



American Friends of Canadian Conservation

Cross-Border Conservation Gifts: Fact Sheet for Land Conservation Organizations

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Purpose of this fact sheet

More and more Canadian land conservation organizations are working with U.S. taxpayers to protect important conservation land they own in Canada. Gifts of fee simple title, conservation easements and other partial interests in Canadian land owned by U.S. taxpayers are known as “cross-border conservation.”

This fact sheet, produced by American Friends of Canadian Conservation (AFCC), gives land conservation organizations an overview of the important elements of cross-border conservation gifts. Helping Canadian entities to successfully complete these transactions, and protect more of Canada’s natural legacy, is one of the ways AFCC accomplishes its mission of protecting Canada’s natural heritage.

The fact sheet also describes AFCC and explains how its partnerships make it possible for Canadian organizations to accomplish their strategic conservation objectives in geographies where U.S. taxpayers own key properties.

To learn more about cross-border conservation, download *Save Some Green: a handbook for U.S. taxpayers who own land in Canada* from AFCC’s website, <https://conservecanada.org>. This fact sheet summarizes the key points in *Save Some Green* that are essential for Canadian organizations to know.

This fact sheet is not intended to provide legal, financial, or other advice. Land conservation organizations and their donors must seek independent, professional advice in both the U.S. and Canada.

Unique Aspects of Cross-Border Conservation Gifts

To complete cross-border conservation transactions, land conservation organizations need to have a basic understanding of both Canadian and U.S. tax law. This fact sheet is only an overview. The publication, *Save Some Green*, is the best resource for learning how the tax laws of our two countries intersect, and what that means for conserving priority properties owned by U.S. taxpayers.

Cross-border transactions also require the capacity to manage the tasks associated with processing donations of land, and partial interests in land such as easements or covenants, and potentially split receipt donations (known as “bargain sales” in the U.S.). Although most of the tasks are the same as those associated with a comparable donation involving a Canadian taxpayer, cross-border gifts present some unique challenges, such as:

- ✓ If a U.S. donor wants his donation to be tax deductible against U.S. income, the donor and the Canadian entity will need to partner with a U.S. charity, such as AFCC. For a gift to be deductible in the U.S. it must be made to a U.S.-based organization.

- ✓ Gifts to Canadian charities and government agencies may provide income tax deductions on the donor's U.S. tax return but only against Canadian-source income, as permitted under the income tax treaty between Canada and the U.S.
- ✓ Income, estate and gift tax consequences of a gift of land, remainder interest or conservation easement (including servitudes and conservation covenants) vary depending on the charitable status of the donee (organization receiving the gift), the nationality of the donee and on the nature and type of gift.
- ✓ Canada Revenue Agency (CRA) deems there to be capital gains produced by gifts of land and interests in Canadian land (i.e. conservation easements and remainder interests) even though no money changes hands. Donors will be liable for capital gains tax, just as if the property or easement had been sold. If the property has appreciated substantially since the donor acquired it, the capital gains tax can be substantial. This reality will likely be unwelcome news to U.S. donors and their advisors.
 - If the donee is a Canadian charity, government agency or a U.S. organization recognized in Canada as a *prescribed donee*, the U.S. donor may be able to reduce or eliminate the tax on capital gains on the gift itself, through a special election under the Canadian Income Tax Act. AFCC is an approved U.S. charity and is also a Canadian *prescribed donee*.
 - Gifts to a U.S. charity (i.e. which is not a *prescribed donee*) will result in full capital gains and usually capital gains tax on the gift, which the donor may not be able to reduce or avoid.
 - A donor whose primary financial objective is to avoid paying Canadian capital gains taxes (and is not concerned about obtaining a U.S. income tax benefit) could make their gift through the Ecological Gifts Program (EcoGift), provided the Donee is a registered Canadian charity, qualified to receive EcoGifts, and the property meets the program's ecological criteria.
 - Because an EcoGift also can produce a Canadian tax credit, it may be a good approach for U.S. taxpayers who have other property to sell or transfer. The credit can be used to reduce or offset the capital gains taxes due on those other dispositions.
 - As non-residents, U.S. donors must obtain special clearance from the Canada Revenue Agency prior to making a donation of land, remainder interest, or conservation easement. Otherwise, the *donee* may be liable to pay potentially significant withholding taxes from capital gains.

Potential donors of land or partial interests must seek independent, professional tax, legal and estate planning advice from specialists in Canada who understand the interaction between U.S. and Canadian requirements.

- ✓ Whether given to a U.S. or Canadian charity, conservation easements and gifts of remainder interest (lifetime or testamentary gifts) must meet specific U.S. tax law

requirements for *qualified conservation contributions* (discussed below) to avoid gift taxes and significant estate tax problems for the donor, and to ensure eligibility for certain income tax benefits. Conservation easements must also meet the requirements of the respective jurisdiction/province in which the conserved property is located.

- ✓ Canadian entities that wish to accept gifts of conservation easements from U.S. taxpayers should apply to the U.S. Internal Revenue Service (IRS) for recognition as a *publicly-supported charity*. It is important to secure that status before accepting such gifts - even if the gift is first made to a U.S. organization and subsequently transferred to the Canadian partner. Without that designation, the easement donor could face U.S. gift taxes and significant estate tax problems because the gift was not a *qualified conservation contribution*. In that event, the donor's estate may be valued as if there are no restrictions in place on the protected property; potentially triggering an estate tax problem for the donor's heirs.
- ✓ IRS recognition as a *publicly-supported charity* also increases the deduction limits against the U.S. donor's Canadian-source income (if any) for any gifts of land, remainder interest, conservation easement and for cash and securities to the Canadian charity. The income tax treaty between Canada and the U.S. recognizes Canadian charities as equivalent to US 501(c)(3) organizations, but by default assumes them to be private foundations and therefore not a "qualified organization" under Section 170(h) of the Internal Revenue Code for donation of a conservation easement. (Refer to AFCC's fact sheet on securing IRS recognition in the Resources section of <https://conservecanada.org>)
- ✓ Testamentary gifts (i.e. donated through the donor's will) of cash, land and conservation easements to Canadian charities may provide a U.S. estate tax deduction like a testamentary gift to a U.S. charity.
- ✓ The tax rules for "bargain sales" (split-receipt donations) are somewhat different in the U.S. and Canada.
- ✓ Appraisals should meet both U.S. and Canadian requirements (as outlined in the Ecological Gifts Program), including timing requirements, regardless of whether the donee is American or Canadian. Both CRA and the IRS will have some role in the gift process. U.S. tax law contains specific appraisal requirements for all conservation gifts¹. Recent amendments to U.S. tax law have increased the penalties for overstated appraisals and tightened requirements for appraisals. (For more information see AFCC's *Fact Sheet on Appraisals* at <https://conservecanada.org>)
- ✓ A U.S. donor is required to file income tax returns and forms in both Canada and the U.S.
- ✓ AFCC protects priority conservation properties owned by U.S. taxpayers by using its binational preferred tax status to produce valuable bi-national tax incentives that can make cross-border transaction financially feasible. All AFCC's work is done through collaborations with Canadian entities.

- *American Friends of Canadian Conservation* is a U.S. 501(c) (3) publicly-supported charity created in 2006 by a coalition of conservation professionals from both countries to overcome the obstacles to cross-border conservation gifts.
- The Canadian government recognizes AFCC as a prescribed donee which means that gifts of ecologically significant Canadian land are effectively not subject to Canadian capital gains tax. Donors make a special election on their Canadian tax returns, designating their adjusted cost base as the disposition value.
- As a U.S. charity, AFCC must ensure it does not act as an “agent” or “flow-through” for its Canadian partners or it could lose its invaluable U.S. charitable status. AFCC is not an eligible Ecological Gift recipient because it is not a Canadian charity. Therefore, the donor must choose whether the U.S. tax incentive is more valuable than the tax credit available for an EcoGift.
- Each province or territory will have requirements that must be met before the U.S. organization will be allowed to hold land or a conservation easement. To date, AFCC has completed gifts in six provinces. (BC, MB, ON, PEI, NB, NS)
- ✓ Consequences for not completing transactions properly can range from forfeiting significant tax savings for the donor, or a hefty Canadian capital gains tax on the gift for the donee, to unanticipated gift and/or estate tax problems for the donor.

Key Steps for Cross-Border Conservation Gifts

In addition to standard procedures for typical conservation gifts from Canadian donors, conservation organizations and U.S. landowners need to complete the following steps for cross-border gifts:

1. If the gift will be made to a Canadian donee, the donee should be recognized by the IRS as a *publicly-supported* charity (required for conservation easement gifts; advisable for fee simple donations). See AFCC’s *Factsheet for Canadian Charities Applying for Publicly-Supported Charity Status in the U.S.* available at <https://conservecanada.org>.

Such recognition does **not** mean the organization is a U.S. charity that can provide income tax deductions against U.S.-source income— this is only possible when the gift is received by a U.S.-based charity like AFCC.

(Note: To comply with its U.S. obligations, AFCC requires that Canadian registered charities secure IRS recognition prior to, or as part of, partnering on conservation easement gifts in order to address IRS regulations which permit easement transfers only to a “qualified donee”.)

2. If the gift will be made to AFCC, complete any steps necessary for a U.S. charity to secure permission to hold land or conservation easements in the province/territory where the land to be protected is located.

3. If the gift will be a conservation easement, prepare a baseline study using a format that meets all U.S. tax code requirements under Internal Revenue Code Section 170(h) requirements for *qualified conservation contributions*.
4. Complete title work.
 - a. For conservation easements, all mortgages must be removed or subordinated to the easement's terms so that if the lender forecloses on the mortgage, the easement remains completely enforceable, as required by U.S. tax law.
 - b. Verify that mineral rights have not been severed from the ownership of the surface. If they have, U.S. tax law requires a letter from a qualified geologist indicating that the probability of surface mining occurring on the property is "so remote as to be negligible."
5. Draft conservation easement to comply with local easement and/or tax legislation requirements, and requirements under U.S. tax law. AFCC has templates for the provinces where it holds easements. They are available to AFCC's paying partners.
 - a. The requirements for *qualified conservation contributions* can be found in Section 170(h) of the Internal Revenue Code and Treasury Regulations 170A(14). It would be prudent for all cross-border conservation easements, whether donated to a Canadian entity or U.S. conservation partner, to meet these requirements (for the reasons discussed above)
 - b. Specific IRS requirements include:
 - the recipient of the gift must be a "qualified donee" which includes being recognized as a *publicly-supported charity*;
 - the easement must be perpetual
 - the conservation purposes listed in the easement must meet the "conservation purposes test"
 - Language must be included about inconsistent use, transferability of the easement to other donees, mineral interests, donor notice regarding exercise of reserved rights, enforceability, the right to enter the property for compliance monitoring, requirements for restoration, extinguishment of the easement, and proceeds of disposition in case of extinguishment
 - These requirements demand specific wording in the easement document and additional steps not typically required for conservation easements in Canada.
6. Obtain an appraisal that meets Canadian and U.S. appraisal requirements even if the proposed donee is a Canadian entity. AFCC is a U.S. charity and its donors are interested in U.S. tax benefits therefore the appraisal must meet U.S. and Canadian appraisal requirements for donations. As mentioned previously, in the case of conservation easement donations, the appraisal should address U.S. guidelines for *qualified conservation contributions* even if the gift is made to a Canadian entity.

- a. Because of potential scrutiny by both the U.S. and Canadian governments of cross-border gifts, appraisals should meet the key appraisal requirements of the Ecological Gifts Program (even if the gift is not going through the Ecological Gifts program).
 - b. U.S. tax law provides specific guidance and requirements for appraisals (for further information, see *Additional resources* below).
 - c. To meet U.S. tax law requirements, the effective date of the appraisal can be no more than 60 days before the donation date and no later than the actual date of registration of the gift.
 - d. Plan to have the appraisal completed and then updated to meet both Canadian and U.S. appraisal timing requirements.
 - e. If the donor wants the gift to be deductible against U.S. income, the appraisal must be commissioned by the donor, not the donee.
 - f. U.S. tax law prohibits certain fee arrangements including fees based on the value of the donor's tax deduction or on a percentage of the appraised value.
 - g. Amendments to U.S. tax law in 2006 increased the penalties (for appraisers, donees and donors) for overstated appraisals, and tightened requirements for appraisals.
7. If the donee is a Canadian charity or government agency, qualified as an Ecological Gifts recipient, and if the gift meets program requirements, it should secure Ecological Gift approval, appraisal review and complete all other steps required by the EcoGift program. (Note: Gifts to AFCC do **not** go through the Eco-Gifts process. Eco-gifts may only be granted to Canadian charities. Donors to AFCC eliminate capital gains tax on their gift through a different election under the Income Tax Act.)
 8. Ensure that the donor has a Canadian Social Insurance Number or a Temporary Tax Number (as a result of filing a previous tax return). If not, the donor will need to get a Tax Identification Number.
 9. Donor works with a Canadian accountant, **with non-resident experience**, to apply for Certificate of Compliance for Non-Resident Disposition of Real Estate (required for non-resident dispositions of real property in Canada). A fact sheet on T2062 Application Steps is available at <https://conservecanada.org>.
 - a. Donee provides a Letter of Undertaking for inclusion in the application indicating: it is a registered charity or prescribed donee; will accept the conservation gift; and issue a Canadian charitable tax receipt.
 - b. Include a copy of the conservation easement document (if applicable) to be signed after the certificate is issued.
 - c. Pay capital gains tax or provide evidence that there is no tax owing. The letter discussed above should suffice as 'security' thereby avoiding the need for upfront payment of estimated capital gains.
 10. Receive Certificate of Compliance from the Minister (T2068) prior to closing. If the donee accepts the real property from a non-resident without the Certificate, it may

be liable for payment of the Canadian capital gains taxes arising from the disposition. Therefore, donees should ensure that Certificates are issued prior to any deed transfer or execution/registration of conservation easement.

11. Donee provides a Charitable Donation Receipt stating the disposition value. U.S. donees should draft a letter that includes key information required for a Canadian tax receipt under Section 3501 of the Income Tax Act. (AFCC provides a Canadian tax receipt because it is a prescribed donee.)
12. AFCC provides a U.S. Gift Acknowledgement, that conforms with IRS guidelines, as this is the U.S. form of a tax receipt. For cross-border conservation gifts, it would be prudent even for a Canadian donee to provide such a letter to satisfy Internal Revenue Service requirements.
 - a. Contents of the letter should include: verification that the donee is a charity; it is recognized as a *publicly-supported charity* by the Internal Revenue Service (if true); its U.S. tax identification number; a description of the gift; and affirmation the donee did not provide goods or services in consideration for the gift.
13. Donor files Canadian Tax Return with the assistance of a Canadian accountant with experience in non-resident taxation.
 - a. Attach Canadian Tax Receipt (or letter from U.S. donee from step 10 above). See CRA website for sample tax receipts and required contents www.cra-arc.gc.ca
 - b. Final payment of capital gains tax (if taxes owing) or declaration attached claiming an exemption or reduction in capital gains tax through the Income Tax Act election under Section 118(1), or through the Ecological Gifts Program.
 - c. If the gift is an Ecological Gift, the donor also includes the Certificate for Donation of Ecologically Sensitive Land, the Certificate of Fair Market Value by Environment Canada, and the appraisal.
14. Donor files U.S. Income Tax Return. AFCC works closely with donors and their U.S. advisors to ensure all documents needed from the donee are complete and delivered in a timely manner.
 - a. IRS requires that the full appraisal be attached for gifts over \$500,000 in value. However, experts in cross-border donations recommend that the full appraisal be included irrespective of the size of the gift.
 - b. Donee gift acknowledgement letter (experts in cross-border donations recommend that it be included with the return in addition to being kept by the donor).

Overview of Potential Taxation Outcomes

The income, gift and estate tax implications of cross-border conservation gifts of land, conservation easements or remainder interests, depend on the nationality and tax status of the “donee” and the nature of the gift. The following chart summarizes some of the key potential tax outcomes for cross-border gifts with four types of donees.

Donee	Tax Advantages	Tax Disadvantages
Canadian charity recognized by the IRS as a <i>publicly-supported charity</i> , not a private foundation (qualified donee)	Opportunity to reduce/eliminate capital gains tax (Canada) • through Ecological Gifts Program or • through election to reduce “disposition” value under Section 118(1) of the Income Tax Act Income tax deduction for Canadian-source income on U.S. tax return • deduction at highest level available (50% of adjusted gross income for easements or cash, 30% for land or securities) U.S. estate tax benefit for outright or testamentary gifts of conservation easements or land No U.S. gift tax on gifts of land, conservation easements	No income tax deduction against U.S. income (only gifts to a <u>U.S.-based</u> charity can generate a deduction of this type)
Other Canadian charities	Opportunity to reduce /eliminate capital gains tax (Canada) • through Ecological Gifts Program or • through election to reduce “disposition” value under Section 118(1) of the Income Tax Act Income tax deduction for Canadian-source income on U.S. tax return • deduction at lower level (30% for cash, 20% for securities or land) U.S. estate tax benefit (for outright or testamentary gifts of land only) No U.S. gift tax on gifts of land	No income tax deduction against U.S. income (must be a <u>U.S.-based</u> charity) Potential U.S. gift tax on conservation easement or remainder interest (gift would not qualify as a “qualified conservation contribution” because donee is not a “qualified donee”) Potential U.S. estate tax issues on outright or testamentary gift of conservation easement (easement may be ignored in assessing value of the land for estate tax purposes creating large estate tax)
U.S. charity that is also a recognized as a “prescribed donee” in Canada (AFCC is currently the only prescribed donee working with land trusts on cross-border projects)	Income tax deduction against U.S. income deductible at highest level (50% for easements or cash, 30% for land or securities) Opportunity to reduce /eliminate Canadian capital gains tax • through election to reduce “disposition” value under Section 118(1) of the Income Tax Act U.S. estate tax benefit for outright or testamentary gifts of conservation easements or land No U.S. gift tax on gifts of land, conservation easement <i>Best scenario for tax sensitive donors because it is the only one that can offer U.S. income tax deduction and protection from Canadian capital gains</i>	U.S. charity will have to register to hold conservation easements in some provinces. Could even require changing provincial law. No benefit against Canadian-source income
Other U.S. charity	Income tax deduction against U.S. income • deduction at highest level available (50% of adjusted gross income for easements or cash, 30% for land or securities) U.S. estate tax benefit for outright or testamentary gifts of conservation easements or land No U.S. gift tax on gifts of land, conservation easement or cash	Triggers Canadian capital gains tax. No option to reduce/eliminate this tax through Ecological Gifts or Canadian Income Tax Act Section 118 Election. A U.S. charity may not be eligible to hold conservation easements in some provinces at present No benefit against Canadian-source income

Note: This chart summarizes and simplifies complex tax scenarios for illustration purposes. Land conservation organizations and landowners must seek appropriate professional advice. The chart assumes that U.S. donees will have taken steps necessary to be

recognized as “qualified donees” in the U.S. It further assumes that all cross-border conservation easements will meet U.S. tax law requirements for *qualified conservation contributions* as discussed elsewhere in this document.

Summary

Conservation gifts of priority Canadian properties by U.S. taxpayers are complex and generally more costly due to the necessity of addressing requirements of both countries’ tax laws, and possibly also of involving provincial/territorial agencies.

Fortunately, there is a growing network of Canadian conservation organization and professional advisors with experience in cross-border transactions.

AFCC is an excellent resource having completed 32 donations of both fee simple title and partial interest in six provinces as of the end of 2022. It has the unique expertise and experience to assist Canadian entities and the conservation-oriented U.S. taxpayers who own important properties.

AFCC’s transactions permanently protect U.S. owned properties that could otherwise been lost to development. See <https://conservecanada.org> for detailed information on how to partner with AFCC, including fact sheets for donors, their professional advisors and appraisers, and additional information for land trust partners.

For more information, contact Robert Orland, Director of Conservation at robert.orland@conservecanada.org, or 519-241-4022.

Additional Resources

Reference Materials

At www.conservecanada.org

- *American Friends of Canadian Conservation: Conservation Lands Program*
- *American Friends of Canadian Land Trusts: Fact Sheet for Donor Advisors*
- *American Friends of Canadian Land Trusts: Applying for Public Charity Status,*
- *American Friends of Canadian Land Trusts: Fact Sheet for Appraisers*

Key Statutes and Regulations

Internal Revenue Service Internal Revenue Code Section 170(h)

U.S. Treasury Regulations 1.170A-14

Income Tax Act (Canada) Sections 115, 116, 118(1)

Income Tax Act (Canada) Regulations 3504

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Qualified Appraisal/Appraiser Requirements (U.S.) – Appraisal requirements are outlined in Internal Revenue Code Sections Section 170(f)(4), Section 170(f)(11), and Section 170(h) and U.S. Treasury Regulations 1.170A-12, 1.170A-13, and 1.170A-14. Revisions made to the Internal Revenue Code in August 2006 (under the Pension Protection Act of 2006 (H.R. 4) Section 1219 and Section 170(f)(11), and new Section 6695A) redefine who is a “qualified appraiser” and gives the Internal Revenue Service the power to issue new regulations on appraiser qualifications. See Notice 2006-96 for guidance regarding appraisal requirements until final changes are made to the Internal Revenue Code Section 170(f)(11), Section 6695 of the Internal Revenue Code, and Section 1219 of the Pension Protection Act of 2006 and amended regulations under Section 170(f)(11) and 1.170A – 13(c)(3) and (5).