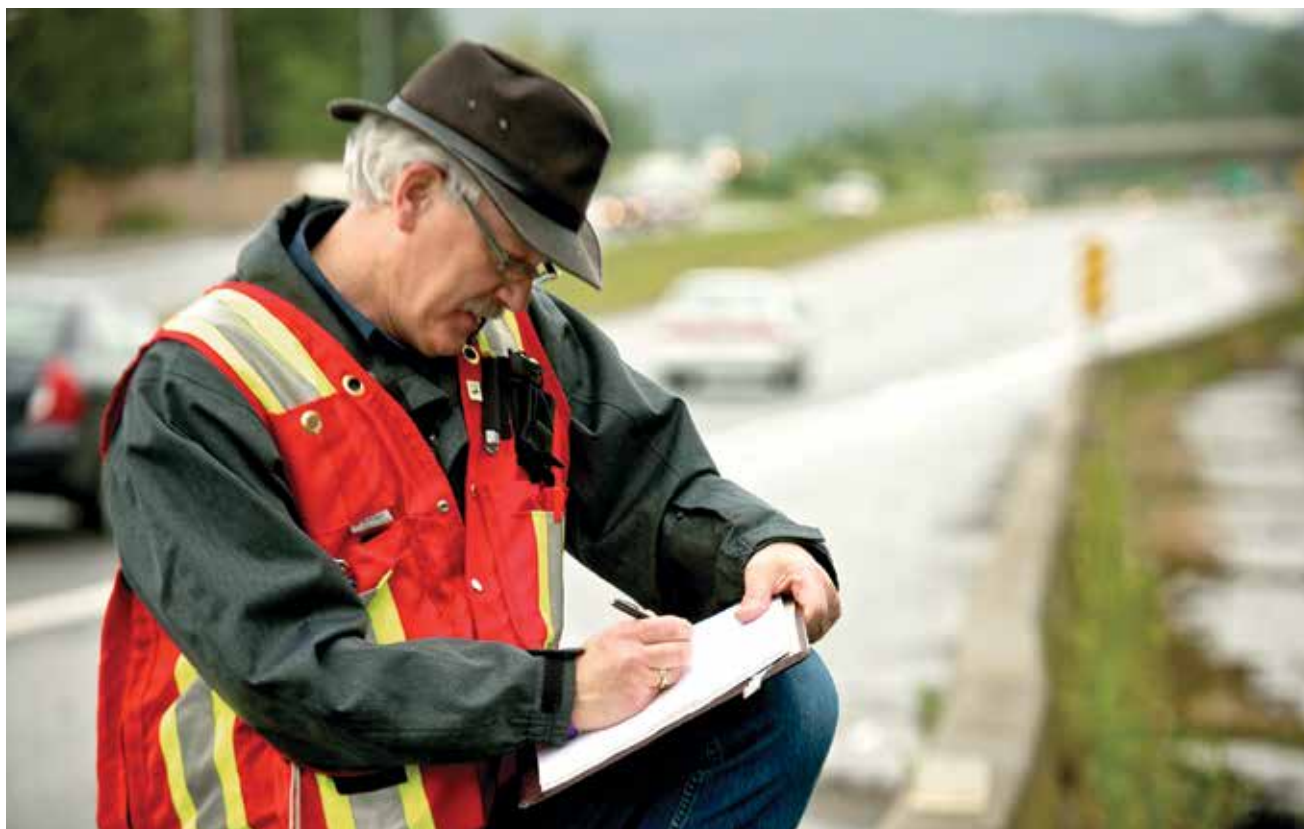


# CUSPAP, the Ontario Expropriations Act and Jurisdictional Exception

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All appraisals completed in Canada by members of the Appraisal Institute of Canada (AIC) must comply with the AIC’s standards presented in the *Canadian Uniform Standards of Professional Appraisal Practice (CUSPAP)*. All members of the AIC must receive regular instruction on *CUSPAP* compliance as a prerequisite for maintaining accreditation and membership status. The entirety of *CUSPAP* is subject to compliance, which includes, but is not subject to, *CUSPAP*’s caveat of Jurisdictional Exception. This article endeavours to

explore Jurisdictional Exception and how it relates to the appraisal of property being expropriated in accordance with the *Ontario Expropriations Act (OEA)* by an AIC member. The impact of Jurisdictional Exception upon an appraisal in the case of lands being expropriated in compliance with the *OEA* is significant and affects a number of aspects of the appraisal.

## CUSPAP and Jurisdictional Exception

*CUSPAP* exists with the intent to “promote and maintain a high level of public trust in professional appraisal practice by establishing requirements for

appraisal, review, consulting and reserve fund planning assignments.”<sup>1</sup> One of the primary ways this is accomplished is by the prerequisite that every appraisal completed by a member of the AIC must comply with all relevant legislation and public policy governing the property being appraised and the purpose of the assignment. At times, however, the relevant Definitions, Rules and Comments of *CUSPAP* applicable to the appraisal can be in contradiction to such legislation. When this occurs, *CUSPAP*’s rule of Jurisdictional Exception comes into play, placing the relevant legislation in priority over the *CUSPAP* Definitions, Rules and Comments.

Note Section 3.6 of *CUSPAP 2014*:

### 3.6 Jurisdictional Exception

3.6.1 An assignment condition that voids the force of a part or parts of the *Canadian Uniform Standards of Professional Appraisal Practice (CUSPAP)*, when compliance would be contrary to law or public policy applicable to the assignment.

3.6.2 Jurisdiction relates to the legal authority to legislate, apply or interpret law at either the federal, provincial or local levels of government. It is misleading not to identify the part or parts of *CUSPAP* disregarded and the legal authority justifying this action.

3.6.3 In every case, it is ultimately the responsibility of the appraiser, not the client or other intended users, to determine whether the use of Jurisdictional Exception is appropriate. It is unethical for a member to complete an assignment that a reasonable appraiser could not support.

In every instance where Jurisdictional Exception is invoked in an appraisal report, an extraordinary assumption and associated extraordinary limiting condition must be applied.

#### 7.11 Assumptions and Limiting Conditions

7.11.2: Extraordinary Assumption refers to a hypothesis – either supposed or not confirmed, which, if not true, could alter the appraiser’s opinions and conclusions. Full disclosure of any Extraordinary Assumption must accompany statements of each opinion/conclusion so affected (see also Hypothetical Conditions).

7.11.3: Extraordinary Limiting Condition refers to a necessary modification or exclusion of a Standard Rule. The burden is on the appraiser to explain and justify such necessity in the report, and to conclude before accepting an assignment and invoking an Extraordinary Limiting Condition that the scope of work applied will result in opinions/conclusions that are credible.

#### 7.12: Hypothetical Conditions

7.12.1: May be used when they are required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison. ...

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7.12.2: For every Hypothetical Condition, an Extraordinary Assumption is required in the report.

7.12.4: Appraisals for expropriation can incur hypothetical conditions, and may require the appraiser to invoke the Jurisdictional Exception protocol.

7.12.5: The hypothetical condition must be clearly disclosed in the report, with a description of the hypothesis, the rationale for its use and its effect on the result of the assignment.

7.12.6: An analysis based on a hypothetical condition must not result in an appraisal report that is misleading.

Various legislated acts exist under which land can be expropriated in Ontario. In particular, this article discusses the impact that Jurisdictional Exception can have upon the various components of an appraisal report that has been created to comply with *CUSPAP* and the *OEA*.

#### *CUSPAP* and the *OEA* Ignoring the Scheme

The term “the Scheme” in this article refers to the anticipated improvements that necessitate the expropriation of the required lands. Sections 14(4) and 14(5) in the *OEA* refer to the Scheme as “the development.”

*CUSPAP* states that, in the appraisal,

the appraiser must “identify the scope of work necessary to complete the assignment.”<sup>2</sup> This includes “research into physical and economic factors that could affect the property.”<sup>3</sup> Furthermore, *CUSPAP* states that the appraiser must “analyze the effect on value of anticipated public or private improvements.”<sup>4</sup> However, when an appraisal is completed for expropriation purposes under the *OEA*, Section 14.4 of the *OEA* takes precedence, as noted below:

In determining the market value of land, no account shall be taken of,

- (a) the special use to which the expropriating authority will put the land;
- (b) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation; or
- (c) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health. R.S.O. 1990, c. E.26, s. 14(4).

Thus, in the case of an appraisal written in compliance with the *OEA*, the Scheme must be ‘screened out’ of the valuation process. As a result, one component of the physical and economic factors that could affect the property – namely, an anticipated public improvement – is not taken into consideration in the valuation.

#### Betterment

Betterment is defined in *The Dictionary of Real Estate Appraisal* as “substantial improvements to real property representing capital expenditures that constitute more than mere repairs.”<sup>5</sup> In the case of lands being expropriated in Ontario, betterment is generally referred to as a substantial improvement to the market value of

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the remaining lands after the taking of the required lands of a subject property, due to the construction and use of the Scheme. In a typical appraisal, betterment resulting from the Scheme must be taken into consideration in the valuation of the remaining lands in order for the appraisal to comply with *CUSPAP*, specifically, with Appraisal Standard Rules 6.2.4 and 6.2.20 and Appraisal Standard Comment 75.1 ii that refer to scope of work and analyzing the effect on value of anticipated public or private improvements (see subsection ‘Ignoring the Scheme’ in this article). However, when an appraisal is completed for expropriation purposes under the *OEA*, Section 23 of this legislation takes precedence, as noted below:

23. The value of any advantage to the land or remaining land of an owner derived from any work for which land was expropriated or by which land was injuriously affected shall be set off only against the amount of the damages for injurious affection to the owner’s land or remaining lands. R.S.O. 1990, c. E.26, s. 23.

Simply put, even though betterment to the remaining lands arising from the completion of the Scheme may be substantial, its value may only be taken into account to the extent that it offsets the damages for injurious affection upon the remaining lands which arise from the taking of the required lands.

## Equivalent reinstatement

When lands are expropriated, the owner of the required lands may be entitled to what is termed ‘equivalent reinstatement’ in the *OEA*, as noted below:

(2) Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner genuinely intends to relocate in similar premises, the market value shall be deemed to be the reasonable cost of equivalent reinstatement, R.S.O. 1990, c. E.26, s. 14 (2).

Compliance with the *OEA* can cause a change in an appraisal completed for the purpose of estimating equivalent reinstatement. Estimating the market value of a property will require the application of the relevant valuation methodologies subject to compliance with *CUSPAP* Appraisal Standard Rule 6.2.16 (i.e., the cost approach and/or the direct comparison approach and/or the income approach). As stated in *CUSPAP*, in the appraisal report, the appraiser must:

6.2.16 describe and apply the appraisal procedures relevant to the assignment and support the reason for the exclusion of any of the usual valuation procedures.

In the case of a single-family residence with improvements that were specifically designed for the owner and are not typical in the marketplace, the market value of the property, in certain circumstances, may be estimated by calculating the reproduction cost new for a residence of similar utility, rather than by applying the direct comparison approach, the most commonly used methodology when valuing residential properties.

Equivalent reinstatement can be measured in numerous ways, depending upon the situation, with the “reasonable cost

of equivalent reinstatement” definition being the measure of value. However, appraisal methodology of property in compliance with the *OEA*’s equivalent reinstatement clause can differ quite substantially from typical appraisal methodology, and may attribute more (or less) value to certain characteristics of the subject property than would usually be attributable in a purely market-derived measure of market value. The resulting difference between the estimated market value according to the *OEA*’s equivalent reinstatement clause and that of market value as typically defined in *CUSPAP* can be substantial.

## Conclusion

Reconciliation of *CUSPAP* with the *OEA* occurs by way of invoking extraordinary assumptions and extraordinary limiting conditions in the appraisal report. Compliance to both *CUSPAP* and *OEA* requires the practitioner to be intimately knowledgeable of the legislative requirements and how they may affect the valuation process.

## End notes

- 1 Appraisal Institute of Canada, *Canadian Uniform Standards of Professional Appraisal Practice* (2014), 3.1.1.
- 2 Appraisal Institute of Canada, *Canadian Uniform Standards of Professional Appraisal Practice* (2014), 6.2.4.
- 3 *Ibid.*, 75.1.ii.
- 4 *Ibid.*, 6.2.20.
- 5 Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 4th ed. (2002), p. 29. 