



American Friends of Canadian Conservation

Cross-Border Conservation Gifts: Fact Sheet for Potential Donors of Land or Conservation Easements

Adapted from 2006 original work by Bonnie Sutherland
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Introduction

Your land in Canada is a treasure. Favorite memories have been created there. Perhaps the property is a financially valuable business asset. Or it may be both.

Your property is also part of Canada's incomparable natural heritage. The forests, lakefronts, marine coasts, rivers and streams, ranches and farms owned by Americans are treasured by citizens of both countries.

The histories of Canada and the U.S. have been intertwined for more than two centuries. We share the world's longest border, are major trading partners and political allies. Migrations of citizens in both directions – both permanent and temporary – have shaped our families and economies. As a result, Americans own natural lands that are conservation priorities in many Canadian provinces.

American ownership is concentrated in Canada's most scenic and resource-rich areas along both coasts, in the Great Lakes and other vacation locales and important working landscapes known for fishing, hunting, hiking, skiing as well as farming, ranching, timber and other business uses.

The Cross-border Conservation Movement

In recent years, largely as a result of baby-boomers' estate planning, Canadian land conservation organizations have witnessed an increasing level of interest in conservation among American landowners, like you. These potential donors' primary motivation is protecting the lands they love. In addition, they often have financial considerations and objectives. In order to achieve all their goals, American donors usually want their gift to be eligible for US income and/or estate tax benefits.

Prior to 2010, U.S. taxpayers considering donating their Canadian property for conservation were confronted by the disappointing reality that their gift would not produce U.S. tax deductions. Worse yet, they might be liable for substantial capital gains tax liabilities in Canada if a gift was not structured properly. Canadian taxpayers had long enjoyed income and capital gains tax incentives from their government to encourage conservation donations. But these incentives were not useful for U.S. taxpayers without Canadian-source income. Land trusts recognized that if comparable incentives were available to U.S. taxpayers, many more strategic properties could be preserved.

Canadian conservation leaders allied with their U.S. colleagues to create a legal mechanism by which U.S. taxpayers could make tax deductible donations of land or a partial interest, such as a conservation easement, to protect their special Canadian properties. This is known as "cross border conservation."

American Friends of Canadian Conservation (AFCC) is the entity created to facilitate cross border conservation, in partnership with Canadian organizations. In 2011 AFCC began accepting conservation gifts of environmentally sensitive lands in Canada from U.S. taxpayers. The gifts are eligible for U.S. income and estate tax benefits and, if structured properly, can be made without incurring a Canadian capital gains tax liability.

As of December 2018, AFCC had completed 26 cross-border land and easement donations, protecting high priority conservation properties in five provinces, involving ten Canadian partners and nearly four dozen individual landowners. The total appraised value of these gifts is over USD \$16 M.

In addition, AFCC has provided technical assistance to land conservation organizations, landowners and their professional advisors that led to the protection of dozens more ecologically and culturally significant parcels.

This document was developed to give you basic information about cross-border conservation generally and AFCC specifically, and how it can help you achieve your conservation and financial objectives.

Note: This document is not intended to provide tax, legal, estate planning or other advice. It is essential that you obtain independent advice from professional advisors who understand tax and legal issues in both the US and Canada.

Cross-border Conservation Basics

Canada is blessed with a dedicated cadre of land conservation organizations and government agencies, operating in most of the landscapes with high numbers of American owners, with which you can work to achieve your resource protection objectives. Under some circumstances, potential donors may find that a gift to a Canadian land trust or government agency satisfactorily serves their financial objectives.

Alternatively, your financial, tax, familial, corporate and/or estate circumstances may make it more beneficial for you to donate your property or a conservation easement to AFCC because of its bi-national tax status. Your tax and legal advisors will help you determine which approach is best for your unique situation. In general, a gift to American Friends will be advantageous if you and your Canadian property meet the following criteria:

- Appraised value of the land or easement to be donated is likely to exceed \$200,000
- Your cost base is low so most of the current market value is the result of appreciation
- You do not have significant Canadian-source income
- You have sufficient U.S.-source income to utilize a tax deduction (can be carried forward for five years for a fee title gift, up to fifteen years for a conservation easement)

- Property is a conservation priority for a Canadian conservation entity, or First Nation. Your choice of donee – the entity to which you make your donation – will determine the income, estate and gift tax consequences of your cross-border gift. For example, a conservation gift donated to most U.S. charities will produce an income tax deduction against U.S. income, but such a gift will likely trigger Canadian capital gains tax.

Conversely, donating the land or easement to a Canadian donee will allow the donor to avoid paying the Canadian capital gains tax, but will forego a U.S. tax deduction.

Donors of appreciated property who are seeking deductions against their U.S. income, and meet the above criteria, will likely find that AFCC is the ideal donee because it has preferential tax status in both countries.

AFCCs' mission is to preserve Canada's natural heritage. It achieves its mission, in partnership with Canadian conservation organizations, by working with U.S. donors who want to preserve their Canadian properties. AFCC is a U.S. publicly-supported charity, recognized by the IRS as a tax-exempt organization under Section 501(c)(3) I.R.C., and is also a *Prescribed Donee* under Canadian tax regulations.

For a thorough introduction to the bi-national tax incentives for conservation refer to [Save Some Green: a handbook for U.S. taxpayers](#), available for download on the Resources page of <https://conservecanada.org> or in print by calling AFCC.

Conservation Gifts Defined

Charitably-oriented U.S. taxpayers who own important conservation lands in Canada have several options to consider, in addition to the decision regarding their chosen donee:

Gift of Land: The most straight-forward alternative is a donation of the fee simple interest, meaning the full ownership, in land. You can donate all or a portion of your land.

Gift of Conservation Easement: This can be an alternative approach for property owners reluctant to gift all or a specific part of their entire property. A conservation easement is a voluntary, legal agreement between a landowner and a *qualified conservation organization* that restricts the future uses of land to accomplish a defined set of conservation purposes. The conservation easement is registered and becomes part of the title for the property, making its terms binding on future owners. (In British Columbia easements are known as “covenants”. (In Quebec a “servitude” is the comparable legal instrument.)

Conservation easement law varies by province. Cross-border easements must address specific language and content requirements for the jurisdiction where the land is located. In addition, in order to address U.S. income, gift and estate tax laws, cross-border

easements must incorporate specific elements required by the IRS for the gift to be tax deductible. (See further discussion below).

If you are contemplating donating a conservation easement to a Canadian land trust, you must be sure that the organization is recognized by the IRS as a *publicly-supported charity*. (See section titled *Recognition as a Foreign Publicly Supported Charity* below).

“Bargain Sale” (known as a Split-Receipt Donation in Canada): If you cannot afford to make an outright donation of your property, or a conservation easement, you may want to consider selling your land, or a conservation easement over your land, for less than full fair market value. (Acquisition funds are very scarce in Canada, so a bargain sale may not be feasible unless your property is exceptionally valuable from an ecological perspective and the donation percentage is substantial.)

The monetary difference between the sale price and the appraised value of the property is a charitable gift. Such gifts are subject to specific rules and limitations in Canada. Consult a Canadian tax expert before considering this approach.

Testamentary Gift: A donation of land or conservation easement (or cash or other assets) can be accomplished through your will. You can name AFCC in your will as the recipient of a testamentary gift, however please contact us before doing so in order to ensure that the bequest language is properly drafted so that AFCC can accept the bequest.

Testamentary gifts to Canadian charities should provide the same estate tax benefits as gifts to a U.S. charity. Special rules apply to conservation easements for such a gift to qualify as deductible under U.S. tax law. Of particular importance is the IRS recognition of the Canadian organization as a publicly-supported charity. (See section on Recognition as a Foreign Publicly Supported Charity, on page eight.)

Under Canadian income tax legislation, a bequest to anyone other than your spouse will normally be treated as a disposition of the property at its fair market value on the date of death, triggering taxes on the accrued capital gain. This could produce a major cash drain for your heir(s) that could require a sale of the Canadian property or other assets at an inopportune time, or at a lower price due to the urgency of raising funds. This comes as a shock to many U.S. taxpayers because the U.S. tax code contains a generous exemption for all but the wealthiest estates.

If the property, or an interest in it, is bequeathed to a Canadian conservation entity or AFCC, the estate’s executor can elect to report lower deemed proceeds for the “gift portion” in Canada, thereby limiting or eliminate exposure to capital gains taxes. (See the section titled *Canadian Capital Gains Tax* below for more explanation of this election.)

Conservation Gifts and Financial Incentives

Landowners considering donating their Canadian land, or a restriction on its future use, are generally inspired by their love of the natural landscape and desire to see it remain intact for future generations. Monetary incentives such as U.S. income tax deductions, minimizing or eliminating Canadian capital gains tax, reduced estate tax liability and, in some cases, reduced ongoing costs of property ownership, can make it possible for landowners to pursue their conservation dreams.

The information that follows provides a primer on the key considerations for this type of transaction. The publication Save Some Green: a handbook for U.S. taxpayers is the complete resource on this topic. Download or order a print copy at <https://conservecanada.org>. Be sure to consult legal and tax advisors experienced in crossborder conservation transactions. Your advisors may want to review the Fact Sheet for Landowner Advisors, also available at the Resources section of the same website.

Tax Issues and Opportunities Associated with Cross-Border Conservation Gifts

The following is a brief summary of various considerations associated with a cross-border conservation gift. As mentioned above, Save Some Green, is the best resource for a complete overview of these issues and opportunities.

Canadian capital gains tax

Under Canadian tax law, any “disposition” of property, or a property interest, will create a capital gains tax liability – except for bequests to one’s spouse. Therefore, passing your family retreat to the next generation is a taxable event in Canada! Dispositions, as defined by the Canada Revenue Agency, include most donations of property - even if no money was received by the donor.

The Canadian tax liability is the same, whether you make a gift or sell the property, unless you structure the transaction correctly. This is a challenging concept for most U.S. taxpayers, and even their advisors. For example, many American owners of Canadian property report paying a hefty price, in the form of capital gains taxes, for transferring their land into a trust or corporation, as part of their estate planning.

The Canadian capital gain is calculated as the difference between the fair market value of the property and the owner’s adjusted cost base (which consists of the price paid for the property plus certain documented expenses). The donor pays tax on 50% of the capital gain, at his or her Canadian marginal tax rate. For the sake of simplicity, you could assume a capital gains tax liability of approximately 25% of the property’s value, if it is highly appreciated. Remember that even a gift of a conservation easement will trigger a Canadian capital gains tax liability.

Capital gains tax can be eliminated on your gift if your property meets certain ecological criteria and you donate it through the Canadian Ecological Gifts Program (EGP or EcoGift) to an eligible EcoGift recipient; meaning a qualified Canadian charity or government agency.

(For more information visit <http://www.ec.gc.ca/pde-egp/>). AFCC is not an eligible EcoGift recipient. Instead it is a prescribed donee under the rules of the Canadian Income Tax Act.

The section 118.1 election

A second option to reduce or eliminate the Canadian capital gains tax on a conservation gift is through a special “election” under the Canadian Income Tax Act. This option is only available if the donee is a Canadian charity, government agency or a prescribed donee. AFCC is the only entity created specifically to partner with Canadian entities on cross-border projects in Canada that has both U.S. publicly-supported charity status, and prescribed donee status in Canada.

The election is made in the Canadian tax return that you will file for the year in which you donate the property, or an easement. If you make a gift of appreciated land or easement to almost any other U.S. charity that is not a Prescribed Donee, Canadian capital gains taxes cannot be avoided or reduced, and the accrued gains usually will be taxed.

U.S. tax deductions generated by gifts of fee title

Tax treatment of gifts of Canadian property to either AFCC or a Canadian charity is relatively simple. Valuation of a fee title gift is straightforward. The problem for U.S. donors is that a gift to a Canadian charity will not produce a deduction against U.S. source income. The gift is deductible only against Canadian-source income, if any, declared on a U.S. return.

In contrast, gifts of Canadian land made to AFCC are tax deductible in the U.S., because it is a U.S. charity. Any unclaimed deduction that the donor cannot utilize in the year of the gift may be carried forward and applied to income over the course of five subsequent years. In short, if you want to obtain a deduction against U.S.-source income, the gift must be made to a U.S. charity.

U.S. tax deductions from a gift of a conservation easement to AFCC

The Internal Revenue Code has very specific guidelines for *qualified conservation contributions*. The conservation easement document must comply with these guidelines for the value of the gift to be deductible against U.S. income. Requirements range from very specific wording and restrictions in the easement document, to issues related to mortgages on the property, mineral interests and the type of organization to which the

easement can be transferred. The Pennsylvania Land Trust Association offers a good overview on tax deductibility of conservation easement gifts.

<https://conservationtools.org/guides/159-tax-deductibility-of-conservation-easement-donations>

AFCC is a qualified recipient of conservation easement gifts under the Internal Revenue Service code.

Appraising conservation easements is a specialized field of expertise. Canadian appraisers who have experience valuing donations for the EcoGift Program will be familiar with most of the IRS requirements. AFCCs' [Appraisal Fact Sheet](#) illuminates the differences between Canadian and U.S. requirements.

U.S. tax deductions from a gift of a conservation easement to a Canadian charity

A donation of a conservation easement to a Canadian charity by a US taxpayer may be deductible against Canadian-source income on his U.S. tax return. It is essential to follow the Internal Revenue Code guidelines for *qualified conservation contributions*, including qualified conservation easements. Even though the land is in Canada and the donee is a Canadian charity, the conservation easement must meet the same criteria for a gift of a conservation easement to a U.S. charity on land in the U.S., including terms of easement and nature of recipient organization, to ensure deductibility on your U.S. tax return.

Income tax deductions against the donor's U.S. income are only possible if the donee is a U.S.-based charity. Although a Canadian charity may be recognized by the IRS as a publicly-supported charity, such recognition is not sufficient because the organization is not based in the U.S. Gifts to such organizations are not deductible against U.S.-source income.

IRS recognition of a Canadian land trust as a foreign Publicly-Supported Charity

Under a tax treaty between the U.S. and Canada, gifts to Canadian charities by U.S. taxpayers may provide a U.S. income tax deduction on Canadian-source income (but not U.S.-source income). The level of deductibility increases if the Canadian organization is recognized by the IRS as a *publicly-supported charity*. If the donee is recognized by the IRS as a *publicly-supported charity*, the deduction limit for gifts of cash increases to 50% of the donor's adjusted gross income, and 30% for gifts of land or conservation easements, or appreciated securities. Without such recognition, deduction limits for cash would generally be reduced to 30% and for land and appreciated securities to 20%.

Gifts of conservation easements to Canadian land trusts that have not been recognized by the IRS are not deductible because they do not meet U.S. tax law requirements for *qualified conservation contributions*. For information on securing IRS recognition, refer to AFCCs' fact sheet on this topic.

In 2015, Congress made an enhanced tax incentive for conservation easements permanent and retroactive. The deduction ceiling was raised from 30% to 50% for qualified conservation easements given to publicly-supported charities, and the unused benefit can be carried forward for fifteen years, rather than the usual five years.

U.S. estate tax benefits

Neither Canada nor any of its provinces levy estate or gift taxes. The capital gains tax is essentially the equivalent as it is levied on any type of disposition of land, including a bequest to any person or entity other than a spouse.

On the other hand, it is possible to reduce U.S. estate tax liability through a charitable gift of land or conservation easement. The value of the gift may be exempted from calculation of the overall value of the donor's estate. Donating a conservation easement that reduces the property's value can make the difference between land passing to the next generation versus the heirs being forced to sell the property to pay estate taxes.

State and U.S. federal estate tax liability may be an issue for certain estates that exceed federal and state thresholds. This liability is due and payable within nine months of death. A charitable gift of land that is part of the estate (or an interest in that land) reduces the estate's value by an amount equal to the value of the gift, thereby reducing the potential estate tax liability. This reduction may be significant if the value of the gift is large, or the donation reduces the total value of the estate below the threshold that triggers estate tax liability.

As described in the section on income tax benefits above, a Canadian donee must be recognized as a publicly-supported charity for estate tax benefits to be realized in the U.S. by a gift of a conservation easement. And the conservation easement must comply with all relevant U.S. tax law criteria. Failure on either of these points can lead to rejection of the deduction and estate tax problems for the donor's heirs. If the IRS were to reject the validity of the donated easement, the easement conserved land would be valued for estate tax purposes as if there are no restrictions in place

Making a gift to a U.S. publicly-supported charity eliminates the risks associated with donating to a Canadian donee that the IRS might argue is not a publicly-supported charity. However, the requirements related to the content of the easement document are the same.

U.S. state and federal gift taxes

Gifts of cash or real property interests exceeding certain values may trigger gift tax liability for the donor. Properly sequenced and managed conservation transactions avoid this tax. Examples of actions that can incur the gift tax include granting a

conservation easement to a charity that is not deemed to be a publicly-supported charity, or if the easement conditions and wording do not meet U.S. tax law requirements as a qualified conservation contribution, as discussed above.

Unique aspects of Cross-Border Conservation donations

Although almost all the steps involved in protecting your Canadian property are similar to those required to complete a comparable donation in the U.S., there are a few that are unique to the cross-border process. Below you will find a list of those which are unique. AFCC assists with all these steps when it is receiving a conservation gift.

For gifts of both fee title and conservation easements:

- Obtain an appraisal of the donated property that meets both Canadian and U.S. appraisal requirements
- Secure a “certificate of compliance for a non-resident disposition of land in Canada” from Canada Revenue Agency (CRA)
- Apply to CRA for a reduction or elimination of Canadian capital gains tax on the gift through the election described above.
- File both a Canadian and U.S. income tax return and associated documents.
- Meet provincial requirements, if any, regarding ownership by a U.S. entity, if the donee will be AFCC. (Note: AFCC has already received gifts in Nova Scotia, New Brunswick, Ontario, Manitoba and British Columbia.)

For conservation easements only:

- As explained in the prior section on tax benefits, if a Canadian entity is going to be the donee, obtaining IRS recognition of that organization as a publicly-supported charity.
- Ensure that conservation easement language satisfies Canadian and Provincial conservation easement and tax law, and U.S. tax law for qualified conservation contributions.

For more complete information, please refer to AFCCs’ Advisor Fact Sheet available at <https://conservecanada.org>.

Time and expense

Competent tax and legal advisors are essential because poorly executed gifts can result in the loss of significant tax savings, a hefty and unanticipated Canadian capital gains tax on the gift, or unexpected and unmanageable estate tax liabilities.

You should not even consider making a cross-border gift without professional assistance. There are still relatively few lawyers and accountants who have cross-border expertise. Contact AFCC for possible referrals.

All AFCCs' transactions involve a qualified Canadian partner. The partner is responsible for determining if a property is a conservation priority, and for much of the work connected to the gift. There may be costs associated with the partner's crucial participation. In addition, you should expect that AFCC and/or the Canadian partner will require you to provide funds for land management and stewardship.

Permanently protecting your treasured property in the U.S. or Canada in a way that generates defensible tax benefits requires dedication and a measure of patience, in addition to paid professional assistance. The bi-national nature of cross-border conservation and the additional steps outlined above will increase costs and time required to move a donation from conception to closing.

You will find descriptions of the steps and costs associated with the cross-border land conservation donation process at <https://conservecanada.org> .

Resources

AFCC and its partners have built a growing library of resources for donors, land trusts, appraisers and professional advisors to assist with cross-border conservation gifts. Some of those resources are available in the Resources section of AFCCs' website.

For additional information: Get in touch with AFCC!

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