Ecological Gifts Program

Appraisal Review Panel:
A model for the U.S.?
Outline

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- Overview of the Appraisal Review Panel
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Development of the Ecological Gifts Program

- The Government of Canada established the Ecological Gifts Program (EGP) in 1995
- Purpose - Encourage the conservation of habitat and biodiversity in Canada
- Goal - Promote the donation of privately held lands and conservation easements
- The donations (or gifts) can be made to municipalities, provincial, territorial or federal governments or approved registered charities involved in the conservation and preservation of Canada’s environmental heritage.
- Donors are eligible for a number of tax benefits
Development of the Ecological Gifts Program - continued

The certification of Ecological Gifts is a three-step process:

- The federal Minister of Environment, or a designate (the Certification Authority), must certify that the land comprising the gift is ecologically sensitive and must be of the view that the conservation and protection of land is important to the preservation of Canada’s environmental heritage.
- If the recipient is a registered charity, the Minister or the Certification Authority must approve the recipient to receive the gift.
- The Minister must issue a *Statement of Fair Market Value of an Ecological Gift* certifying that the fair market value of the land comprising the ecological gift.

It is at this last step where appraisers get involved in the process.
Development of the Ecological Gifts Program - continued

- Criteria for ecological sensitivity:
  - Areas identified, designated or protected under a recognized classification system;
  - Natural spaces that are significant to the environment in which they are located;
  - Sites that have significant current ecological value or potential for enhanced ecological value as a result of their proximity to other significant properties;
  - Private lands that are zoned by municipal or regional authorities for the purposes of conservation;
  - Natural buffers around environmentally sensitive areas such as water bodies, streams or wetlands, and
  - Areas or sites that contribute to the maintenance of biodiversity of Canada’s environmental heritage.
Benefits of the Ecological Gifts Program

- Environment & Climate Change Canada (EC) promotes and coordinates the donation of privately held land and conservation easements in Canada through the Ecological Gifts Program (EGP).
  - Maintains a website that supplies information about the EGP to both recipients and potential donors.
  - Provides advice to recipients, both large and small.
  - Delivers appraisal workshops to appraisers across Canada. These workshops provide an overview of the EGP and advice related to the specific requirements for appraisals being submitted to the EGP.
Benefits of the Ecological Gifts Program - continued

- Donors are eligible for a number of tax benefits
  - Tax credit is based on the entire value of the gift
  - Fully exempt from capital gains
  - Ten-year ‘carry forward’ provision
  - Allows for ‘split-receipting’
Benefits of the Ecological Gifts Program - continued

- Minister has the power to issue a *Statement of Fair Market Value*
  - Basis of the receipt issued by the recipient
  - Donor knows amount of tax credit or deduction *before* the gift is made
  - Reduced or eliminated challenges from CRA regarding the value of a gift
Benefits of the Ecological Gifts Program - continued

- Provides protection for donated land in perpetuity.
  - Recipients must seek written authorization from the Minister of Environment for all changes in use and dispositions.
  - In accordance with the *Income Tax Act*, recipients who do not do so would be subject to a tax equal to 50% of the fair market value of the land at the time of the unauthorized change of use or disposition.
Appraisal Review Panel (ARP)

- Following a recommendation from an expert panel in 2000, the Appraisal Review Panel (ARP) was established to review appraisals submitted in support of donor’s estimates of the fair market value of ecological gifts and to make recommendations to the Minister about the fair market value.
Appraisal Review Panel (ARP)

- The ARP carries out an administrative review of each appraisal report to determine:
  - whether it is in accordance with the *Guidelines for Appraisals* and
  - the basis for a recommendation to the Minister regarding the fair market value of the land or the easement, covenant or servitude

- In its review, the ARP considers whether the analysis, opinions and conclusions in the appraisal report under review are appropriate and reasonable and support the fair market value set out in the appraisal report.
Appraisal Review Panel (ARP)

- Independent contractors - not EC employees
- Master contract for ARP Manager/Chair
- ARP Manager/Chair reports to the EGP National Secretariat
- APR members are subcontractors under the master contract
- ARP members report to the ARP Manager/Chair
Appraisal Review Panel (ARP)

- Request for Proposals (RFP) issued through a GOC website
- Four year contract
  - Three operational years
  - One transitional year
- Current contract extends to FP 2020-21
The proponent must demonstrate that they meet a number of mandatory criteria, including:

- at least three (3) years in project management and administration
- at least fifteen (15) years of experience as a senior appraiser in a fee appraisal organization
  - prepared valuations of rural real estate that have included conservation lands
  - performed peer-reviews of appraisal reports valuing rural real estate that have included conservation lands
The ARP is comprised of five (5) members who represent the five regions of Environment Canada, namely: Atlantic, Quebec, Ontario, Prairie/Northern and Pacific/Yukon.

Due to workload, conflicts of interest, etc., there are also 6 Ad-hoc reviewers from the various regions (2 from Ontario) who conduct reviews as required.
All of the members of the ARP are members of the Appraisal Institute of Canada (AIC) or l’Ordre des évaluateurs agréés du Québec (OEAQ) with demonstrated knowledge in the appraisal of environmentally significant land and the review of appraisal reports.

The ARP can engage other experts such as a forester, an agrologist, a planner or another appraiser to provide advice or information as required. The ARP also can consult with a legal policy specialist as required.
Summary of gifts across Canada

- Between 1995, when the Ecological Gifts Program began, and May of 2017 there were a total of 1,302 gifts in the form of either the fee simple interest in land, or a partial interest in land, such as a conservation easement, covenant or servitude.

- There have been gifts made in every province in Canada. However, the greatest number of gifts (±40%) have been from Ontario.

- Approximately 64% of gifts were of the fee simple interest in land, while the remaining ±36% consisted of a conservation easement, covenant or servitude.

- As of the date of their donation, the total fair market value of all of the gifts was estimated to be in the order of $824,000,000.
Summary of ARP recommendations

- Since the 2008-2009 fiscal year, the ARP has made a total of 690 recommendations to the Minister of Environment as to the fair market value of ecological gifts. This is an average of 77 recommendations per year.

- In the same time period, the total fair market value of ecological gifts that were recommended by the ARP was estimated at about $444 Million.

- The total area of ecological gifts that were recommended by the ARP during this time period was estimated at almost 73,000 hectares (180,000 ac.).

- Approximately 6 applications to make a proposed ecological gift are either abandoned or withdrawn during each fiscal period. This accounts for about 7% of the total applications received per fiscal year.

- Following is a map that depicts the location of the gifts across Canada and some photos of portions of actual gifts:
The Ecological Gifts Program 1995 – August 2016

Location and Area of Completed Ecological Gifts (hectares)
- 0 – 200
- 201 – 500
- 501 – 1,000
- 1,001 – 5,000
- 5,001 – 56,000

National Numbers
Total Number of Completed Ecological Gifts: 1,243
Total Area of Completed Ecological Gifts: 175,668 ha
Role of an appraiser in the ‘gift’ process

- According to a publication entitled “The Ecological Gifts Program - Engaging an Appraiser to Appraise an Ecological Gift”, which is available on the Environment Canada website, donors wishing to make an ecological gift are advised that they, “must provide an appraisal as evidence of the value of the gift as part of the donor’s application to the Ecological Gifts Program.”

- The publication goes on to state that, “A donor wishing to make an ecological gift will need to engage the services of a real estate appraiser to complete an appraisal of the property that meets the requirements of the Ecological Gifts Program. Recipient organizations are often involved in this process as well and, in some cases, engage an appraiser on behalf of the donor.”

- Letter of engagement - Donors/recipient are provided samples of a letter of engagement for the appraisal of both fee simple and partial interest gifts and encouraged to use them. If the recipient does not use one when engaging the services of an appraiser, the appraiser is advised to use the sample letters as the basis for their ‘contract for services’.
Role of an appraiser in the ‘gift’ process - continued

According to “The Ecological Gifts Program - Engaging an Appraiser to Appraise an Ecological Gift”, when deciding to engage a particular appraiser, donors and/or recipients should carefully consider the following:

1. Whether the professional qualifications of the appraiser meet the requirements of the Ecological Gifts Program;
2. The availability of the appraiser to complete the assignment within the time frame required by the donor;
3. The appraiser’s experience and knowledge about the local real estate market and, in particular, experience in valuing similar types of property;
4. Any experience of the appraiser relevant to the Ecological Gifts Program, including whether the appraiser has completed other appraisal reports that have been submitted to the Ecological Gifts Program.
Issues with Appraisals

Not understanding the purpose of the appraisal

- What is the purpose of the appraisal?
  - To meet Income Tax Act requirements, the purpose of the appraisal must be to estimate the ‘fair market value’ of the proposed gift. Although the term ‘fair market value’ is not defined in the Income Tax Act, a policy statement issued by the Canada Revenue Agency (Charities - Summary Policy CSP-FO2) defines ‘fair market value’ as follows:

  _Fair market value generally means the highest price, expressed in dollars, that a property would bring in an open and unrestricted market, between a willing buyer and a willing seller who are both knowledgeable, informed, and prudent, and who are acting independently of each other._

- As most appraisers in Canada would recognize, this definition is highly similar to the definition of ‘market value’ that can be found in the Practice Notes section of the Canadian Uniform Standards of Professional Appraisal Practice.
Issues with Appraisals - continued

- Fair Market Value
  - *highest price* - highest and best use
  - *expressed in dollars* - cash, or in terms equivalent to cash
  - *open and unrestricted market* - not value to the buyer, or value to the seller; value in the open market
  - *willing buyer and willing seller who are both knowledgeable, informed, and prudent, and who are acting independently of each other* - no duress or compulsion
Issues with Appraisals - continued

- Not understanding the intended use of the appraisal
  - In order to understand the intended use of the appraisal, the appraiser is advised to interview the recipient or the donor (whoever is the client) to ascertain their intended use of the report. Unless instructed otherwise, the intended use of the appraisal is generally for submission to the *Ecological Gifts Program* for the issuance of a tax receipt under the *Income Tax Act*.
  - In keeping with this intended use, the appraiser should be aware that the appraisal will be made available to Environment Canada for review by the Appraisal Review Panel. As such, the Certification must contain the following statements:
    - I acknowledge that Environment Canada can rely on the opinion, (regardless of who commissioned the report), and that the purpose of the report is to establish the fair market value of the donation for the issuance of a tax receipt under the *Income Tax Act*.
    - I acknowledge that Environment Canada can make additional copies of this report for review purposes.
The use of unsupported assumptions - In accordance with the *Guidelines for Appraisals*, the use of unsupported assumptions is not permitted in the preparation of appraisals for the Ecological Gifts Program, including unsupported assumptions that have an impact on highest and best use. For example, a waterfront property can be valued to reflect a marina development, if that is its proven highest and best use - not its assumed use for what has been termed as ‘practical valuation’.

- Provide support for your conclusion to the reader/reviewer of the report.
- The test employed is that of ‘reasonable and probable’ - has the author of the report acted in the manner of a ‘reasonable appraiser’?
- On occasion, an appraiser will base their appraisal on the assumption that zoning can be changed to accommodate a certain highest and best use - again, for the purpose of ‘practical valuation’. Is such a change in zoning ‘reasonable and probable’? What proof is offered, e.g. letters from planning officials, pattern of similar land use changes in the area, etc.
Issues with Appraisals - continued

- **Is it really a ‘gift’?** - Make sure you understand the interest in the property you are appraising. Is the interest (either fee or partial) unfettered by side agreements with the recipient or a related party. For example, if the recipient is a municipality, will the donor receive any consideration or benefit from the recipient (other than a tax receipt) for their gift? Is the donor giving away (or placing an easement on) a parcel of ecologically sensitive land in exchange for the right to develop another portion of their property in a more intense manner?

- **‘Before and after’ method** - If the purpose of the appraisal is to estimate the current fair market value of a partial interest (easement, covenant or servitude) in land, make sure you employ the ‘before and after’ method. This method, which is a requirement of the *Income Tax Act*, results in an estimate of fair market value that is the difference between the two conclusions and accounts for any betterment accruing to the remaining interest.
Issues with Appraisals - continued

- If you are estimating the fair market value of a partial interest in land, make sure you thoroughly read and understand the burdens and benefits of the proposed conservation easement, covenant or servitude - ask questions.

- A number of recipients have developed a template for their ‘standard’ conservation easement and will ask you to use this as the basis of your appraisal. This is an accepted practice, but be aware that there are often changes to the final conservation easement and you will be expected to review the changes and provide an opinion of their impact on value.

- Although the market for the purchase and sale of properties subject to conservation easements is relatively immature in Canada, there is a growing body of transactional evidence in Alberta and, to a lesser degree, in Ontario. If you discover such ‘first-tier’ transactional evidence, make sure you determine the details of the deal. For example, were the terms of the conservation easement similar to the proposed conservation easement that is the subject of the appraisal?
Issues with Appraisals - continued

In summary, here are some recommended steps to mitigate the risks of an appraisal assignment for the Ecological Gifts Program:

- Make sure any letter of engagement clearly defines what is required/expected by both parties. Ask for any information that may be pertinent to the assignment.
- Follow the Environment Canada publication *Guidelines for Appraisals*
  - No unsupported assumptions
  - Limited use of hypothetical conditions, e.g. proposed conservation easement
  - Provide support for your conclusions in a straightforward and logical manner
Issues with Appraisals - continued

- Comply with the *Canadian Uniform Standards of Professional Practice* or *Les normes de pratique*.
  - Remember to take ‘reasonable’ steps to ensure that the information and analyses provided is sufficient for the intended user of the report to adequately understand the rational for the opinion and conclusions.
  - Quoting from CUSPAP (ASC 7.18), “Reasoning requires the logical review, analyses and interpretation of the data in a manner that would support the conclusion, not mislead the reader and be consistent with the “Reasonable Appraiser” standard.”
ARP Recommendation

- Following a review of the appraisal, the ARP makes a recommendation to the Minister as to the fair market value of the ecological gift.

- After considering the recommendation, the Minister will determine the fair market value of the ecological gift and send the donor a *Notice of Determination of Fair Market Value of an Ecological Gift*.

- Upon receiving the notice, the donor will advise EC whether they will accept the fair market value, withdraw their application, or request a redetermination of fair market value within 90 days.

- If the donor accepts the determination of fair market value the Minister will issue a *Statement of Fair Market Value* once the gift is transferred.
ARP Recommendation (continued)

- If the donor requests a redetermination of fair market value, a redetermination committee of the ARP will consider evidence such as:
  - additional written submissions by the appraiser in support of the estimate of value in the appraisal report;
  - additional relevant valuation or market information;
  - written submissions responding to the reasons provided for the determination of value provided with the Notice of Determination of Fair Market Value of an Ecological Gift.

- After considering the recommendation of the redetermination committee, the Minister will confirm or redetermine the fair market value of the ecological gift and send the donor a Notice of Redetermination of Fair Market Value of an Ecological Gift.
Upon receiving the notice, the donor will advise EC whether they will withdraw their application or accept the fair market value as set out in the *Notice of Redetermination*. If the donor accepts the redetermination of fair market value the Minister will issue a *Statement of Fair Market Value* once the gift is transferred.

Providing the donor has gone through the redetermination process and the gift has been transferred, the donor has the right to appeal the fair market value of the ecological gift determined by the Minister to the Tax Court of Canada. The Court may confirm or vary the amount confirmed or redetermined by the Minister to be the fair market value of the gift.
QUESTIONS???
Thank you
ENVIROMENT CANADA WEBSITE

- Environment Canada: http://www.ec.gc.ca/
- Ecological Gifts Program: http://ec.gc.ca/pde-egp

In the middle of the page there is a link to ‘publications’, click and you will be given the option of ‘National’ or ‘Regional’; if you select ‘National’ you will see a list of a number of the documents we discussed today including:
  - Engaging an Appraiser to Appraise an Ecological Gift
  - Guidelines for Appraisals