

# **Ecological Gifts Program**

## **Overview of Appraisal Review and Determination Process**

### **Ecological Gifts under the *Income Tax Act***

The Government of Canada established the Ecological Gifts Program in 1995 to encourage the conservation of habitat and biodiversity in Canada. The Program is administered by Environment Canada and promotes the donation of privately held land that is certified as ecologically sensitive and conservation easements, covenants or servitudes on certified ecologically sensitive land.<sup>1</sup> These donations can be made to municipalities, federal or provincial Crown agencies or approved nature conservation charities.

Since the beginning of the Ecological Gifts Program, there have been a number of important changes to provisions of the federal income tax legislation that have resulted in special tax incentives to encourage Canadians to participate in protecting ecologically sensitive habitat and biodiversity. Specifically, the 1995 changes provided that donations of ecologically sensitive land are exempt from the net income limits applicable to other types of donations. The 1998 changes established a method for valuing easements, covenants and servitudes for tax purposes. Changes made during 2000 reduced the income inclusion rate on capital gains arising from donations of ecologically sensitive land, easements, covenants and servitudes to half of the normal rate. Changes in 2006 exempt donations of ecological gifts from capital gains tax. Effective May 2, 2006, no portion of any capital gain deemed to arise on making an ecological gift is taxable.

### **Income Tax Act provisions**

The tax benefits associated with the Ecological Gifts Program are established under the federal *Income Tax Act*.

### ***Certification of ecological gifts***

A process has been established under the *Income Tax Act* for the certification of ecological gifts:

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<sup>1</sup> Unless the context requires otherwise, in this material the word “land” will include conservation easements, covenants and servitudes.

1. **Certification of land as ecologically sensitive:** To qualify as an ecological gift, land must be certified by the Minister of the Environment or a designate (the Certification Authority) to be ecologically sensitive land, the conservation and protection of which is, in the opinion of the Minister, or the Certification Authority, important to the preservation of Canada's environmental heritage.<sup>2</sup>
2. **Qualification of recipient:** The Minister Certification Authority must certify that the recipient of the gift has been approved to receive the gift. A number of parties are qualified to receive ecological gifts. They are
  - the Crown in right of Canada,
  - the Crown in right of a province or territory,
  - a municipality in Canada,
  - municipal or public bodies performing a function of government in Canada, and
  - a registered charity, one of the main purposes of which is, in the opinion of the Minister, the conservation and protection of Canada's environmental heritage, and that is approved by that Minister, or the Minister's designate.<sup>3</sup>
3. **Determination of fair market value:** The Minister must determine the fair market value of the land comprising the gift. This step is discussed in detail below.

### ***Tax incentives and reduction in taxable capital gains***

To encourage the conservation of habitat and biodiversity in Canada, the Government of Canada provides tax incentives to those who donate ecologically sensitive land or an interest in ecologically sensitive land to qualified recipients.

To qualify as an ecological gift, a donation of ecologically sensitive land must be a voluntary transfer of property for which the donor expects and receives nothing of value in return, subject to the recently introduced rules relating to split-receiving.

Prior to 2006, ecological gifts by individual donors were eligible for a non-refundable tax credit of 16% of the first \$200 of the fair market value of the gift and 29% of the balance. For the year 2006, tax credits for individuals are calculated as 15.25% of the first \$200 of the eligible amount of the gift and 29% of the balance. The tax credit for 2007 will be calculated as 15.5% of the first \$200 of the eligible amount of the gift and 29% of the balance. Corporations may deduct from income an amount up to the fair market value of the ecological gift. For gifts generally, the amount of a taxpayer's net income against

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<sup>2</sup> *Income Tax Act*, ss. 110.1(1)(d) and 118.1(1), definition of "total ecological gifts".

<sup>3</sup> *Income Tax Act*, ss. 110.1(1)(d) and 118.1(1), definition of "total ecological gifts".

which a tax credit or deduction may be claimed is 75%. In the case of ecological gifts, there is no income limitation placed on determining the amount of the tax credit or deduction.

The tax credit or deduction may be claimed in the year of the donation and any amount not claimed in that year carried forward for up to five subsequent years provided the recipient is qualified to receive the donation at the time it is made.

A donor may realize a capital gain as a result of making an ecological gift. For gifts made prior to May 2, 2006, only half of the amount of a capital gain otherwise required to be included in income must be included in the case of ecological gifts. For ecological gifts made on or after October 18, 2000 and before May 2, 2006, 25% of any capital gain arising as a result of an ecological gift must be included in the donor's income for the year in which the gift was made. For ecological gifts made on or after May 2, 2006, no portion of any capital gain arising as a result of the gift is taxable.

## **Valuation**

Initially, the *Income Tax Act* was silent on the subject of determining the fair market value of ecological gifts. In 1998, the *Income Tax Act* was amended to provide that “the value of an ecological gift of a servitude, covenant or easement to which land is subject is deemed to be the greater of its fair market value otherwise determined and the amount by which the fair market value of the land is reduced as a result of making the gift.”<sup>4</sup>

Since the February 2000 Federal Budget, donors of ecological gifts are required to file with the return of income for the taxation year in which the gift was made

- an official receipt for the gift;
- a *Statement of Fair Market Value of an Ecological Gift* in which the Minister of the Environment<sup>5</sup> certifies the fair market value of the gift; and
- a certificate from the Minister of the Environment or a Certification Authority certifying that the land is ecologically sensitive.<sup>6</sup>

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<sup>4</sup> *Income Tax Act*, s. 118.1(12).

<sup>5</sup> The Minister of the Environment may delegate this responsibility to another official within Environment Canada.

<sup>6</sup> Finance Canada, *Notice of Ways and Means Motion to Amend the Income Tax Act*, February 2000 and *Income Tax Act*, s. 118.1(2).

## ***Disposition or change of use without approval***

A tax may be imposed by the Canada Revenue Agency if a municipality or charity that receives an ecological gift disposes of it or changes its use without the approval of the Minister of the Environment or the Minister's designate.<sup>7</sup> The amount of the tax is 50% of the fair market value of the property at the time of the unauthorized disposition or change in use.

This is a significant deterrent and provides additional security that land certified as an ecological gift will be protected as intended by the donor.

## **Key Steps in Determining Fair Market Value**

The tax benefits associated with ecological gifts are based on the fair market value of the land or the easement, covenant or servitude donated. To take advantage of the tax benefits, the donor must submit an *Application for Appraisal Review and Determination*. The following procedures apply once the donor submits the Application.

For detailed information about the Appraisal Review and Determination Process and about requirements for appraisals of the fair market value of ecological gifts, see the Ecological Gifts Program web site at <http://www.cws-scf.ec.gc.ca/ecogifts/>.

## ***Determination of Fair Market Value – Procedures***

1. The Appraisal Review and Determination Process normally begins after the certification of the ecological character of the gift and the approval of the recipient, if necessary, are complete, even if the applications are made at the same time.
2. The donor must have the fair market value of the land, easement, covenant or servitude appraised according to the *Guidelines for Appraisals* (available on the Ecological Gifts Program web site) and submit the appraisal report with the *Application for Appraisal Review and Determination*.
3. The donor should submit the *Application for Appraisal Review and Determination*, together with three originally signed copies of the appraisal report or reports stating the fair market value and all supporting documentation, to the appropriate regional office of Environment Canada. It is recommended that a Portable Document Format (pdf) version of the appraisal report be submitted electronically together with the printed copies of the appraisal report. If the ecological gift is an easement, covenant

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<sup>7</sup> *Income Tax Act*, s. 207.31.

or servitude, the donor must submit the final or the most recent dated version of the easement, covenant or servitude. If the ecological gift is a gift of land after the termination of an interest (such as a life estate or superficies) retained by the donor, the donor must submit the final or the most recent dated version of the agreement creating the retained interest.

4. The donor may submit the application before or after completion of the donation. In many cases, the donor will submit the *Application for Appraisal Review and Determination* before making the donation. However, the donor may submit the *Application for Appraisal Review and Determination* up to three years after the end of the donor's taxation year in which the gift was made.<sup>8</sup>
5. The *Application for Appraisal Review and Determination* will indicate that the donor has taken all necessary steps to ensure that the gift qualifies as ecologically sensitive land by inclusion of either a copy of a completed *Certificate for Donation of Ecologically Sensitive Land* or a request for that Certificate. In Quebec, donors must submit a copy of the *Visa pour dons de terrains ou de servitudes ayant une valeur écologique*, or a copy of the Notice of intention to issue a Visa, along with their *Application for Appraisal Review and Determination*.
6. Incomplete applications will be returned to the applicant, together with any supporting documentation including the appraisal report, with a request that the applicant provide all required information.
7. Complete applications will be forwarded to the Appraisal Review Panel, together with any supporting documentation, including the appraisal report.
8. The Appraisal Review Panel will conduct a preliminary review of the appraisal report to ensure that the *Guidelines for Appraisals* have been followed. The donor will be notified if the appraisal report has minor deficiencies that can be rectified without returning the *Application for Appraisal Review and Determination* to the donor.
9. If there is a minor deficiency with the appraisal report, the donor may be asked to provide additional or improved information in connection with the appraisal report. A minor problem is a problem that can be corrected with additional or improved information, for example, an incomplete legal description or inconsistent references within the appraisal report to the size of the property comprising the ecological gift.
10. The appraisal report then will be subject to an administrative review by one or more members of the Appraisal Review Panel.
11. If authorized by the donor on the *Application for Appraisal Review and Determination*, further information may be requested directly from the appraiser who completed the appraisal report. For example, depending on the circumstances, the appraiser may be asked for the following kinds of additional information:

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<sup>8</sup> *Income Tax Act*, s. 118.1(10.3).

- rationale or support for conclusions in the appraisal report;
  - additional exhibits, including maps and photographs.
12. Where necessary, the Chair of the Appraisal Review Panel may retain additional experts to assist in the review of the appraisal report or to aid in resolving a problem in reviewing the appraisal report. For example, if the valuation of the ecological gift involves the valuation of timber, the reviewer may require the assistance of an expert knowledgeable in this area. In appropriate circumstances, for example, where access to the donor's land may be required, the donor will be notified that an additional expert has been retained.
  13. If, during the review, an additional expert is retained or additional information is obtained from sources other than the original appraiser, Environment Canada will provide the donor with a copy of any report prepared by the expert or other additional information gathered during the review and offer the donor an opportunity to respond to the additional information prior to the Appraisal Review Panel making a recommendation to the Minister of the Environment.
  14. If the ecological gift is an easement, covenant, servitude, or a gift of land after the termination of an interest (such as a life estate or superficies) retained by the donor, and any changes were made to the agreement establishing the interest after the appraisal was completed or after the *Application for Appraisal Review and Determination* was submitted to the Ecological Gifts Program, the donor must provide a copy of the final version of the agreement to the Program together with a statement from the appraiser who completed the appraisal report advising whether or not there has been a change in value as a result of the changes to the agreement. Each submitted version of an easement, covenant or servitude or agreement creating a retained interest must be dated.
  15. Upon completion of the review, the Appraisal Review Panel will recommend a fair market value for the ecological gift to the Minister of the Environment. The recommended fair market value may be either the value stated in the original appraisal report or a value other than that stated in the appraisal report.
  16. After considering the recommendation of the Appraisal Review Panel, the Minister of the Environment 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*.
  17. If the fair market value set out in the *Notice of Determination of Fair Market Value of an Ecological Gift* differs from the value stated in the application and the original appraisal report, the *Notice of Determination of Fair Market Value of an Ecological Gift* will include reasons for the difference in value.

18. Upon receiving the *Notice of Determination of Fair Market Value of an Ecological Gift*, the donor should advise the nearest regional office of Environment Canada in writing, within 90 days, whether the donor will
- a) accept the fair market value set out in the *Notice of Determination of Fair Market Value of an Ecological Gift*,
  - b) withdraw the *Application for Appraisal Review and Determination* on the understanding that the donor may reapply in the future,
  - c) request a redetermination by the Minister of the Environment of the fair market value set out in the *Notice of Determination of Fair Market Value of an Ecological Gift* (the donor must request a redetermination within 90 days of being notified of the fair market value by way of a *Notice of Determination of Fair Market Value of an Ecological Gift*).
19. The value set out in the *Notice of Determination of Fair Market Value of an Ecological Gift* will apply to the land, easement, covenant or servitude for all income tax purposes related to charitable gifts, not just for ecological gift purposes, for a period of two years from the date of the *Notice of Determination of Fair Market Value of an Ecological Gift* unless the donor requests a redetermination of the fair market value.<sup>9</sup> This is the case whether or not the donor notifies Environment Canada that the donor is withdrawing from the Program.
20. If the donor accepts the fair market value set out in the *Notice of Determination of Fair Market Value of an Ecological Gift*, upon receiving evidence that the ecological gift has been made, such as a copy of the registered transfer document, the Minister of the Environment will issue a *Statement of Fair Market Value of an Ecological Gift* at the value set out in the *Notice of Determination of Fair Market Value of an Ecological Gift*.
21. If the ecological gift is an easement, covenant, servitude, or a gift of land after the termination of an interest (such as a life estate or superficies) retained by the donor, the donor must provide a copy of the registered easement, covenant, servitude or agreement creating the retained interest and any other relevant registered transfer agreements to the Program.
22. After the Minister of the Environment has issued a *Statement of Fair Market Value of an Ecological Gift*, it is the recipient's responsibility to issue an official donation receipt to the donor for the fair market value of the property and the eligible amount of the gift.
23. If the donor withdraws from the Ecological Gifts Program, normally the donor may re-enter the process within two years, subject to the provisions, including all relevant

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<sup>9</sup> *Income Tax Act*, s. 118.1(10.1). The value as determined by the Minister will also be the value for two years for the purposes of subparagraph 69(1)(b)(ii), subsection 70(5) and sections 110.1 and 207.31.

time limits, of the *Income Tax Act*. For example, if a donor withdraws from the Ecological Gifts Program after receiving a *Notice of Determination of Fair Market Value of an Ecological Gift* and wishes to re-enter the process and request a redetermination, the donor must do so within the 90-day time period set out in the *Income Tax Act*, that is, within 90 days of being notified of the fair market value by way of a *Notice of Determination of Fair Market Value of an Ecological Gift*. The donor may re-enter the process for up to two years from the date of the *Notice of Determination of Fair Market Value of an Ecological Gift* if the donor wishes to complete the donation of the ecological gift. If the donation has not been made within the two-year period and the donor wishes to make an ecological gift, the donor must reapply and provide an updated or new appraisal.

### ***Redeterminations of fair market value – Procedures***

1. When a donor requests in writing a redetermination of the fair market value of an ecological gift within 90 days after receiving a *Notice of Determination of Fair Market Value of an Ecological Gift*, the Redetermination Committee of the Appraisal Review Panel (the Redetermination Committee) will consider the redetermination at its next meeting.
2. The Redetermination Committee meets up to three times a year to consider requests for redetermination of the fair market value of ecological gifts.
3. The Redetermination Committee normally will consider a request for redetermination of fair market value within four months of the date on which the request is received.
4. Although donors requesting a redetermination of the fair market value of an ecological gift are not required to provide additional information in support of the request, they may provide the Redetermination Committee with information relevant to the fair market value of the gift that was not provided in the first instance. This information, which must be in writing, might include, as appropriate:
  - additional written submissions by the appraiser in support of the estimate of value in the appraisal report; and
  - additional relevant valuation or market information such as the following:
    - one or more additional appraisal reports;
    - where the gift has not been made, information about market activity at the time of or since the date of the original appraisal report;
    - where the gift has been made, additional information about market activity at the time the gift was made;

- written submissions responding to the reasons for the determination of value provided with the *Notice of Determination of Fair Market Value of an Ecological Gift*.
5. The Redetermination Committee will consider the request for redetermination, together with all accompanying material, and recommend a fair market value of the ecological gift to the Minister of the Environment. This recommendation normally will be made within 60 days of the conclusion of the meeting of the Redetermination Committee. The meeting may take place over more than one day.
  6. After considering the recommendation of the Redetermination Committee, the Minister of the Environment will confirm or redetermine the fair market value and send the donor a *Notice of Redetermination of Fair Market Value of an Ecological Gift*.
  7. If the fair market value set out in the *Notice of Redetermination of Fair Market Value of an Ecological Gift* differs from the value stated in the original appraisal report or from the value in the *Notice of Determination of Fair Market Value of an Ecological Gift*, the *Notice of Redetermination of Fair Market Value of an Ecological Gift* will include reasons for the redetermination of value.
  8. Upon receiving the *Notice of Redetermination of Fair Market Value of an Ecological Gift*, the donor should advise the nearest regional office of Environment Canada in writing, within 90 days, whether the donor will
    - a) withdraw the *Application for Appraisal Review and Determination* on the understanding that the donor may reapply in the future, or
    - b) accept the fair market value as set out in the *Notice of Redetermination of Fair Market Value of an Ecological Gift*.
  9. The value set out in the *Notice of Redetermination of Fair Market Value of an Ecological Gift* will apply to the land, easement, covenant or servitude for all income tax purposes related to charitable gifts, not just for ecological gift purposes, for a period of two years from the date of the *Notice of Redetermination of Fair Market Value of an Ecological Gift*.<sup>10</sup> This is the case whether or not the donor notifies Environment Canada that the donor is withdrawing from the Program.
  10. If the donor accepts the fair market value set out in the *Notice of Redetermination of Fair Market Value of an Ecological Gift*, upon receiving evidence that the ecological gift has been made, such as a copy of the registered transfer document, the Minister of the Environment will issue a *Statement of Fair Market Value of an Ecological Gift* at the value set out in the *Notice of Redetermination of Fair Market Value of an Ecological Gift*.

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<sup>10</sup> *Income Tax Act*, s. 118.1(10.1). The value as determined by the Minister will also be the value for two years for the purposes of subparagraph 69(1)(b)(ii), subsection 70(5) and sections 110.1 and 207.31.

11. If the ecological gift is an easement, covenant, servitude, or a gift of land after the termination of an interest (such as a life estate or superficies) retained by the donor, the donor must provide a copy of the registered easement, covenant, servitude or agreement creating the retained interest to the Program.
12. After the Minister of the Environment has issued a *Statement of Fair Market Value of an Ecological Gift*, it is the recipient's responsibility to issue an official donation receipt to the donor for the fair market value of the property and the eligible amount of the gift.
13. If the donor withdraws from the Ecological Gifts Program, normally the donor may re-enter the process within two years, subject to the provisions, including all relevant time limits, of the *Income Tax Act*. The donor may re-enter the process for up to two years from the date of the *Notice of Redetermination of Fair Market Value of an Ecological Gift* if the donor wishes to complete the donation of the ecological gift. If the donation has not been made within the two-year period and the donor wishes to make an ecological gift, the donor must reapply and provide an updated or new appraisal.
14. Accepting the fair market value as set out in the *Notice of Redetermination of Fair Market Value of an Ecological Gift* does not prevent the donor from appealing the confirmation or redetermination of value to the Tax Court of Canada following completion of the donation and receipt of the *Statement of Fair Market Value of an Ecological Gift* from the Minister. The appeal must be filed within 90 days of the Minister issuing the *Statement of Fair Market Value of an Ecological Gift*.

### ***Appeal to Tax Court of Canada***

The donor may have a right to appeal the fair market value of the ecological gift redetermined by the Minister of the Environment to the Tax Court of Canada.<sup>11</sup> The donor may appeal to the Tax Court of Canada only if an irrevocable gift of the ecological property has been made and the following conditions are satisfied:

1. The donor requested, within 90 days of receiving a *Notice of Determination of Fair Market Value of an Ecological Gift*, that the Minister confirm or redetermine the fair market value of the property and the Minister has so confirmed or redetermined the value by issuing a *Notice of Redetermination of Fair Market Value of an Ecological Gift*, or a *Notice of Redetermination of Fair Market Value of an Ecological Gift* was issued to the donor at any time on the Minister's own initiative.

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<sup>11</sup> *Income Tax Act*, s. 169(1.1).

2. The Minister has issued to the donor a *Statement of Fair Market Value of an Ecological Gift*.<sup>12</sup>
3. The appeal is filed within 90 days of the Minister's issuing the *Statement of Fair Market Value of an Ecological Gift*.

The Tax Court of Canada may confirm or vary the amount confirmed or redetermined by the Minister of the Environment to be the fair market value of an ecological gift. The value determined by the Court is then deemed to be the fair market value of the ecological gift determined by the Minister.<sup>13</sup>

In Quebec, the donor may appeal to the Tax Court of Canada and the Court of Québec. The value determined by the Tax Court of Canada will serve for the purposes of the federal income tax return. The value as determined by the Court of Québec will serve for the purposes of the provincial income tax return.

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<sup>12</sup> *Income Tax Act*, s. 169(1.1).

<sup>13</sup> *Income Tax Act*, s. 171(1.1).