



Land Easements and Acquisitions Under Infrastructure Projects

As rural landowners, farmers should know how to navigate rules surrounding access to their land for infrastructure projects. This includes roadworks, energy, telecom, and media infrastructure, in addition to granting access of a landlocked property.

One of the first steps for a proponent of an infrastructure project, while they determine route or site options, is acquiring the necessary land interests for the project. Landowners and project proponent land agents negotiate land purchase, easement, or lease agreements. Project proponents should have a published document describing land acquisition principles which must be adhered to by land agents working for the proponent.

Regulators

Depending on the type of project, federal or provincial authorities regulate land access, pre-construction, construction, operation, and easements or land acquisition processes, and the decommissioning, dismantling or abandonment of the infrastructure.

The Canada Energy Regulator (CER), formerly the National Energy Board, regulates all international crossing electricity transmission lines, and all pipeline transmission projects. The Ontario Energy Board (OEB) regulates Ontario natural gas distribution, and electricity transmission and distribution projects, regardless of whether the Independent Electricity System Operator (IESO), an electricity transmitter, a local distribution company (LDC), or a utility customer initiated the project.

Innovation, Science and Economic Development (ISED) Canada regulates telecommunications towers. A combination of federal and provincial regulations guide telecom infrastructure, including cell and wireless internet towers and technology added to existing utility infrastructure.

Securing adequate coverage in a service area and finding a willing host landowner for the development are key factors considered in determining the location for a communications tower. While pipelines, electrical and roadway infrastructure could result in expropriation, for telecom towers, if proponents do not reach needed land access agreements, there is no right-of-entry or expropriation process. While pipeline, electrical or roadworks have limited siting options, selecting alternate cell tower locations avoids expropriation.

Telecom assets often attach to electricity infrastructure, where telecoms rent space in existing underground or wire pole asset rights-of-way, and there is no additional easement for the telecom infrastructure.

For example, on poles that already carry distribution lines, the right granted to a telecom company is access presumed to not interfere with the operation of the power poles. This also means that a landowner with an easement in place for their distribution lines, must act in good faith with a telecom company renting pole space. For this reason, while negotiating a utility agreement, consider including a 'reasonable access' clause with nominal compensation, to manage the situation, should it occur, to ensure the same care for property by the telecom, as agreed to by the electrical company in the underlying easement agreement.

The size, design, and height of a telecom tower depends on local service demand. A telecom communications hut is typically 12' x 12' feet, and a concrete pillar or guy wires anchor towers. A landowner may request bushes or trees to limit the aesthetic impact to the surrounding area. Necessary lighting is determined by Transport Canada standards.

The role of the OEB on telecoms towers can be confusing. OEB makes decisions on electricity and substation applications, but the communications tower falls under ISED authority. Normally developers will use the ISED Canada consultation process and the OEB's consultation process.

Compensation Principles and Practices

Acquisition principles published by infrastructure proponents are helpful for landowners to better manage their experience and expectations. These principles provide a means for timely settlement, to avoid potentially lengthier, less flexible, and less certain outcomes associated with the legislated expropriation process.

The project proponent's main objective is to secure prompt, voluntary property rights and land settlements. Landowners may wish to contact a lawyer to assist them in the process and to finalize agreements.

Land agents should balance their obligation to secure property interests at fair and reasonable costs, with providing individual landowners some flexibility and the choice of either an easement or a full or partial purchase of land for the project.

An initial meeting with each individual landowner should be to review and discuss the process and land acquisition compensation principles. Landowners need enough time during this process to review the materials, complete follow-up meetings and any discussions with the land agent.

Agreements should include landowner compensation to account for time invested in the process, and compensation to allow access for environmental assessments, surveys, studies, and land appraisals. Depending on the scale and scope of the project, this compensation is typically up to \$5,000 on a per impacted property basis. This payment does not infer any obligation to proceed with negotiations or convey permanent land rights for the project.

Landowners should negotiate compensation for any land out of production during the entire project timeline, from pre-construction right through to operation and maintenance, and include a clause to address farm production interruption, should the company need access that interrupts normal agricultural production resulting in crop loss.

Many regions contain farmland ideal for specialty, seed, and processing crops. Some of these arrangements contain minimum production clauses whereby a shortfall in total production could nullify the production contract. Farmers with these types of crop production contracts need to make sure they negotiate compensation for full contract nullification caused by infrastructure proponent access negating the arrangement with the crop processor.

The use of third-party appraisers designated, for example, through the Accredited Appraiser Canadian Institute (AACI), ensures appraisal conducted in accordance with professional standards established by the Appraisal Institute of Canada. The landowner can ask an appraiser to provide such credentials. Any formal offer will be based on the appraisal and should include the appraisal report and maps detailing the area of development interest.

Agreements may offer landowners additional compensation, above fair market value (FMV) as an incentive to agree to the timely acquisition of property interests. If landowners decide to retain a second independent appraisal, they should inform the proponent, as most, if not all proponents, are willing to fund an additional accredited appraisal. This extra process may reduce or negate a portion of the incentive compensation offered but should not be a discouragement. It only means you may not receive any more immediate compensation, beyond any offered for your time and for their access to the property, but this will not imply refusal by you to consider any theoretical final offer.

To address property damage, agreements typically include a commitment by the project proponent during pre-construction, construction, and operational activities to mitigate physical property damages, and if mitigation is not possible, to provide compensation for damages that arise related to these activities. For farm properties, easement agreements should include appropriate clauses related to tiling, grading, compaction, and a clear agreement as to what constitutes permitted farming activity within explicit areas of any easement or right-of-way.

A formal voluntary offer is typically available with a set deadline that provides necessary time for landowners to review materials, consider the offer and complete any additional independent appraisals and legal review, if required.

The proponent typically draws up an option agreement upon the landowner accepting the offer. Full permanent land rights, and associated compensation will follow any necessary project approvals, legal conveyancing, and registration of the permanent land rights.

Negotiations With a Land Agent

A land agent is often the first person a landowner encounters during the consultation and negotiation process. The land agent will provide specific information about the project and seek input on the project and potential effects. This is an early and important opportunity to share land details and how the project could affect the landowner and their use of the land.

It is the choice of the landowner to have a lawyer or anyone else review documents. While there is no regulation that entitles the landowner to have these costs covered, regulators encourage steps to negotiate for reasonable costs to have the review.

These lawyers should be familiar with property right easements, rights of way, and voluntary and expropriated land acquisitions. Legal advisors can ensure any agreements include all the appropriate considerations of the landowner. Project proponents normally reimburse the landowner for reasonable costs related to the review and completion of documents and agreements, including landowner legal fees.

It is important to take the time to review the entire agreement and to fully understand the details before signing anything. If negotiations break down, the provincial court in the province where the lands are located can enforce acquisition agreements.

Landowners should share any project concerns with the proponent as soon as possible. This allows more time to address issues while the company designs and plans the work. Landowners should identify any impacts relating to the proposed location, timing, and methods of project construction to ensure the regulatory decision process considers these matters.

Types of Acquisition Agreements

Regulators stipulate what forms of agreements proponents can use to acquire lands. Content of agreements should include:

- details of the compensation offered for the lands required, including the landowner option to choose a lump sum or periodic payments,
- compensation for any documented damages caused by the company, and
- landowner indemnification from all liabilities, damages, claims, suits and actions resulting from the company's operations, pipelines, or abandoned pipelines, other than those resulting from gross negligence or willful misconduct of the landowner.

Option Agreements

Project proponents plan general routes before filing a regulatory application and may begin to negotiate an option agreement with landowners, even though the final route may not affect some of them. This agreement gives the company the assurance that it can obtain necessary land rights if needed, as it is promising the company that you will sign a permanent voluntary land agreement, sometimes within a specified period. This voluntary land right agreement could be in the form of an easement or outright purchase, described below.

If the specified period passes and the company has not exercised the option, the option agreement is no longer valid, and the landowner keeps any option bonus payment. However, if the company exercises the option within the time specified, the terms of the option agreement come into effect. This grants the company a right-of-way agreement automatically, according to the terms the landowner and the company agreed to in the option agreement.

An option agreement is a legal contract. It contains certain required clauses that cover various rights, but you can also negotiate other terms to meet your needs. Before signing any agreement, it is important to read and understand all terms and conditions carefully or have a lawyer review.

Easement Agreements

Depending on the scale and scope of a project, easement agreements often use a base value of 50%-75% of property fair market value (FMV) because easements are not outright purchases. The agreements can include incentive compensation of about 10% FMV or a fixed amount in the form of an option payment paid to the landowner for giving the right to acquire the easement to the proponent. Should they decide to proceed with the project, the proponent will make a similar option payment plus an incentive payment for timely acceptance of the offer. These combined amounts mean an exercised option and easement agreement could represent up to 150% of the subject land value under easement. This allows the proponent to promptly obtain needed land rights at less cost than to purchase the entire property.

Easement agreements should include a compensation provision to address the case where the use of the easement by the project proponent has reduced the FMV of the remaining property, known as Injurious Affection. The property appraisal should explain this Injurious Affection compensation process and the dollar amount. It should consider attributes of the remaining property, and whether value loss is likely to result from construction in, and use of, the easement.

Many landowners want to farm the land within an easement, once the project becomes operational, assuming it is safe. The initial land agent conversations are the best time to discuss this and to negotiate a license-back arrangement, if applicable. The arrangement will help ensure any crop damage, tile damage or compaction over the life of the easement is minimized and repaired, and any road access or other grading considers farming requirements.

Outright Purchase Agreements

If a project proponent is acquiring access on land that includes a residence or farm buildings, the proponent will typically offer to purchase the property outright or purchase the land where the major out-buildings are located. Sometimes, a landowner does not wish to grant an easement, and would rather grant the option for an outright purchase of either the whole property or the part of property under question.

Whether you counter an acquisition offer for easement with a request to consider the outright purchase of the entire or partial property, or the project proponent offers to outright purchase the property, the agreement should include compensation for timely acceptance, and a reasonable

amount of compensation because you are granting the proponent with the option to act on the agreement. All purchase and sale agreements should include disturbance and relocation compensation and allow for reimbursement of any reasonable legal fees to the landowner.

Property Expropriation

Proximity to public services and infrastructure, such as transit, healthcare, or highways can be a convenience. Along with that proximity is the risk of extensive expropriation to ensure sufficient land is available. This is also the case for highway and highway extension projects in rural areas. Farmers should be aware of the possibility of expropriation, be familiar with the process, and know their rights under a notice of expropriation.

Expropriation is an act by Government or Legislated Proponent to acquire private property from landowners for a public purpose. It is the Government exercising the power of Eminent Domain, governed by the [Expropriations Act, Ontario](#), or the [Expropriation Act, Canada](#).

Expropriation can be an incredible inconvenience for a landowner. In addition to the difficulty of losing a portion of property, landowners can experience adversities in trying to navigate an appeal and compensation negotiation process.

For road, highway, and energy infrastructure, if the parties are unable to reach a voluntary property settlement by the end of the review period, the formal offer expires, and the project proponent will file an application to seek expropriation authority. In Ontario, [Section 99 of the Ontario Energy Board Act](#) outlines the expropriation authority for electricity transmission and distributions and natural gas distributions.

The first step is formal notice served on landowners of the Government's intention to seek expropriation. An inquiry officer conducts a review and prepares a report for the Expropriating Body. They may approve a report considering the expropriation necessary and still recognize that the landowner may not be satisfied with those findings. Once approved and registered, the plan of expropriation is served to the owner.

The Expropriating Authority conducts an appraisal of the lands to determine expropriated land FMV. While it will comply with the compensation requirements of the Expropriations Act, it will usually not include any compensation incentives designed to achieve early voluntary property settlements.

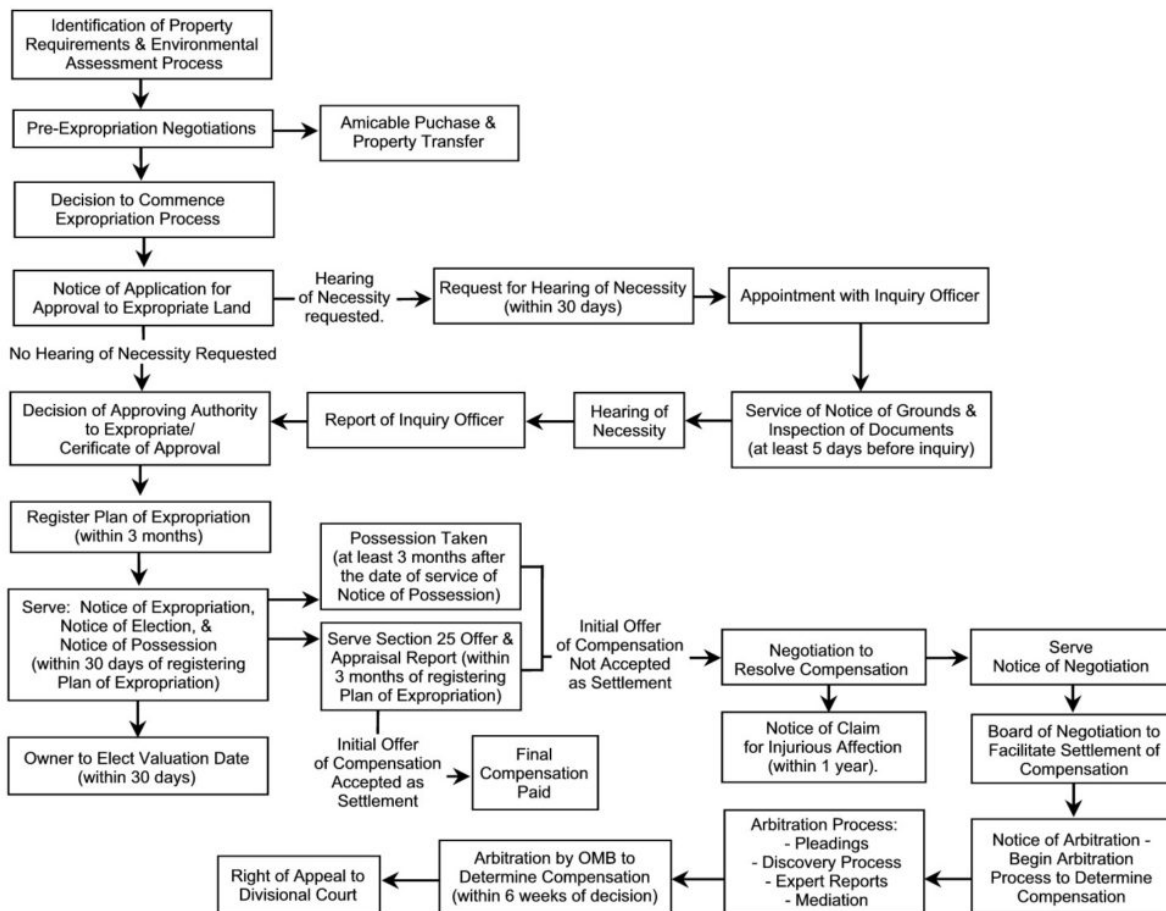
The owner can accept the offer or choose to accept the offer "Without Prejudice." In this case, the owner can receive compensation, but reserves their right to claim more than the amount offered through negotiation or appeal. Landowners can request an appeal regarding the compensation from the Local Planning Appeal Tribunal (LPAT), and further appeal to a divisional court.

Should the owner be willing to cooperate, and the appropriate plans drafted, expropriation can complete in as little as 4 months, often with a premium negotiated in favour of the owner.

Expropriation Compensation can be based on FMV taken for the land as-is, without considering value added improvements, or the possible decrease in value of the overall property due to the nature of the expropriation and disturbance.

This compensation may also include Damages for Disturbance: relocation compensation, moving expense reimbursements (about 5% of FMV) plus compensation for difficulties to relocate (for example, if a new residence needs wheelchair accessible), damages for Injurious Affection (remaining land value decline following expropriation), and other reasonable costs, such as legal fees, disbursements incurred in negotiating, and appealing expropriation.

Expropriation Flowchart – [Ontario Expropriation Association](#)



Property Damage, Complaints, Disputes and Resolutions

Damage

Thoroughly documenting damage is important, during every stage of the project, from pre-construction through to decommissioning, including;

- identify the company or contractor that caused the damage,

-
- explain the damage done in writing and through photographs,
 - describe the location, duration, and effect of the damage,
 - describe the expected mitigation (repair fence, reseed),
 - provide any supporting information, such as a quote from a local repair company, and
 - send documented information to the company, including, and retain a copy.

If there is no land easement or land purchase agreement, the company can apply for a right-of-entry order under applicable legislation or other granted rights. The company may need landowner property access to respond to and manage an emergency. Companies must compensate the landowner for any damage that may happen because of these entries.

Complaints

A company has an economic incentive to operate the site well. A landowner who believes that a developer is not abiding by their licence requirements should contact the company for a resolution. Further escalation steps include contacting an independent ombudsman, then the regulator for dispute resolution to help avoid proceeding through the courts.

Things to consider before making a complaint include:

- whether your complaint involve a business, company, or private individual,
- whether the other party has a policy in place regarding your complaint,
- ensuring you carefully read and understand the company's policy, and
- whether you agree to terms or a contract with the other party.

Disputes and Resolutions

For pipelines and international power transmission lines, CER has a [Land Matters Advisory Service](#) and questions about land matters can be emailed to LMAS@cer-rec.gc.ca. For an [alternative dispute resolution](#), landowners can email ADR-RED@cer-rec.gc.ca to ask a specialist to help find solutions. CER has a [Complaint Resolution](#) process. See the CER website www.cer-rec.gc.ca, for information about [land use compensation](#) disputes.

For projects regulated by the OEB, Section 97 of the Ontario Energy Board Act, relates to the requirement of regulated companies submitting details of agreements. Utility policies also cover landowner access based on the CER Landowner Guide.

For telecom agreement disputes contact Ontario Consumer Affairs, email Consumer Protection Ontario at consumer@ontario.ca or visit www.ontario.ca/page/consumer-protection-ontario.

If any links are out of date, please contact OFA Research Department for current information.

I.N. April 2021 (rev. Feb. 2022)

