

Special to *Ontario Farmer*

Clients need help with complex wind turbine lease documents

In answer to Ontario citizens' concerns about rising electricity bills and the fact that Ontario now has a surplus of power, the provincial government suspended its process to accept new bids for wind and solar power in 2017.

While the process is on "hold," wind power developers are still holding open houses and prospecting for willing landowners to sign Options to Lease land for wind turbines and associated equipment, in hope the contract process will resume after the provincial election in 2018.

Landowners should know that these are very complex documents and they need legal advice before signing. Some option/lease agreements contain a box to be checked that means the landowner has read the agreement and waives legal advice. That may not be the smart move. The Ontario Federation of Agriculture, for example, advises members to seek legal advice before signing.

Why? There are many implications to signing an Option to Lease (which converts to a Lease if the company gets a power contract) including rights to use of the property, first right of refusal at time of sale or if the owner wishes to sever property, even the ability to speak out if there are side effects of having turbines on the land.

The fact is, current forms of options/leases are very one-sided in favour of the wind power developer and should be reviewed literally word for word by an independent lawyer. It's easy to focus on the dollar amount offered by the developer, and ignore other, important aspects of the agreement. For example, some leases contain cancellation options for the power developer, but most do not provide any option for the landowners to terminate the agreement if they change their minds.

Wind power developers always create a separate corporation to own and operate each project. Its assets include, in Ontario, the Renewable Energy Approval, the contract with the government to supply power, the options/leases for the land for turbines and equipment, and any agreements such as for road use with municipalities.

These corporations are usually mortgaged to the hilt. All assets can be sold to another company without consent of the landowners; the buyer could be a dummy company without assets, which is unwilling or unable to perform any obligation of the original company, including, the decommissioning or dismantling of the huge towers.

There are key financial considerations to consider above the lease amount: having a lease on the property may affect the owner's ability to use the land as collateral for financing; construction liens may also be filed against the project and will appear on the landowner's title.

The lease may allow the power developer full access to the property. Without notice, workers or contractors may enter and use the leased property in order to conduct studies to meet government requirements, and of course, to build and operate the turbines.

Equipment needed for the project can generally be located anywhere on the property at the discretion of the power developer. Normal farm practices, such as manure or pesticide application, may also be

affected with the power developer dictating when these may occur. Recently, one wind power developer asked that Ontario landowners close their land to hunting.

The ability of the lessor to sell the property may be affected: the lease must be declared to a potential purchaser. Any new owner is obliged to sign the agreement too, accepting all terms of the lease.

The lawyer needs to review confidentiality requirements in the lease: some prohibit the leaseholder from discussing any adverse effects of having the turbines such as the presence of noise and vibration and effect on water wells.

Liability must be assessed: many unwilling neighbours of properties with turbines are threatening to sue for property value loss, and loss of quiet enjoyment of their own properties following construction of the power generation machines and transformers.

Landowners might be to see this clause in one lease currently being proffered in Ontario, ironically clause number 22, which might well be nicknamed "Catch 22" for its meaning.

22. Further Assurances - The Lessor and Lessee hereby agree that they will each do and perform all such acts and things and execute all such documents and give all such assurances as may be necessary to give effect to this Agreement.

Upon signing the original document in this instance, about 20 pages in length, the lessor is required not only to sign straightforward documents like building permit and bank mortgage applications, but to sign another document of about 200 pages, with more restrictive requirements for the lessor.

Look ahead to conclusion of the project, too: who is responsible for decommissioning? Taking the turbines down and removing all equipment can cost hundreds of thousands of dollars. In some cases, letters of credit have been offered to the leaseholder but the amounts involved (e.g., \$100,000) are likely insufficient to cover the actual costs. Some landowners have been told they are welcome to the materials to sell when the agreement is finished, but the fact is, the materials are often not recyclable, and the petrochemicals and other substances such as rare earths require special (and costly) disposition.

It is easy to be swept up in thoughts of income and claims that wind power is good for the environment and brings prosperity to communities, but it is important for landowners to understand that they are in fact inviting a power plant onto their properties, and that there may be significant impacts for 20, 40, even 60 years afterward.

Garth Manning QC, retired, practiced law for almost 50 years; he resides in Prince Edward County. Jane Wilson is volunteer president of Wind Concerns Ontario, a coalition of community groups and families.