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## Land Easements, Acquisitions and Expropriations

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

### Compensation Principles and Practices

Review acquisition principles published by infrastructure proponents to better manage expectations. These principles provide a means for timely settlement, to avoid lengthier, less flexible, and less certain outcomes associated with the legislated expropriation.

A developer's main objective is to secure prompt, voluntary property rights. They should also offer some flexibility, and many offer the choice of either an easement or a full or partial purchase of land for the project. The first meeting 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 assessments, surveys, studies, and 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 decommissioning. Consider including a clause to address farm production interruption, should company access during agricultural production periods result in crop loss.

Farms producing specialty, seed, and processing crops typically have production contracts with clauses whereby a shortfall in total production could nullify the production contract. Farms with these production contracts need to negotiate full compensation should infrastructure proponent access negate the production contract.

Independent appraisers are designated, for example, through the Accredited Appraiser Canadian Institute (AACI). AACI members are qualified to offer valuation, consulting, and expertise for all types of property. This ensures appraisals are conducted in accordance with professional standards. Landowner can ask an appraiser to provide their credentials. Formal offers are based

on the appraisal and should include the appraisal report and maps detailing the area of development interest. Visit <https://www.aicanada.ca/need-an-appraiser/find-an-appraiser/> to access a search tool to find an **AACI** appraiser. Appraisers with CRA designation (Canadian Residential Appraiser) may not have the expertise to appraise a farm property. If an appraisal is beyond the scope of a CRA, they must have their report co-signed by an AACI.

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 delay may reduce or negate a portion of the timely acquisition compensation but not compensation for your time and for allowing the initial access to the property for surveys and assessments.

To address property damage, agreements should include commitment by the project proponent during all activities to mitigate physical property damage, and if mitigation is not possible, to provide compensation for damages that arise related to those activities. Farmland agreements should include 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 offer has a set deadline that allows time to review materials, consider the offer and complete any additional independent appraisals and legal review. This is usually accompanied by 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 the first person a landowner encounters during the consultation and negotiation process. The land agent provides information about the project and seeks input on potential effects of the project. 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.

Landowners can have anyone review documents. Legal advisors should be familiar with property right easements, rights of way, purchases, and expropriation. Legal advisors ensure agreements include all 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

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identify any impacts relating to the proposed location, timing, and methods of project construction to ensure the regulatory decision process considers these matters.

## **Four Types of Acquisition Agreements**

Regulators stipulate what forms of agreements proponents can use to acquire land, including:

- 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 damage 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.

### **1. Options**

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.

Projects select general routes before filing a regulatory application and may negotiate an option agreement with landowners, even though the final route may not affect some of them. The option gives the company the assurance that it can obtain necessary land rights if needed, as it promises the company that you will sign a permanent land agreement, if exercised within a specified period. If the specified period passes and the company has not exercised the option, the option expires, and the landowner keeps the option 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.

### **2. Easements**

Easement agreements often use a base value of 75% of property fair market value (FMV) because easements are not outright purchases. Easements 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 offer an incentive payment for timely acceptance of the offer. These combined amounts mean an exercised option and easement agreement could represent more than the FMV of the subject land under easement. This allows the proponent to promptly obtain the necessary land rights at a lower price than the cost to purchase the entire property.

Consider adding a compensation provision where the use of the easement by the project proponent has reduced the FMV of the remaining property. Known as Injurious Affection, the appraisal should explain the Injurious Affection compensation process and the dollar amount. It should consider the attributes of the remaining property, and whether value loss is likely to result from construction in, and use of, the easement.

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If you want to farm the land in the easement, once the project becomes operational, discuss a license-back arrangement during initial land agent conversations. This ensures 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.

### **3. Purchases**

If a project proponent is acquiring access to land that includes any 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 offer for easement with a request for purchase of the entire or partial property, or the project proponent offers to purchase the property, the agreement should include compensation for timely acceptance, and reasonable compensation because you are granting the proponent the option to act on the agreement. All purchase agreements should include disturbance and relocation compensation and allow for reimbursement of any reasonable legal fees to the landowner.

### **4. Expropriations**

Along with proximity to public infrastructure, such as transit, healthcare, or highways, is the risk of expropriation to ensure sufficient land is available. Farmers should be aware of the possibility of expropriation, be familiar with the process, and know their rights under 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 roads, highways, and energy infrastructure, if the parties fail to reach a voluntary settlement by the end of the review period, the formal offer expires, and the project proponent may file an application to seek Expropriation Authority. In Ontario, [Section 99 of the Ontario Energy Board Act](#) outlines the expropriation authority for natural gas distributions and electricity infrastructure.

The first step is formal notice served on landowners of the intention to seek expropriation. An inquiry officer conducts a review and prepares a report for the Expropriating Body. They could find 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 landowner.

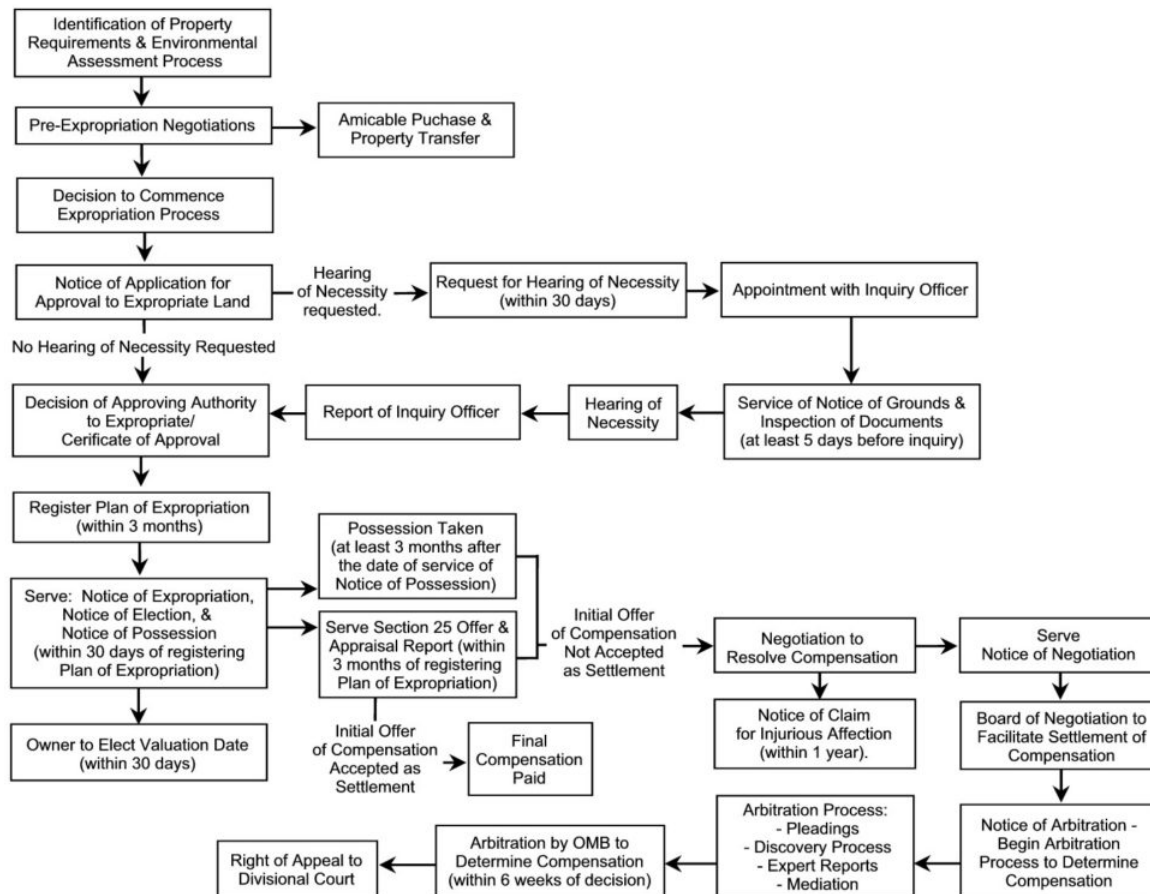
The Expropriating Authority conducts an independent appraisal to determine expropriated land FMV. While it will comply with the compensation requirements of the Expropriations Act, it may not

include 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 to a divisional court, and for municipal expropriation, also request an appeal to the Local Planning Appeal Tribunal. Should the landowner accept the offer, expropriation can be completed 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 remaining property due to the nature of the 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](#)



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## Property Damage

Regardless of the type of access arrangement, thoroughly documenting damage is important, during every stage of a project 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
- share documented information with the company.

Even if there is no land easement or land purchase agreement, some projects can apply for a right-of-entry order under applicable legislation or other granted rights. If a company needs access to respond to and manage an emergency, they must compensate landowners for any damage that happens because of entry.

## Complaints

A landowner who believes that a developer is not abiding by their licence requirements should contact the company for a resolution. Further escalation includes contacting any independent ombudsman and the regulator for dispute resolution to help avoid proceeding through the courts.

Things to consider before making a complaint include:

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

## Regulators

Depending on the type of project, federal or provincial authorities regulate land access, and all stages of a project from pre- construction, through decommissioning of the infrastructure.

The Canada Energy Regulator (CER) regulates electricity transmission border crossings, and pipelines. The Ontario Energy Board (OEB) regulates natural gas distribution, and electricity transmission and distribution projects.

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

While pipelines, electrical and roadway infrastructure could result in expropriation, if telecom tower

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projects do not reach needed land access agreements, there is no right-of-entry or expropriation process. Tower site options are not as constrained as other infrastructure projects.

Other telecom assets often attach to electricity infrastructure, where telecoms rent space in existing 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. Landowners in the easement 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 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.

### **Disputes and Resolutions**

Pipelines and international power transmission lines, visit <http://www.cer-rec.gc.ca>.

[CER Land Matters Advisory Service](#)

Email [LMAS@cer-rec.gc.ca](mailto:LMAS@cer-rec.gc.ca)

[CER Alternative Dispute Resolution](#)

Email [ADR-RED@cer-rec.gc.ca](mailto:ADR-RED@cer-rec.gc.ca) [CER](#)

[Complaint Resolution Process](#) [CER](#)

[Landowner Guide](#)

[Land Use Compensation Disputes](#)

Natural gas and Electricity, visit <https://www.oeb.ca/>. Utility policies on landowner access are based on the [CER Landowner Guide](#). To learn about regulated company agreement requirements, see [Ontario Energy Board Act Section 97](#).

For telecom agreement disputes visit [www.ontario.ca/page/consumer-protection-ontario](http://www.ontario.ca/page/consumer-protection-ontario) or contact Consumer Protection Ontario at [consumer@ontario.ca](mailto:consumer@ontario.ca).

If any links are out of date, please contact the OFA Research Department at (519) 821-8883 or 1 (800) 668-3276 for correct information.

i.n. May 6, 2025