidwell's (1998) elements for conflict resolution are present?* The ERCB program does not exist in a setting where every participant has the capacity, opportunity and volition for resolution. Surface rights law in Alberta forces landowners to allow development on their land even if they are fundamentally opposed to it. In this case, a landowner who was willing to operate within legal parameters achieved resolution to his objections with a

proposed development. While he could not prevent development, he was able to negotiate terms for its occurrence that were satisfactory to both parties.

Through this research, I was able to show that the ERCB ADR program created a setting where each participant possessed the elements of capacity, volition and opportunity to resolve the conflict. The program was able to remove obstacles that affected capacity by ensuring each party had decision makers at the table, enhanced the volition of the parties to resolve and created a setting where the participants had an opportunity to resolve.

The legal structure in Alberta creates an imbalance of power that cannot be resolved by any dispute program. This program, though, strives to address issues of concern, such as location of development, environmental concerns and health concerns, and reach mutually agreeable solutions for the landowner and industry. The other alternative for resolution is a board hearing which has little ability to educate parties, develop mutually agreeable solutions or build relationships. I hope that this paper serves as a source of support for the ERCB ADR program. The program enables participants of oil and gas conflict to build relationships and mutually agreeable solutions to development.

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APPENDIX I

Participant Consent Form

Can Principled Negotiation Modeled ADR Programs Encompass the Necessary Elements for Conflict Resolution in Alberta's Oil and Gas Industry? A Case Study of the ERCB ADR Program

You are invited to participate in a study entitled *Can Principled Negotiation Modeled ADR Programs Encompass the Necessary Elements for Conflict Resolution in Alberta's Oil and Gas Industry? A Case Study of the ERCB ADR Program* that is being conducted by Vanessa Cartwright, MA in Dispute Resolution Candidate.

Vanessa Cartwright is a Graduate Student in the department of Dispute Resolution at the University of Victoria and you may contact her if you have further questions by telephone at (250) 507-3545 or via e-mail at vcart@uvic.ca.

As a graduate student, she is required to conduct research as part of the requirements for a degree in Dispute Resolution. This research is being conducted under the supervision of Dr. Lynne Siemens, PhD. You may contact her at (250) 721-8069 or siemensl@uvic.ca.

The purpose of this research is to determine whether a principled negotiation modeled ADR program, such as that used by the Energy Resource Conservation Board (ERCB) Appropriate Dispute Resolution (ADR) program, encompasses the elements necessary for conflict resolution.

This research will lead to the extension of knowledge in conflict resolution in high conflict industries such as oil and gas exploration and development. The findings will be generalized to result in suggestions for modifying regulations, relationships and the ERCB ADR program to reduce conflict in the industry and to better manage it when conflict occurs.

You are being asked to participate in this study because the case you were involved in, which was mediated by the ERCB ADR Program, encompassed the elements required by this study. You were recommended as an ideal candidate by David Hill, ADR Coordinator for the ERCB. During this study you will be asked a series of questions regarding your experience of the conflict that led you to use the ERCB ADR program and your experience with the program. Your participation will be approximately one to two hours followed by a review of the interview transcript. Your ongoing consent to participate in the project will be implied from your continuing participation.

There is a potential risk that some emotional discomfort may arise from your participation and a potential risk that you may be identified due to the limited number of cases mediated by the ERCB. Additionally, because all participants of the case will be interviewed, participant confidentiality is limited as the other participants will be aware of your participation. To minimize this risk, you and identifying features of your case will not be identified in any publications. You may decline to answer fully or part of any question. You may also choose to discontinue at any time for any reason without explanation and without penalty. If you choose to withdraw at any point, your data will not be included in the study. You will have the opportunity to review and comment on the interview transcript.

The potential benefits of your participation in this research include the opportunity to reflect on the conditions that led to the conflict occurring and the means by which it was managed. The information resulting from your participation could be used to create more effective means of conflict management in the oil and gas industry. Finally, the research will extend the body of knowledge related to conflict management and the use of principled negotiation modeled conflict resolution in natural resource conflict in Alberta. You may request a copy of the final results.

The interview will be audio recorded with all records of participation being kept strictly confidential, such that only I will have access to the data. It will be stored in a locked filing cabinet in my home and be kept indefinitely in that location. Please indicate at the bottom of this letter your choice as to my handling of the data which will be collected. You are given the opportunity to specify the explicit period in which documents must be destroyed or provide your consent to the documents being kept indefinitely. Should you wish for the data to be destroyed, any hard copies will be shredded and all electronic copies will be deleted.

Your participation in this research must be completely voluntary. If you do decide to participate, you may withdraw at any time without any consequences or any explanation. If you do withdraw from the study your data will not be used.

It is anticipated that the results of this study will be shared with others through the publication of the resulting Masters thesis and in the publication of an academic journal article. In publication, all identifying information will be removed and participants will be referred to by either a number or letter.

You may verify the ethical approval of this study, or raise any concerns you might have, by contacting the Human Research Ethics Office at the University of Victoria (250) 472-4545 or ethics@uvic.ca.

Please indicate your preference for the handling of the collected data:

- Documents may be kept and stored indefinitely in the manner outlined above.
- Documents must be destroyed within _____ months of the conclusion of the study.

Your signature below indicates that you understand the above conditions of participation in this study and that you have had the opportunity to have your questions answered by the researcher.

Name of Participant

Signature

Date

A copy of this consent will be left with you, and a copy will be taken by the researcher

APPENDIX II
INTERVIEW QUESTIONS

1. How did you become involved with Party X?
2. Could you describe for me the circumstances that led to the escalation of the conflict?
3. Tell me about any attempts at conflict resolution prior to approaching the ERCB ADR program.
4. Could you describe for me the success of these attempts at resolving the conflict?
5. Think about the conflict and tell me what factors you think led to its escalation and de-escalation.
6. Did either party, at any time, quit negotiations? If this occurred, why do you think this happened?
7. Could you describe for me any attempts at remedial action taken by either party at any point in the process? Why do you believe these actions were successful or unsuccessful?
8. Could you tell me about any instances where either party attempted to resolve the conflict through persuasion? Can you describe the effectiveness of these attempts?
9. Could you tell me why the ERCB ADR Program was chosen to assist in conflict resolution?
10. Could you describe your experience with the ERCB ADR Program?
11. What principles do you think the Program operates on and how did these guide your experience with it?
12. Tell me about your satisfaction with the program.
13. Given the opportunity, what changes would you make to the Program?
14. In your opinion, did the ERCB ADR process and its result create a long term resolution between party x and y?
15. Could you describe for me what has occurred in the relationship between party x and party y since taking advantage of the ERCB ADR program?
16. Could you describe for me the process of the facilitation?