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A Forensic Appraiser's Perspective:

Government Overpaid for Land Relying on Unauthorized Appraisal

An appraisal is intended to support a decision-making process involving appraised property.

A party commissioning an appraisal will either rely on the appraisal or attempt to induce another party to do so. Even parties that are frequent users of appraisals often lack the skills to understand when and under what conditions they can or should rely on an appraisal report. A decision made on the basis of an appraisal report, to which there is no lawful entitlement, can lead to financial losses and unintended consequences, as occurred when the Saskatchewan government negotiated a deal to purchase additional land for the Global Transportation Hub (GTH) through the Global Transportation Hub Authority (GTHA). A sequence of events (and questionable conduct), commencing in November 2011, culminated in the December 2013 decision of the GTHA to acquire 204 acres at a grossly inflated price,¹ while relying on an unauthorized appraisal report "using a cash flow-subdivision development analysis" to value raw land in agricultural use.

An appraisal report prepared by a member of the Appraisal Institute of Canada (AIC) or the Appraisal Institute (US) must contain a 'Mandatory Certification,' including a statement to the following effect:

"I certify that, *to the best of my knowledge and belief* that: ... My analyses, opinions and conclusions were developed, and this report has been prepared, in conformity with the CUSPAP." [emphasis added]

This declaration is an assertion without proof of compliance with the *Canadian Uniform Standards of Appraisal Practice (CUSPAP)* or the *Uniform Standards of Professional Appraisal Practice (USPAP)*. No appraisal should be accepted at face value by any public agency without being properly reviewed. A public agency with no qualified appraisers on staff should retain the services of a competent review appraiser who has an obligation to conduct the review in an independent and objective manner, with a focus on the appraisal and **not** the appraiser. An appraisal report must be read from cover to cover, and all appendices examined.

According to the AIC, in describing *What Real Estate Appraisers Do*, the public can expect its members to provide "unbiased and dependable valuations" that "attest to the real value of property," and rely on them to make "informed decisions about real estate."² A flawed or unreliable appraisal undermines public confidence in the credibility of the appraisal profession, and a governmental agency exposed to such a report should reject the appraisal outright. If the appraisal has been

completed by someone with an appraisal designation, a complaint should be lodged with the organization to which the appraiser belongs.

If a flawed or unreliable appraisal has been acted upon, causing financial harm, it is advisable to simultaneously retain a competent review appraiser (preferably under the direction of legal counsel) and seek legal advice as to whether it is appropriate to claim damages for negligence. The elements necessary to succeed in a claim of negligence, as set out in *Queen v. Cognos Inc.*,³ are:

1. There must be a duty of care based on a 'special relationship' between the representor and the representee;
2. The representation in question must be untrue, inaccurate, or misleading;
3. The representor must have acted negligently in making said misrepresentation;
4. The representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
5. The reliance must have been detrimental to the representee in the sense that damage resulted.

These five elements must be proved by the claimant. It is not uncommon for reasonable appraisers to disagree on value. Appraisers can also commit an error in judgement, which does not rise to the level of negligence.⁴ If there is no reasonable or logical basis for an opinion of value in the context of the

intended use, or an appraisal report is fraught with errors of commission or omission related to completeness, accuracy, adequacy and relevance, as supported by a comprehensive review of the appraisal report, a claimant will likely prevail on a negligence claim.⁵ A review appraiser acting as an expert witness has an overriding duty to assist the court, without advocating for the client's position.⁶ A document such as *CUSPAP* is likely to bear on a court's legal analysis.⁷

An unintended (unauthorized) user had a negligence claim against an appraiser dismissed,⁸ but the judge declared that, if the issue of negligence had to be addressed, he would have found "the appraiser was negligent," citing *CUSPAP* as the basis of the legal analysis. Despite the explicit statement in the appraisal that the "analysis, opinions and conclusions were developed in conformity with *CUSPAP*," the appraiser had an obligation to include in his report:

The impact on value of the floodplain bylaw, which the appraiser neglected to do... [and] in the result overstated the market value of the property by... \$622,000. [paras. 45 and 46]

The appraisal's intended use was to assist a lender in deciding whether the property offered sufficient collateral for a mortgage loan. The appraiser knew the land was in a floodplain, and the report made no mention of that fact. Highest and best use is a fundamental requirement of every appraisal, of which land use controls are a key consideration, and on which rests every market value estimate. The land consists of 11 lots that cannot be developed for the stated highest and best as "being development to commercial-type use," due to the onerous building restrictions contained in the floodplain by-law.

A public agency acquiring land at public expense on behalf of taxpayers has a duty to conduct its affairs in a prudent and transparent manner, and to pay market value. In a highly controversial deal involving the Government of Saskatchewan's purchase of land in connection with the development of the GTH, **\$103,000 per acre** was paid for 204 acres in

December 2013. The government rationalized the purchase on the basis of an unauthorized February 2013 appraisal submitted by the **vendor** that "indicated the land was worth \$125,000 [per acre]."

In **June 2012**, appraisals commissioned by the Ministry of Government Services (appraisal contract redirected to GTHA) estimated the value of these same 204 acres at \$3.46 million, based on **\$20,000 per acre** (116.86 acres) and **\$15,000 per acre** (87.40 acres). An appraisal was also commissioned of a 41.15-acre parcel, which was appraised at **\$15,000 per acre**, and, in **November 2012**, the GTHA reached an agreement with the landowner to acquire the property at **\$30,000 per acre**.

Considering that this property had been available for sale on the open market for over 3 ½ years and, based on the June 2012 appraisal at \$15,000 per acre, it is reasonable to conclude the price of \$30,000 per acre negotiated by the GTHA in November 2012, roughly twice the market value of the property, was heavily influenced by the highway and GTH public projects, (i.e., the 'scheme'). The property is zoned 'UH – Urban Holding.'

The GTHA's 204-acre acquisition in December 2013 at \$103,000 per acre is three times the \$30,000-\$35,000 per acre estimated in an October 2013 appraisal⁹ prepared on behalf of the Government of Saskatchewan (Ministry of Highways),¹⁰ with the "intended use of the appraisal... to assist in the purchase of the land for a proposed roadway." The appraisal of the 204 acres prepared for the Ministry of Highways (MH) reflects values of \$30,000 per acre (87.40 acres) and \$35,000 per acre (116.86 acres), and the value estimates are supported by comparable sales, applying the direct comparison approach.

These 204 acres were under threat of expropriation, but the appraisal report makes no reference to the Saskatchewan *Expropriation Procedure Act*: legislation that protects the expropriating authority from paying for any increase in the value of the land occasioned by the public works (i.e., the 'scheme'), and unrelated to the general movement of prices in the relevant real estate market. It can be a difficult task for an appraiser to discern price increases experienced by land sales that have occurred as a consequence of an announced or imminent major public project.

An owner whose land is under the threat of expropriation should seek legal advice from an expropriation lawyer and retain an appraiser that understands the relevant expropriation statute, and that possesses the skill and expertise required to complete the assignment. An expropriation appraiser often works under the direction of legal counsel. An appraisal prepared on behalf of the expropriating authority must also meet the same expected standards of competency, and the appraisal report should be reviewed by an experienced review appraiser on behalf of the property owner.

A taking of private land for a public project, such as a major highway or the GTH, can have a profound influence on real estate prices, depending on the segment of the real estate market impacted by the project. A property owner that sold some of their land to the MHI under the threat of expropriation on two occasions (once mediated and once negotiated), years later, after land prices had escalated, filed a lawsuit against the government seeking more money.¹¹

Compensation payable under the *Expropriation Procedure Act* must



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ignore any increases or decreases in value flowing from or having a causal connection to the expropriation. In the context of the MH's contemplated acquisition of the 204 acres, was the proposed GTH connected to the planned highway expansion? In other words, is the GTH part of the overall 'scheme'? As noted in the Auditor's Special Report (June 2016), both the Ministry of Government Services and the MH were to acquire the 204 acres (East Parcels) and an additional 41 acres (South Parcel).

The *Global Transportation Hub Authority Act* did not come into existence until August 2013, and did not possess the legislative power of expropriation enjoyed by the Ministry of Highways and Infrastructure (MHI). Why then, did the GTHA interfere or compete with MHI over the proposed acquisition of the 204 acres, and subject itself to the whims of the market place and pay an exorbitant price for the land, the value of which was, in fact, mostly created by the 'scheme' itself? It was common knowledge that MHI would ultimately acquire these lands for highway purposes.¹²

The appraisal prepared on behalf of MHI clearly discloses that the value estimates of **\$30,000 per acre** and **\$35,000 per acre** are "assumptive" values rather than "as is" values. Presumably, without these assumptions, the value of the 204 acres, as of the effective date of appraisal (October 23, 2013¹³), would have been less than \$30,000 per acre and \$35,000 per acre. It is also clear that any transactions occurring after MHI's March 9, 2009 public announcement of its highway plans to facilitate the GTH project caused the price of land to escalate.

The *GTH Authority Act* was not enacted until August 6, 2013.¹⁴ As of March 2016, the GTH encompassed 1,871 acres, of which 732 acres are owned by businesses operating out of the Hub and 346 acres are used for common infrastructure, and 114 acres are for use by MHI. Other than for 245 acres, including the controversial 204-acre purchase by the GTHA, MHI acquired the land for the GTH.

The *GTH Act* states that, "if the purchase price or sale price of real property in one transaction entered into



Buying land that is under the threat of expropriation is a highly unusual practice, especially if the prospective purchaser is a developer.

by the authority exceeds the amount fixed by the Lieutenant Governor in Council [\$5 million]," the authority must obtain the approval of the Lieutenant Governor in Council.

These same 204 acres had been previously acquired by Tappauf, when, in early 2012, he noticed an 87-acre parcel of land up for sale (listed in August 2011) next to the GTH, the industrial park owned by the provincial government. Tappauf paid the asking price of \$45,000 per acre. Through his realtors, Tappauf then approached the owner of the adjoining 117 acres, struck a deal at \$55,000 per acre, and, in March 2012, had both properties under contract.¹⁵ Negotiations for the 117 acres commenced in February 2012 starting at \$15,000 an acre, then \$25,000, \$30,000, \$45,000, and finally concluding at \$55,000 per acre.

Combined, Tappauf paid an average price of \$50,735 per acre for the 204 acres. How the two transactions were structured is unknown, but it is possible that a significant portion of the purchase price in each transaction was in the form of vendor-take-back mortgage financing on favourable terms and conditions, which is typical of speculative raw land purchases. Conventional mortgage financing on raw land on good terms and conditions is difficult to obtain, and the loan-to-value ratio usually does not exceed 50%. Tappauf controlled both properties pursuant to the March 2012 conditional agreements, which included extended due diligence periods and were not scheduled to close until February 26, 2013, allowing the potential purchaser time to find a buyer willing to pay a higher price for the lands. Both the pending transactions and property 'flips' closed on the same day, and Tappauf's name never appeared on title.

Tappauf said "he thought he might eventually be able to turn the properties into an industrial subdivision," reportedly

uninformed by his realtor that "the government was thinking of building a highway through his land."¹⁶ These lands are not serviced; they are not zoned to permit urban development; and they form part of the planned West Region Bypass, adjacent to a railway corridor.¹⁷ A sketch of the proposed interchange, which appears to have been created in November 2011, had been circulated by MHI to potentially affected property owners. In June 2013, three months after the two vendors signed agreements to sell their lands to Tappauf, they were notified by MHI "warning that the government might need more of their land for the interchange." That information was subsequently conveyed to Tappauf's attorney, and Tappauf "still could kill the deal and gotten back his deposit," but, instead, both transactions moved forward and closed on February 26, 2013. Buying land that is under the threat of expropriation is a highly unusual practice, especially if the prospective purchaser is a developer. As for a transaction motivated by speculation, buying land under the threat of expropriation only makes sense at a price below market value.

The two vendors that sold the combined 204 acres to Tappauf had previously sold some of their land holdings to MHI under the threat of expropriation. MHI purchased acreage at **\$9,000 per acre in 2010** and at **\$11,000 per acre in 2011**.¹⁸ These prices are consistent with prices paid by the government for other properties around the same time.

Also, in **August 2009**, when economic conditions were less robust as a consequence of the 2008 global financial crisis, the Regina Airport Authority purchased **217.77 acres** at a unit rate of **\$12,000 per acre**. This property, which abuts Regina Airport, is located within the city limits, and is zoned UH (Urban Holding).

On December 3, 2013, a recommendation from the Ministry of the Economy (Chair of the GTH) went to the GTH board recommending that the Government of Saskatchewan “acquire the east parcels [for \$105,000 per acre] to support the development of the interchange to access the GTH with the surplus lands being sold to the GTH for further development.” A follow-up recommendation to the GTH board on December 19, 2013 issued a revised recommendation stating that “GTH would acquire the lands at a slightly reduced price of \$103,000 per acre **and** support development of the interchange.”¹⁹ A series of memos prepared by GTH offers some insight into the acquisition of the 204 acres.²⁰

The February 12, 2013, 42-page appraisal was prepared for the exclusive use of *Royalty Developments Limited* (Pres: Anthony Marquart)²¹ and lenders of their choosing, and they were listed as the only intended users of the appraisal report, which precluded the GTHA from relying on the report. The appraisal report has not been made public. In fact, the Saskatchewan Privacy Commissioner ordered all copies in the possession of the government destroyed or returned to the appraiser, as GTHA did not pay for the appraisal and because “the GTH was inappropriately provided a copy of the appraisal” without written authorization of the appraiser. In reaching this decision,²² the Commissioner made note of the following restrictions placed in the appraiser’s report:

The intended use of the appraisal is for internal uses of the client and to assist with financing arrangements relating to the subject property. It is not reasonable for any other person other than the client, the lender of the client’s choice, and [the appraisal firm] to rely upon this appraisal without first obtaining written authorization from all parties.

This report has been prepared on the assumption that no other person will rely on it for any other purpose and all liability to all such persons is denied. [para. 15] [emphasis added]

Except as it may be necessary to expedite the function of this appraisal as identified herein, it is not reasonable for any person other than the client, the lender of the client’s choice, and [the appraisal firm] to rely upon this appraisal without first obtaining written authorization from all parties. [para. 16]

Neither possession of this report nor a copy of it carries with it the right of publication. All copyright is reserved to the author and is considered confidential by the author. It shall not be disclosed, quoted from or referred to, it [sic] whole or in part, or published in any manner without the expressed written consent of the client and [the appraisal firm]. [para. 16]

The GTHA failed to heed the disclaimers and cautions prominently placed up front in the appraisal report—not buried or deliberately concealed in the body of the report. There is nothing ambiguous about the language that would cause confusion or misunderstanding. No satisfactory explanation has been provided to justify the government’s reliance on a report clearly marked as to the intended users and the intended use. Even if the GTHA had been an intended user of the appraisal, other aspects of the appraisal should have raised concerns. As reported in the Provincial Auditor’s 2016 Special Report:

A copy of...[the February 12, 2013] appraisal [prepared on behalf of Royalty Development Ltd. (Pres: Anthony Marquart)] for the NW quarter of the East Parcels [116.86 acres], which assigned a land value of about \$129,000 per acre,...used a different valuation approach [cash flow-

subdivision development analysis] than the GTH requested [Direct Comparison Approach] [for its own appraisals].

[The appraisal] was prepared in **February 2013** for a purpose other than selling the land. Given this different purpose, the appraisal used a different appraisal methodology [cash flow-subdivision development analysis] that used numerous assumptions. Changes to any one of the assumptions would impact the appraiser’s opinion of land value. Also, it did not use the direct-comparison approach in the analysis.... [emphasis added]

Considered only the NW quarter [116.86 acres] of the East Parcels. We found this difference important because the GTH’s **October 2013** [commissioned circa May to August 2013] appraisal... had assigned significantly different land values for the two quarters comprising the East Parcels. [emphasis added]

The other approach to valuing the land, the Subdivision Development Method (SDM), is a highly unreliable method of valuation, and inappropriate for valuing raw land that is not serviced, is not physically ripe for development, and for which there is no immediate demand for end users (i.e., no presales to end users of serviced lots or built space) and for which no credit facility has been obtained. The SDM requires numerous inputs, all of which must be individually supported, and changes in any of the inputs can lead to different estimates of land value. The SDM can be an appropriate valuation model as a test of financial feasibility if development approvals can be obtained, infrastructure installed, credit facility arranged, and finished lots absorbed (absorption stage), all within a reasonable timeframe of, say, five years. In any event, SDM is rarely employed as a standalone valuation approach in estimating the market value of raw land.

Also, the appraisal relates only to the 116.86-acre parcel, which, relatively speaking, is more valuable per acre than the other (87.40-acre parcel) because of proximity to services.

While the government had the unauthorized appraisal in its possession, it never made overtures to the appraiser,



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nor did the government retain a qualified appraiser to conduct a review of the appraisal. In fact, the Senior Advisor representing the GTHA maintained “that he had deemed... [the] appraisal as irrelevant to the negotiations.[and] as a result he indicated that he did not formally review it.” That statement is not consistent with comments appearing in the Privacy Commissioner’s September 30, 2016 decision that “the GTHA has recognized that a copy of the Appraisal was useful to them, however, it was not necessary,” [and] “that this Appraisal only formed part of the information considered for one land transaction [116.86 acres]... [and that] they did not rely on this appraisal to a substantial extent.” A March 3, 2014 memo prepared by GTHA discloses the following details about the purchase of the 204.26 acres and acknowledges relying on two appraisals, including the unauthorized one:

- A total of 204.26 acres (82.7 hectares) will be assembled. It is estimated that MHI will require about 80 acres for the West Regina Bypass.
- The purchase price in the Offer to Purchase was based on two appraisals and an actual land transaction that closed in February 2013.
- The first appraisal was completed in October 2013 using a direct comparison approach arriving at a market value of about \$65,000 per acre for the North parcel [116.86 acres] and \$51,000 for the Southern parcel [87.40 acres]. A second appraisal was completed in February 2013 using a cash flow-subdivision development analysis arriving at a market value of about \$129,556 per acre for the North parcel [116.86 acres]. The purchase price for the land transaction in February 2013 was about \$84,000 per acre.
- Based on the above information, the GTHA was approved to send a formal Offer to Purchase on December 23,

2013. The Offer to Purchase was accepted by the seller on December 24, 2013 with a March 3, 2014 closing date.

- The price the accepted offer was for \$103,000 per acre (about \$254,410 per hectare) for a total cost of about \$21 million.

Pursuant to the 2012 edition of *CUSPAP*, an appraisal must disclose all particulars surrounding recent sales, listings (expired and current) and pending agreements of purchase and sale pertaining to the subject property:

7.24 An Agreement for Sale/Option/Listing

Must be analyzed and reported if any agreement for sale, option, lease... or listing of the subject property occurred within one year prior to the date of valuation, including any pending/current Contract of Purchase and Sale... in such information is available to the appraiser in the normal course of business.

7.25 Prior Sales

Must be analyzed and reported if any sale of the subject property occurred within three years prior to the effective date of the appraisal, if such information is available as at the date of valuation to the appraiser in the normal course of business.

There are only two possibilities as to these mandatory disclosures under *CUSPAP*. Either the February 12, 2013 appraisal report does not include the disclosures, which means that the report has not been prepared in compliance with *CUSPAP*, or that the disclosures are included in the appraisal report, and were ignored by the GTHA, as well as the Ministry of the Economy. Either way, property-specific information of this nature is critical as to its influence on the market value of the 116.86-acre parcel.

It was the Ministry of the Economy that provided the GTHA with an emailed copy of the unauthorized appraisal on December 20, 2013, and the email offers

no explanation as to when and how the appraisal came into the possession of the Ministry of the Economy. However, a November 11, 2013 email circulated within the Ministry of the Economy²⁴ included the February 12, 2013 appraisal report as an attachment, and expressed concern over the appraisal methodology, but that the appraisal, which was of only the 116.86-acre parcel, could “make a case” in rationalizing paying more for the property than warranted.

Why the government disregarded an October 23, 2013 appraisal prepared on behalf of MHI, which estimated the value of the 204 acres at **\$30,000 per acre** (87.40 acres) and **\$35,000 per acre** (116.86 acres), has never been adequately explained. This October 23, 2013 appraisal makes full disclosure of the sales history of the subject property and the required analysis, as mandated by sections 7.24 and 7.25 of *CUSPAP*.

The GTH Authority’s own commissioned appraisal, effective September 26, 2013,²⁵ was more recent than the unauthorized report (February 26, 2013) in its possession. This 28-page appraisal, excluding appendices, based on the Direct Comparison Approach, reflects values of **\$65,000 per acre** (116.87 acres) and **\$51,000 per acre** (87.41 acres).²⁶

In discussing the sales history of the two properties, as mandated by sections 7.24 and 7.25 of *CUSPAP*, the report states:

Public records show that the subject property [116.87 acres] transferred on February 26, 2013 for \$9,818,588 [**\$84,020 per acre**] from 139 Land Corporation to 101225232 Saskatchewan Ltd.,²⁷ this sale has been utilized as Index #2. On **March 21, 2012**, there was a miscellaneous interest registered on title by 139 Land Corporation claiming an interest as purchaser under an accepted Offer to Purchase for **\$55,000 per acre** confirmed with the purchaser. Written documentation was not provided.



Pursuant to the 2012 edition of *CUSPAP*, an appraisal must disclose all particulars surrounding recent sales, listings (expired and current) and pending agreements of purchase and sale pertaining to the subject property.

To our knowledge, the subject property is not currently listed for sale, nor to our knowledge are there any sale agreements or offers to purchase the subject property. However, we understand the subject property is currently owned by a development company that is active in the area. [emphasis added]

Public records show that the subject property [87.41 acres] transferred on February 26, 2013 for \$6,264,954 [**\$71,673 per acre**] from 139 Land Corporation to 101225232 Saskatchewan Ltd., this sale has been utilized as Index #3. On **March 21, 2012**, there was a miscellaneous interest registered on title by 139 Land Corporation claiming an interest as purchaser under an accepted Offer to Purchase for **\$45,000 per acre** confirmed with the purchaser. Written documentation was not provided. On September 13, 2011, there was a non-arm's length transfer of the property between related parties.

To our knowledge, the subject property is not currently listed for sale, nor to our knowledge are there any sale agreements or offers to purchase the subject property. However, we understand the subject property is currently owned by a development company that is active in the area. [emphasis added]

Whatever the GTHA's rationale for purchasing the 204 acres at the grossly inflated and unwarranted price of **\$103,000 per acre**, it is apparent that the GTHA:

- Had no appraisal policies in place to support potential land acquisitions, and it lacked in-house appraisal expertise;
- Failed to act prudently on behalf of the taxpaying public, which ultimately were out millions of dollars; and
- Undermined MHI's intention to acquire the lands for highway purposes, a ministry with the statutory power to acquire the lands at market value in compliance with the *Expropriation Procedure Act*.

A governmental agency that lacks the expertise to review an appraisal report, whether commissioned directly or received indirectly through a third party, should retain a competent review appraiser. A third-party appraisal report should never be accepted or acted upon unless the governmental agency is expressly identified as an intended user, the intended use is consistent with the agency's objective, and allows for public disclosure. In the event of sustained financial losses stemming from reliance on an appraisal report as an unintended user, it is unlikely that a negligence claim against the appraiser would be successful. 🚩

NOTE: To access an extended version of this article as well as the footnotes/end notes that are referenced, please visit the AIC Online Library at <https://aicexchange.ca/>