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## Land Representative Orientation Module for Federally Regulated Pipelines



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## MODULE 1

### Course Introduction and Training Objectives

The transmission pipeline industry, which CEPA represents, serves Canadians by transporting about 97% of the onshore crude oil and natural gas produced and used in Canada. These pipelines are what we like to call 'energy highways', which move across the country, enabling about 20% of Canada's trade value. These highways allow basic everyday modern life activities, such as fuelling your car, and economic prosperity through, for example, delivering natural gas to power machines at a manufacturing plant. We currently operate over 115,000 kilometres of transmission pipelines, which involves safely transporting approximately 3.2 million barrels of oil and 14.6 billion cubic feet of gas every day.

We are an integral part of a reliable energy system that enables the quality of life Canadians enjoy and ties our country together. The energy pipeline industry is an enabler of prosperity across Canada and continues to be a hallmark of this country's nation-building. We help keep the cars moving, factories running, and houses heated, creating jobs and economic activity in every region of the country.

Since the Second World War, the pipeline industry has been building large, long-haul transmission pipelines to transport hydrocarbons to market safely and reliably. Recent expansions and developments of the oil sands, shale gas plays and other conventional and non-conventional plays has resulted in a surge of new individuals coming into the energy industry, including those that engage with landowners. The purpose of this course is to assist these new individuals in the development of skills for landowner interaction.

Regulatory requirements have been placed on pipeline companies to ensure that the appropriate quality and content of information is readily available to landowners and conveyed to them by a representative who understands the information being provided. In addition to the increased level of stakeholder engagement required by the regulator, companies also have a need to take additional steps to ensure that representatives are being trained properly and presenting information in a consistent manner during the lifecycle of a project. This training module is designed to provide individuals with an insight into what the National Energy Board ("NEB") expects from pipeline companies engaging with individuals affected by NEB regulated projects.

In addition to this training, representatives will be required to read and become familiar with the following NEB publications:

- *Landowner Guide*
- *Guidance for Safe Crossings of NEB Regulated Pipelines Using Agricultural Equipment*
- *Hearing Process Handbook*



- *Participant Funding Program*
- *Regulating Pipeline Abandonment*
- *Living and Working Near Pipelines*
- *NEB Information for Proposed Pipeline Projects that Do Not Involve a Hearing; and*
- *NEB Information for Proposed Pipeline Projects that Involve a Hearing*

Representatives should also take the time to view the following NEB videos (available on the NEB website at [www.neb-one.gc.ca](http://www.neb-one.gc.ca)).

- *National Energy Board Who We Are*
- *National Energy Board Hearing Process*
- *National Energy Board Participant Funding Program*

Stakeholders and the general public have access to each of these documents and videos through the National Energy Board website and library. It is important that representatives understand this information, where it can be found and how it pertains to each stakeholder. Other resource material is also available, including the *National Energy Board Act* ("NEB Act"), *National Energy Board Filing Manual* ("NEB Filing Manual") (which describes what must be included in applications), *National Energy Board Rules of Practice and Procedure, 1995* ("NEB Rules") and the *National Energy Board Onshore Pipeline Regulations*.

These modules summarize information from the NEB website, the NEB Act, Natural Resources Canada and industry courses that educate on property law, negotiation, communication and other relevant principles. They are designed to ensure that individuals representing companies involved with NEB regulated projects are trained and informed.

Upon completion of the modules, representatives will have a basic understanding of the regulatory and acquisition processes for an NEB regulated project. It is important that representatives understand the importance of conveying information to the public in a clear and consistent manner.

## **Introduction to the National Energy Board**

The NEB is an independent federal agency that reports to Canadian government through the Minister of Natural Resources. The National Energy Board's purpose is to promote safety, security, environmental protection and economic efficiency in the Canadian public interest through its regulation of pipelines, energy development and trade, as mandated by Parliament.

The responsibilities of the NEB include:

- regulation of interprovincial and international oil and gas pipelines;
- ensuring environmental protection during all stages of a project;



- ensuring that proper environmental assessments are conducted;
- public safety and compliance with regulations, which includes working with CSA International to develop safety & technical standards;
- efficient processing of applications, including the requirement that the Board complete its assessment and make a recommendation / decision on a project within a legislated time frame;
- regulating pipeline tolls and tariffs;
- importing and exporting natural gas, and exporting oil and electricity;
- regulation of frontier oil and gas, including offshore areas not covered by provincial and federal agreements;
- providing technical and administrative assistance to the Northern Pipeline Agency; and
- conducting studies or research into energy matters.

At the outset of any project under NEB jurisdiction, the proponent must apply to the Board. The Board then reviews the application and decides whether the project is in the public interest and whether approval should be granted. The NEB defines 'public interest' as being inclusive of all Canadians and refers to a balance of economic, environmental and social interests that change as society's values and preferences evolve.

When seeking approval, applicants must submit applications or information filings (collectively referred to as 'filings') to the Board that are complete and enables the Board to:

- evaluate the overall public good that the request can create as well as its potential negative aspects;
- weigh the various impacts; and
- make an informed decision that balances, among other things, the economic, environmental and social interests

When making an application to the National Energy Board, the company must follow the NEB Act, NEB Rules and the NEB Filing Manual. These publications are available on line at <http://www.nerb-one.gc.ca/clf-nsi/rpblctn/ctsndrgltn/rrggnmgpnb/rrggnmgpnb-eng.html>

Applications for new facilities should include the following:

- the purpose of the proposed project;
- the company's consultation activities and results;
- engineering design of the proposed project;
- an environmental and socio-economic assessment of the proposed project;



- economic and financial information; and
- lands information.

It is important for representatives to understand the role of the NEB, as well as its processes and regulations. The representative is typically the conduit of communication for stakeholders, landowners, the public and the pipeline company. It is critical that representatives receive clear direction from the regulated companies and that they understand the information they are conveying to the public.

Projects can be delayed due to poor communications with stakeholders. These project delays can be minimized by an effective consultation program that uses trained representatives. The consultation phase is a very important phase for the stakeholder, because it is their initial opportunity to receive and review information, provide input and raise concerns. Consultation is highly important to the NEB as it gives company representatives the opportunity to engage with the public, and for stakeholders who may involve themselves in the process.

## National Energy Board Filing an Application

Applications for the construction of a pipeline may be filed under section 52 or 58 of the NEB Act. If the pipeline is longer than 40 km, a section 52 is required, and if approved, a certificate will be issued. Smaller projects can be filed pursuant to section 58 and, if approved, a section 58 order (not a certificate) will be issued.

After considering a section 52 application, the NEB will make a recommendation to the Governor in Council (“GIC” or “Cabinet”) and Cabinet will decide whether a certificate should be issued. If approved, it will direct the NEB to issue the certificate. The detailed route process must then be followed (see discussion later in this document). Cabinet is the decision maker for a section 52 application.

After considering a section 58 application, the NEB will issue its decision and a section 58 order if the project is approved. Cabinet is not involved in a section 58 decision and the detailed route process is not invoked for a section 58 order. The NEB is the decision maker for a section 58 application.

The level of detail required in an application is dependent on the size and complexity of a project. The NEB Filing Manual provides companies with direction to determine the filing requirements with respect to an application. Applications are made to the NEB for any of the activities that the NEB regulates. Once an application is filed, the NEB begins its assessment of the project and determines the process it will follow. For some proposed projects, the Board conducts public hearings, in order to get all relevant views on the project before it makes a decision.

It is important for representatives to understand what standards and regulations companies are to abide by. The information companies submit in an application is available on the NEB website. If representatives are asked questions on the process, safety, stakeholder engagement or other information submitted in an application, they should know where this information can be found.

The NEB Filing Manual is designed to assist NEB-regulated companies to identify the instances where a filing is necessary pursuant to the NEB Act and NEB regulations; outline the Board's responsibilities pursuant to the *Canadian Environmental Assessment Act 2012*; outline the filings for most applications within the jurisdiction of the NEB; and provide guidance as to the type of information the Board would typically need for their approval of a project. The NEB Filing Manual is divided into seven chapters:

Chapter 1 – Introduction and outline of the NEB Filing Manual

Chapter 2 - Describes how to use the manual and includes a flowchart that applicants can use to determine what elements are required in their filing.

Chapter 3 - Identifies the information required in every application. After completing the requirements of Chapter 3, the applicant must then proceed to either Chapter 4 (physical projects) or Chapter 5 (non-physical projects).

Chapter 4 - Identifies the information required for physical project applications.

Chapter 5 - Identifies the information required for non-physical project applications.

Chapter 6 - Identifies the information required for filings other than applications.

Chapter 7 - Lists the NEB documents referenced throughout the manual.

Depending on the nature and complexity of the project, companies can request a pre-application meeting with the NEB. The pre-application meeting will clarify filing requirements with the NEB. Companies that are seeking a certificate pursuant to section 52 of the NEB Act (the section governs the construction of pipelines more than 40 km in length), are strongly encouraged to file a Pre-Application Project Description three months prior to filing the application. The Pre-Application Project Description is used to initiate the following activities:

- the NEB's Enhanced Aboriginal Engagement;
- the NEB's Participant Funding Program; and
- NEB Public Engagement activities.



A Pre-Application Project Description should include information about the project and its components, a detailed map, project location, impacted Aboriginal groups and the nature and extent of consultations conducted with the public.

While each application is unique, the Board expects to see the following common elements:

### Description of the action being sought by the applicant

The application must state the request being made and what action is being requested of the Board. It must also contain information on the provision of the NEB Act or regulations under which the application is made and contain information that supports the application, including information referred to in published policies and guidelines by the Board. The NEB Filing Manual outlines the other information and formatting that the Board wants to see in an application.

### Description of the purpose of the application

The description of the application is exactly that. The Board wants to see a clearly articulated reason for applying to the Board, a project description and a discussion of the need that would be addressed by the project.

### Consultation

The Board expects companies to consider consultation for all projects. Depending on the project scope, it could mean delivering a very extensive consultation program or a program as simple as notifying a single landowner. Consultation is highly important to the NEB as it gives company representatives the opportunity to engage with the public and is important for stakeholders to involve themselves in the process. Even though the NEB is involved throughout the lifecycle of a project, the consultation phase is a very important phase for the stakeholder because it is their initial opportunity to receive and review information, provide input and raise concerns.

The Board expects the following information with respect to a consultation program:

- the persons or groups consulted;
- the methods, dates and locations of consultation activities; and
- the information that was distributed to persons or groups, which in most cases will include:
  - the location, starting and ending points, route and main components of the project;
  - a map or maps at appropriate scale that show all major components of the project, the routing of the project, the location of proposed facilities such as pump and



- compressor stations, and the location of any major towns, roads, water bodies or other landmarks in the area of the project;
- o the proposed timing and duration of construction;
  - o the potential environmental and socio-economic effects of the project and how those effects will be addressed;
  - o how public safety will be addressed;
  - o the emergency response information;
  - o how comments or concerns raised by potentially affected persons or groups will be addressed throughout the consultation process;
  - o how interested persons can participate further in the consultation process;
  - o company contact information;
  - o the proposed timing of filing the application with the Board;
  - o if the project does not require a hearing, the NEB pamphlet "Information for Proposed Pipeline or Power Line Projects that Do Not Involve a Hearing"; and
  - o if the project does require a hearing, the NEB pamphlet "NEB Information for Proposed Pipeline or Power Line Projects That Do Involve a Hearing".

Representatives should be familiar with each of the items. In order for a company to address public concerns, representatives must be able to properly convey information gathered in the field and deliver it to the company for inclusion in the application. Accurately gathering concerns at the field level will help reduce project delays during the approval process. As a representative, you must be prepared to conduct consultation or respond to inquiries using any of, or a combination of the methods listed below:

- project brochures, either mailed or hand delivered;
- periodic newsletters;
- advertisements in local newspapers;
- radio spots;
- a project Web page;
- telephone calls;
- open house meetings;
- project questionnaires;
- facility tours;
- on-site meetings;
- personal visits; and
- workshops.

The NEB requires regulated companies to communicate with and involve Aboriginal peoples when they are developing projects. Aboriginal groups may also bring outstanding concerns about the project, including impact to Aboriginal communities, use of traditional territory, and impact to potential or established treaty rights, directly to the NEB. It is important for the representative to communicate to Aboriginal groups that concerns should be raised about projects through the hearing process.

It is important for representative to stress the importance to stakeholders to be involved with the consultation process and attend open houses, navigate the NEB website, read NEB publications, call information lines, ask questions and be as informed as possible. It is important for stakeholders to make their concerns known to the company as early as possible and stay involved during the process. Similar to a court, when the NEB is making a decision, it can only consider information that has been placed on its public record.

## Notification of Commercial Third Parties

Although representatives are not directly responsible for the notification of commercial third parties, they may be involved with the personnel that are. For more information on the requirements for the notifications of commercial third parties, representatives should consult Section 3.5 Notification of Commercial Third Parties in the NEB Filing Manual.

## National Energy Board Hearing Process

Depending on the type and complexity of the application, the Board can make its decision with or without a hearing. Section 52 applications require a public hearing, which is almost always oral.<sup>1</sup> Section 58 applications do not require a hearing, however, the Board can and will order one where it feels it would be of assistance in the determination of a project and/or where there is sufficient public interest in the project.

When a hearing is mandatory or is ordered by the Board, the Board will decide whether to conduct an oral hearing, a written hearing, or a combination. In an oral hearing, parties file written evidence, information requests ("IRs" -written questions) are allowed, responses are filed in writing, cross-examination of witnesses on their evidence is allowed, and then argument is heard by the panel. In a written hearing, evidence, IRs, responses and argument are submitted in writing. The Board can also conduct a hearing by having a written process, but hearing oral argument.

Smaller section 58s can proceed by way of a written process that may only allow for submissions by parties. This is generally referred to as a proceeding, rather than a hearing.

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<sup>1</sup> The only time a section 52 process is not oral is if, after the NEB issues a Hearing Order, no parties ask to participate in the hearing process. This is very rare, but has happened.

A National Energy Board public hearing is held to give participants opportunity to express their opinions and information about a proposed project. It also gives the Board the information required in order to make an objective, informed decision on a particular project. In this section, we will briefly discuss what a National Energy Board hearing entails. For further information, participants are encouraged to review the National Energy Board website, Section “Public Participation and Land Matter”, sub-section “National Energy Board Hearing Process Handbook”.

During a National Energy Board hearing on a project, the Board will typically consider all, or a portion of the following:

- the design and safety of the project;
- environmental matters;
- socio-economic and land matters;
- impact of the project on directly affected Aboriginal groups;
- impact of the project on directly affected persons;
- financial responsibility of the applicant;
- economic feasibility of the project; and
- the Canadian public interest

Representatives should be knowledgeable of these factors when consulting with a landowner on a proposed project. They should also be extremely thorough when taking meeting notes during discussions with landowners as these notes could play a part in the NEB hearing.

Section 55.2 of the NEB Act sets out when the Board will allow a person to participate in a hearing about an application to construct and operate an oil or gas pipeline. A “person” may be an individual, company, organization, or group. If they wish to participate, they must demonstrate to the Board’s satisfaction that they are: directly affected by the proposed project; have relevant information or expertise for the Board to consider, or both.

People directly affected by a project may participate in a Board hearing. The Board decides on a case-by-case basis who is directly affected. The Board may consider these factors when making this decision:

1. The nature of the person’s interest.
  - Whether a person has a specific and detailed interest, rather than a general public interest.
  - Examples of interests that could support participation are:
    - commercial, property or other financial interest (including employment);



- o personal use and occupancy of land and resources; or
- o use of land and resources for traditional Aboriginal purposes.

2. Whether the granting or refusing of a project application causes a direct effect on the person's interest.

- The degree of connection between the project and the interest
- The likelihood and severity of harm a person is exposed to.
- The frequency and duration of a person's use of the area near the project.

The Board may allow participation if the person has relevant information or expertise for the Board to consider.<sup>2</sup>

Individuals or groups may be able to participate by either writing a "Letter of Comment" or by participating as an intervener. Participants are required to fill in and submit an Application to Participate form available on the NEB website. The Board then decides if you are allowed to participate and what method you may use. Individuals that are interested can monitor hearings by:

- reading information about the hearing on the NEB website;
- reading the evidence that has been filed on the record and included on the public registry;
- listening to live broadcasts of any oral portion of the hearing through the NEB website;
- attending the oral portion of the hearing in person if the opportunity is provided; or
- reading the daily transcripts of the hearing, which are typically posted on the NEB website the following day.

Funding is available to interveners under the Participant Funding Program. A separate application is required for that; and the form is available on the NEB website.

The NEB hearings are usually conducted by a panel of three members. These members have been assigned to make a recommendation or decision on behalf of the full Board. Board members are appointed by the Governor in Council.

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<sup>2</sup> The Board may consider these factors when deciding if a person has relevant information:

- the source of the person's knowledge (for example, local, regional or Aboriginal);
- the extent to which the information is within the project scope and related to the list of issues; and
- how much value the information will add to the Board's decision or recommendation.

The Board may consider these factors when deciding if a person has relevant expertise:

- the person's qualifications (for example, the person has specialist knowledge and experience);
- the extent to which the person's expertise is within the project scope and related to the list of issues; and
- how much value the information will add to the Board's decision or recommendation.

For facilities and pipelines under 40 kilometers in length that are applied for under section 58 of the NEB Act, toll applications, and detailed route applications, the Board will make the decision itself. For projects building a pipeline longer than 40 kilometers, an application pursuant to section 52 of the NEB Act is required, and the Board will send the NEB Report with recommendations to the GIC which will decide whether a Certificate should be issued by the Board. Recommendations and decisions are made based on the Canadian public interest.

Decisions made by the NEB may be appealed to Canada's Federal Court of Appeal on a point of law or jurisdiction if the Court grants permission (or leave) to appeal it. An appeal cannot be made simply because someone is unhappy with the outcome. An application asking for permission to appeal (known as a "leave to appeal application") must be filed with the Federal Court of Appeal within 30 days following the NEB decision. Parties to the hearing may also file review applications with the NEB, requesting that the NEB review the decision that was made on the grounds that there is new information or an error was made.

The NEB takes a life-cycle approach to regulation. The NEB is involved in most projects from start to finish. This includes the application process, construction and long-term operation of the facilities and abandonment. Various inspections take place throughout the life of a project to ensure the project is continuing to operate in a safe manner for the benefit of Canadians.

For more information on National Energy Board Hearings participants are to read through the "National Energy Board Hearing Process Handbook". This will provide detailed information on the types of hearings, what takes place during a hearing and who is involved during a hearing.

## National Energy Board Detailed Route Hearing Process

After a pipeline is approved and a certificate has been issued (if the project involves more than 40 km of new pipeline), the exact route must then be decided. This process is known as the detailed route approvals process and may sometimes include a detailed route hearing. The purpose of detailed route hearing is to determine the best route possible. When a certificate is issued, the company is required to file its Plan, Profile, and Book of Reference with the NEB. The documents show the precise locations of the project, the type of land rights required and a description of affected lands.

- Plan – is the aerial view;
- Profile view – is the side view; and
- Book of Reference – identifies the lands, names of the landowners and occupants and shows the right-of-way dimensions (length, width and total area).

Landowners can oppose the detailed route if they have been served with a notice about the detailed route of the pipeline. Landowners can also oppose the detailed route if they anticipate that their lands may be adversely affected by the proposed detailed route of the pipeline or the methods or timing of the construction of the pipeline.

Prior to a detailed route hearing, the Board encourages companies to attempt to resolve outstanding issues with landowners. Representatives are encouraged to work with Landowners prior to the hearing to gather as much detailed information as possible, to mitigate issues and avoid missed information that may come up in a detailed route hearing. Information gathered by representatives may include:

- reports, information or testimony from a professional;
- registered farming plans;
- architectural or subdivision plans for development;
- maps and photos;
- specific details on the impacts to the land;
- information on current or future land use; and
- proposed alternative routes and details of these alternatives.

Alternative Dispute Resolution is also available through the NEB to help resolve any outstanding issues.

After receiving all of the evidence presented in the detailed route hearing, the Board considers the evidence presented and decides whether the company has proposed the best possible detailed route for the pipeline and the most appropriate methods and timing for building the pipeline. The NEB may then accept the company's proposed detailed route, with or without conditions or reject all or part of the company's proposed detailed route.

The Board does not select a pipeline route or tell the company where the route should be moved. The Board typically provides guidance on how the parties may proceed to identify and present an alternate route for the Board to consider.

If the detailed route is approved, the NEB must send a copy of the decision to each participant of the detailed route hearing and to the Federal Minister of Natural Resources. Landowners, tenants, or others who wish to dispute the Board's detailed route hearing decision have two options:

- they can request that the Board review the decision; or
- they may apply to the Federal Court of Appeal for permission to appeal the decision (only on a question of law or jurisdiction).

If the NEB rejects the company's detailed route, the company has three options:

- seek a review of the decision;
- seek leave to appeal the decision to the Federal Court of Appeal; or
- re-apply with a new location for the rejected segment of detailed route - one that it believes will satisfy the NEB's concerns. If legitimate oppositions about the new detailed route are received by the NEB, then another detailed route hearing would be required.

Representatives are very involved in the information gathering phase for a detailed route hearing. Accuracy, conveyance and communication are very important at this stage, as they will enable companies to make decisions based on the feedback they receive from impacted individuals. Effective communication between the company and the directly affected individuals is imperative to avoid project delays.



## MODULE 2

### Land Acquisition Introduction

This module is designed to give the representative, or any personnel in contact with the general public regarding nationally regulated pipelines, the basic understanding of easements, the land acquisition process, negotiation techniques and the process that occurs if negotiations break down.

Representatives should understand the property law, surface rights law and the associated terminologies. It is important for a representative to understand the “bundle of rights” term and what impact it has on landowners. Representatives should recognize that they are negotiating for a set of rights, representing a company, educating the public and act ethically while doing so.

### Property Law Basics

It is important for the representative to understand the history of different laws, as well as the different acts and jurisdictions that government is responsible for. It will help provide a background understanding of the land acquisition process and transfer of rights. In Canada, contract and property laws were (and are) established on common law principles, meaning that the law is established through case law or “judge made” law.

Property law is the body of law surrounding rights in land and things. It includes personal and real property. Property rights can be either tangible or intangible. Property rights in land (or real estate) include tangible ownership rights in the physical land, as well as intangible rights, which are included in the “bundle of rights” associated with the land. An example of an intangible right associated with land is the right to exclude people from the land. The “bundle of rights” becomes very important during the land acquisition process as certain rights will be transferred, usually for a negotiated monetary value.

In Canada, ‘fee simple ownership’ is the highest ownership interest possible that can be attained. The rights that the landowner has can be considered their “bundle of rights”. This can also be limited by certain encumbrances or conditions that may be registered to the title. When encumbrances or conditions are registered on title, the landowner has granted a portion of their “bundle of rights” to another.

For further information regarding easements and right of ways, the participant is encouraged to take the International Right of Way Association Course 802 C – Legal Aspects of Easements or other industry approved courses that educate on property law and legalities of easements and right of ways.

## National Energy Board Land Matters Group

The NEB is committed to engaging with the public and landowners affected by an NEB-regulated project. The NEB Land Matters Group was created to provide a high level of support to affected landowners. The NEB Land Matters Group consists of public and industry personnel who “have a vested interest in land matters and are impacted by company activities regulated by the NEB”. The purpose of the Land Matters Group is to bring together knowledge and expertise of members of the public and industry in order to:

- build awareness and interest in land matters and encourage a fuller exchange of information between affected individuals and groups;
- promote and facilitate in-depth discussion and recommendations on land matters; and
- inform regulatory development, priority setting and program delivery decisions made by the Board.

More information on the Land Matters Group and its composition can be found under the “Public Participation and Land Matters” and the sub-section “Land Matters Group” [www.neb-one.gc.ca](http://www.neb-one.gc.ca). Representatives should feel confident directing landowners to this resource during the consultation, land acquisition or any other phase of a project.

## Land Acquisition Process

The operating company in an NEB-regulated project may seek to negotiate a land acquisition agreement with the landowner. There are different types of land acquisition agreements companies may seek to acquire. Agreements such as option, right of way, temporary work space, surface lease and purchase agreements may all be used in the land acquisition phase of a project. Each of these agreements has a certain set of terms and obligations. For the purpose of this discussion, we will be focusing on right of way agreements, but will make mention of and provide a description of option agreements, purchase agreements, lease agreements and temporary work space agreements.

A right of way is considered a non-possessory interest in the land of another. A right of way agreement may be negotiated and registered on the landowner’s title. The right of way agreement or instrument is typically a contract between the landowner and person or company obtaining the right of way. Typically, in the contract or agreement, the rights granted to the person or company (from the landowner) are outlined within the terms of the agreement, but there are also obligations that the person or company and landowner have to fulfill. The holder of the right of way has the right to utilize the land of the grantor (landowner) for the stated purposes in the rights granted. Under the NEB Act (Section 86 & 87), this grant is subject to compensation. If an agreement for access to land cannot be reached between the landowner and the company, the company seeking a right of way may

be able to apply for a right of entry. Right of entry would not be granted until a certificate or and order has been issued approving the pipeline.

The right of way agreement outlines the rights granted from the landowner to the company and the obligations of both parties. The right of way agreement is registered on title and is subject to certain restrictions for the landowner(s) while granting the company permission to build, operate and maintain the pipeline for as long as the agreement remains in effect. This section will discuss the standard process of acquiring a right of way agreement, typical clauses and terms in the agreement and negotiation techniques.

A right of way is defined as a “right to make way over or through a piece of land, usually to and from another piece of land”. In order to cross land from another, certain rights must be granted from one to another. The right of way agreement, sometimes referred to as a statutory right of way agreement, is the contractual form that is used to transfer these rights and outline obligations for each side.

A right of way holder (the grantee) has the right to utilize the land of the landowner (the grantor) for the purposes stated in the granting clause of the ROW. Common rights granted are: the exclusive right, license, liberty, privilege, easement and right of way on, upon, across, along, in, under and through the lands; to construct, operate, maintain, repair, replace, pipeline(s); for the purposes of carriage, transmission, conveyance, transportation of natural gas, oil or other hydrocarbons.

Because a right of way is an interest in land, the terms, conditions and obligations in the right of way agreement are also in effect for subsequent landowner or companies that own the pipeline. Depending on the agreement, the right of way agreement may terminate upon abandonment of the pipeline. This means that the term can be indefinite, but once a pipeline is abandoned, the rights outlined in the agreement may be released back to the landowner. This is a complex and controversial area. Before any pipeline is abandoned, the company must file an abandonment application to the NEB, following which, the NEB will hold a hearing, and landowner issues will be considered.

Companies tend to begin land acquisition early on in the project, often before a final route is determined. Often, a company will sign an option agreement with the landowner to ensure that if and when the project goes ahead, the landowner will sign a land acquisition agreement. An option agreement is typically in effect for specific period of time. During this period, the company can exercise their option at any time. If the agreement expires, the company no longer has the right to exercise the option and has to renegotiate the terms. The option agreements can be used in cases where the company is seeking a right of way or a purchase agreement. Representatives must be



familiar and have the ability to explain the purpose and terms of each agreement that are being directed to use.

Companies may seek to acquire a temporary work space agreement from a landowner. A temporary work space agreement is used to acquire a specified area for a certain amount of time. The timeline may be specified by a date, or referenced as the completion of construction on a project. These areas may be required to accommodate crossings, construction techniques and safe works areas as required by the company.

A land purchase agreement can be used by companies to purchase land in “fee simple” and would be a permanent taking of the lands. If executed, the landowner would be granting his entire “bundle of rights” to the company seeking the land purchase agreement and the company would become the landowner.

Prior to a company signing a land acquisition agreement with a landowner for a National Energy Board project, they must serve a Section 87(1) notice on the landowner. Section 87 of the National Energy Board Act states:

**87.** (1) When a company has determined the lands that may be required for the purposes of a section or part of a pipeline, the company shall serve a notice on all owners of the lands, in so far as they can be ascertained, which notice shall set out or be accompanied by

(a) a description of the lands of the owner that are required by the company for that section or part;

(b) details of the compensation offered by the company for the lands required;

(c) a detailed statement made by the company of the value of the lands required in respect of which compensation is offered;

(d) a description of the procedure for approval of the detailed route of the pipeline; and

(e) a description of the procedure available for negotiation and arbitration under this Part in the event that the owner of the lands and the company are unable to agree on any matter respecting the compensation payable.

(2) If a land acquisition agreement referred to in section 86 is entered into with an owner of lands before a notice is served on the owner under this section, that agreement is void or, in the province of Quebec, null.



(3) Where a company serves a notice on an owner of lands under subsection (1) and subsequently decides not to acquire all or part of the land described in the notice, it is liable to the owner for all damages suffered and reasonable costs incurred by the owner in consequence of the notice and the abandonment of the acquisition of the land and the owner may bring an action to recover the amount of the damages and costs in any court of competent jurisdiction in the province in which the land is situated.

To summarize, a section 87 notice must describe:

- what land is needed for the part of the pipeline that will cross the landowner property;
- how the company plans to compensate the landowner for the land it needs;
- a statement of the value of the required land;
- the NEB's process for consideration of the detailed route of the pipeline; and
- a description of the options of negotiation or arbitration that are available if the landowner and the company cannot agree on compensation.

Land acquisition agreements must comply with section 86 of the NEB Act, but the parties signing the agreements control the final contents of the individually negotiated agreements. Land acquisition agreements can be enforced by the provincial court in the province where the lands are located.

Section 86 of the NEB Act states:

**86.** (1) Subject to subsection (2), a company may acquire lands for a pipeline under a land acquisition agreement entered into between the company and the owner of the lands or, in the absence of such an agreement, in accordance with this Part.

(2) A company may not acquire lands for a pipeline under a land acquisition agreement unless the agreement includes provision for

(a) compensation for the acquisition of lands to be made, at the option of the owner of the lands, by one lump sum payment or by annual or periodic payments of equal or different amounts over a period of time;

(b) review every five years of the amount of any compensation payable in respect of which annual or other periodic payments have been selected;

(c) compensation for all damages suffered as a result of the operations of the company;



(d) indemnification from all liabilities, damages, claims, suits and actions arising out of the operations of the company other than liabilities, damages, claims, suits and actions resulting from

(i) in the Province of Quebec, the gross or intentional fault of the owner of the lands, and

(ii) in any other province, the gross negligence or willful misconduct of the owner of the lands;

(e) restricting the use of the lands to the line of pipe or other facility for which the lands are, by the agreement, specified to be required unless the owner of the lands consents to any proposed additional use at the time of the proposed additional use; and

(f) such additional matters as are, at the time the agreement is entered into, required to be included in a land acquisition agreement by any regulations made under paragraph 107(a).

The NEB does not have any jurisdiction over compensation matters. Compensation negotiations take place between the landowner and the company, but may be referred to Natural Resources Canada for arbitration if agreement cannot be reached. Typically the compensation discussion revolves around the fair market value and damages for future use of the lands affected by the project. Compensation may also be available for, but not limited to:

- the use of any temporary work space;
- any inconvenience or nuisance caused by the construction of the pipeline;
- loss of use of the land; and
- all damages suffered as a result of the operations of the company.

The fair market value of the land is typically subject to appraisers completing their assessment of the land either directly, or for a certain area. Area rates and pattern of dealings are also considered when determining compensation.

## Negotiation Techniques

During a negotiation, there are techniques available for the agent to use in order to help achieve a negotiated agreement. These techniques, combined with recognition of the types of situations and personalities of the people you are negotiating with will help enable parties to work towards a mutually acceptable agreement. The first steps of a negotiation are structured around presenting information and developing trust. In this step, a negotiator must be able to present facts and address

any problems openly and directly. If a representative does not have an answer for a specific question the representative should reply with statement similar to “I don’t presently have that information, but will follow up with the appropriate people to find you the answer”. It is more important to give accurate information than quick, inaccurate speculation.

Quite often during a negotiation, especially in regards to land acquisition, there are pre-determined thoughts and opinions of the people involved in the negotiation. The negotiator should understand the various people or individuals they will be meeting, who they are negotiating with, research the appropriate information, build trust, credibility and rapport, practice patience and understand the process that occurs if negotiations break down.

The negotiator must be able to treat the parties equally and develop a common goal. Actively listening to a person is one of the best things a person can do when building trust during a negotiation. It can help break down the barrier between the company and landowner and determine a solution that will find a mutually acceptable agreement for both parties. The different types of listening skills that can be relied upon include: paraphrasing comments made by a landowner, taking notes and asking questions. Courses and seminars are available to people responsible for negotiations and communication with landowners, many of which revolve around developing active listening skills. Agents are encouraged to participate in these courses, as they will help you evolve as a negotiator.

Organization is another essential skill for negotiators. Develop a plan and sort issues to help achieve a mutually acceptable agreement. One of the common techniques used in problem solving is the funnel technique. This technique can be used to organize how information is presented, gathered and used. It also functions as a tool to move from areas of agreement to areas of disagreement.

## **Alternative Dispute Resolution and Right of Entry**

If an agreement cannot be reached between the landowner and the company, there are a number of available options to both parties. If the issue is a matter of compensation, the National Energy Board does not have the authority to determine compensation. Compensation claims for land use or for damages are handled by the federal Minister of Natural Resources. Knowing the timelines, procedures and past precedents will assist in guiding the agent, company and landowner in selecting the appropriate approach for the issue.

If the issue is a matter of routing across the lands or how the project will adversely affect the owner, the owner may take the matter to the NEB for a detailed route hearing if the project is for a pipeline greater than 40 km (as discussed in the NEB detailed route section). The NEB also provides alternative dispute resolutions services when there are issues with routing or project concerns. The landowner can also raise concerns at the section 52 or 58 hearing.

When a landowner and a pipeline company cannot agree on compensation for lands that the company has acquired or damaged, either party may apply to the Minister of Natural Resources to receive the services of a negotiator, or to have the dispute settled by arbitration. The NEB often refers parties to the Natural Resources Canada Pipeline Arbitration Secretariat to settle matters of compensation. In order to apply for these services, the activities of the pipeline company must be directly related to the acquisition of lands for a pipeline, the construction of a pipeline, or the inspection, maintenance or repair of the pipeline.

Negotiation proceedings are covered in section 88 and section 89 of the NEB Act. The Landowner or company must serve a "Notice of Negotiation" to the other party (subsection 88(1) of the NEB Act). The application must include a clear and concise statement of the relevant facts and details regarding the proposed compensation. The application must be submitted to:

The Minister of Natural Resources Canada  
580 Booth Street  
Ottawa, Ontario K1A 0E4

If the company or landowner seeks the assistance of a negotiator, the Minister of Natural Resources appoints a negotiator to help the parties reach an agreement. The negotiator is unbiased towards either party and does not decide on the amount of compensation. The following are details about the Negotiation services:

- The Minister appoints a negotiator to help the parties reach an agreement.
- The negotiator has 60 days after the start of negotiations to report to the Minister as to the success or failure of the process.
- It is an informal process during which the negotiator does not favour either party and does not decide on the amount of compensation.
- If there is agreement, details are not necessarily included in the negotiator's report to the Minister. However, if they are, they are protected under the *Privacy Act* and would not be released by Natural Resources Canada without the consent of both parties.
- The negotiation process is carried out "without prejudice" to any subsequent arbitration proceeding. Whatever happens during negotiations cannot be used against a party during arbitration. In other words, the willingness to make or accept offers during negotiations cannot bind any party for the purpose of the arbitration proceedings.
- During the negotiation process, neither the negotiator nor the Minister can award costs.
- If a landowner wants to be reimbursed for expenses during negotiation (for example, for legal costs, an appraisal or other expert opinion), he/she should discuss this with the pipeline company before negotiations start.



- By pursuing negotiation, parties are not bound to reach an agreement.
- If the negotiations are unsuccessful, either party may apply to the Minister to have the matter settled by binding arbitration. Either party may also request arbitration at any time during negotiations.

Sections 90-103 of the NEB Act deal with arbitration. If the landowner or company chooses to apply for the services of an arbitrator the application must be submitted to:

The Minister of Natural Resources Canada  
580 Booth Street  
Ottawa, Ontario K1A 0E4

Arbitration is conducted by a committee of at least three members appointed by the Minister of Natural Resources Canada. Once appointed, the committee is independent of the Minister and has its own powers.

Unlike negotiation sessions, arbitration hearings are relatively formal. A transcript is kept. The committee may review evidence and hear from witnesses who can be cross-examined during hearings. The decision of the arbitration committee is binding and is enforceable in a court of law, although parties may ask the committee to review a decision. The Federal Court handles appeals on questions of law or jurisdiction. Personal information contained in arbitration committee decisions is protected under the *Privacy Act*. Natural Resources Canada will not release decisions without the written permission of both parties. The NEB Act (subsections 991(1) and (2)) makes provision for landowners to recover the costs they have incurred as a result of the arbitration.

To serve a notice of arbitration on the Minister, a landowner should refer to subsection 90(1) as well as subsection 75, subsection 84 and subsection 85 of the NEB Act, and to subsection 4(2) of the *Pipeline Arbitration Committee Rules, 1986* that specifically set out the information that must be included.

Further information can be obtained on the Natural Resources Canada website (<http://www.nrcan.gc.ca>) under the "Natural Gas" section, sub-section "Pipeline Arbitration Secretariat". This page also has the link for Frequently Asked Questions – Compensation of Land Acquired or Damaged for Pipelines. Representatives should take the time to review this website as it will provide insight on the negotiation and arbitration assistance.

If attempts at negotiation fail and the parties are still at a standstill, the company may apply for a right of entry order. A right of entry order is the last resort and only used in circumstances where



there is no opportunity to reach an agreement. The final decision is no longer in the landowner or company's control. A right of entry order may only be applied for after a project's route is approved.

The company seeking a right of entry order would apply to the National Energy Board and if approved, the order would give the company immediate access to the lands applied for. The right of entry order would then be registered on title and the company can proceed with the proposed work.

In order to apply for a right of entry order, the company must provide written notice to the landowner if it plans to apply to the NEB for the right of entry. The company must prove to the NEB that it served the landowner a notice for the right of entry no less than 30 days and no more than 60 days from the date that it will apply to the NEB. This notice must tell the landowner:

- the date when the company plans to apply to the NEB;
- the date when the company wishes to enter the lands;
- the NEB's address; and
- the right to an advance compensation payment if the order is issued.

It is important to understand that where matters are taken to binding arbitration or to a Right-of-Entry application, the parties (company and landowner) have lost control of the outcome. The final decision will be made by others and the outcome may not be what the landowner, company or both may appreciate.

## Conclusion

The representatives participating in these modules should have a basic understanding of who the National Energy Board is, what they regulate, their filing process and what to expect at a hearing. Representatives will also have a basic understanding in property law, legal aspects of a right of way, land acquisition process and the alternatives to a negotiated agreement in an NEB regulated project.