



American Friends of Canadian Conservation

Cross-Border Conservation Gifts by U.S. Taxpayers: Fact Sheet for Donor Advisors

Adapted from the original created by Bonnie Sutherland
Nova Scotia Nature Trust - 2006



NOVA SCOTIA NATURE TRUST

Purpose of this Fact Sheet

Canada's diverse scenic landscapes and waters have drawn Americans north for recreation and investment for generations. As a result, Americans own property in many of Canada's most ecologically significant and internationally beloved areas. And a substantial number of Canadians live and work in the U.S. making them U.S. taxpayers. Canadian entities that conserve their country's important natural resources have long sought opportunities to partner with U.S. taxpayers who own priority lands in Canada. And U.S. taxpayers who are motivated to protect their Canadian properties have donated land or interests in their land (such as conservation easements, servitudes or covenants) directly to Canadian conservation organizations.

The purpose of this fact sheet is to provide information to tax and legal professionals who are advising conservation-oriented U.S. taxpayers who own land in Canada. It highlights key issues, provides potentially useful resource and reference materials (see *Additional Resources* at the end of the document) and introduces American Friends of Canadian Conservation (AFCC), a U.S. charity created to facilitate "cross border" gifts – referring to transactions involving a U.S. taxpayer and Canadian property. Visit <https://conservecanada.org> for more information about our U.S. 501(c)(3) publicly-supported charity, which also recognized as a "prescribed donee" in Canada.

AFCC's bi-national preferred tax makes it financially attractive for U.S. taxpayers to protect their Canadian land. To date, AFCC has worked with Canadian conservation organizations in six provinces to permanently preserve over 30 priority properties with a combined appraised value of nearly \$20M USD.

The publication Save Some Green: a handbook for U.S. taxpayers who own land in Canada provides more complete information and explanation of all the topics covered in this Fact Sheet. It can be downloaded from the Resources page of <https://conservecanada.org>. Print copies are available upon request.

This document is not intended to provide legal, financial, or other advice, or to provide a comprehensive documentation of all issues relevant to cross-border giving.

Unique Aspects of Cross-Border Conservation Gifts

Gifts of Canadian land, conservation easements and remainder interests by U.S. taxpayers need to comply with both Canadian and U.S. tax laws. Accordingly, there are bi-national considerations when the landowner and land conservation organization are structuring a conservation donation, or sale. It essential that landowner advisors are familiar with key aspects of the tax treaty between Canada and the U.S. Here are some key considerations to evaluate:

Tax Implications

- ✓ Except in the specific, limited, circumstances described below, U.S. donors will not be eligible for tax deduction against U.S. income for a charitable gift to a Canadian charity. The beneficial tax outcome in the U.S. is only possible if the donor makes a conservation gift to a U.S. charity, such as AFCC. Accordingly, donors who wish to make a cross-border gift directly to a Canadian land trust or government entity forego U.S. income tax benefits.

- ✓ Depending on how the cross-border conservation gift is structured, there may be two Canadian and one U.S. government agencies involved in administering and reviewing the donation: the Canada Revenue Agency (CRA), the Ecological Gifts Program of Environment Canada (EcoGifts), and the Internal Revenue Service of the U.S. Department of Treasury (IRS). (Note: Gifts to AFCC do not qualify as Ecological Gifts therefore CRA is the only Canadian agency involved in its transactions.)
- ✓ Income, estate and gift tax consequences of a gift of land, remainder interest or conservation easement (used in this document to refer also to servitudes and conservation covenants) vary depending on the status of the Canadian organization receiving the gift (the donee), and on the nature and type of gift.
- ✓ When land and interests in land are donated by the U.S. taxpayer directly to either a U.S. or Canadian charity, CRA “deems” there to be a capital gain, with potential capital gains tax liability, as though the land or interest in land had been sold. Owners of appreciated property often find this tax liability to be a serious obstacle to making a conservation gift. However, this liability can be reduced or eliminated if:
 - the property is ecologically significant, and the donee is an eligible Ecological Gift Program recipient. No Canadian capital gains are triggered for donations through the Ecological Gifts Program¹.
 - the donee is a Canadian charity or government agency, or a U.S. organization such as AFCC that has been granted *prescribed donee*² status in Canada. In the case of a gift to a prescribed donee, the donor makes a special election to reduce the capital gain on the gift under the Canadian Income Tax Act³. (Note: Gifts to U.S. charities that are not *prescribed donees* are not eligible for this election and CRA will deem that a capital gain has been recognized by the donor and therefore the tax will likely be unavoidable.)
- ✓ If the donor has Canadian-source income, gifts to Canadian charities may provide income tax deductions against Canadian-source income on the donor’s U.S. tax return, as permitted under the income tax treaty between Canada and the U.S.⁴.
- ✓ Conservation gifts to a U.S. charity, such as AFCC, can provide a tax benefit against U.S.-source income.
 - Under U.S. tax law, the fair market value of conservation gifts may be deductible⁵ against a portion of the donor’s adjusted gross income. If the donor has insufficient income to utilize the full donation in the year of the gift, the deduction may be carried forward and used over subsequent years. The length of the carry forward depends on the type of donation (currently, 5 years for fee property⁶ and 15 years for conservation easements⁷).
 - In order to receive a charitable tax deduction for a conservation gift, the donor’s income tax return must include a copy of an appraisal completed to specific IRS standards (see below) and an IRS Form 8283 “Non-cash Charitable Contribution” Appraisal Summary⁸ signed by the donee and appraiser.
- ✓ Donated conservation easements and gifts of remainder interest, lifetime or testamentary gifts must meet specific U.S. tax law requirements for “qualified conservation contributions⁹” (see

discussion below) to avoid gift taxes and significant estate tax problems and to ensure eligibility for certain income tax benefits¹⁰, whether given to a U.S. or Canadian charity. Conservation easements must also meet the requirements of the respective jurisdiction in which the easement is held.

- Canadian entities that wish to accept gifts of conservation easements and remainder interests from U.S. taxpayers should qualify with the IRS as a *publicly-supported charity*¹¹ to demonstrate they are not a *private foundation* under U.S. tax code. This step should be completed before accepting such gifts, even if the gift is first made to a U.S. organization such as AFCC, then transferred to the Canadian organization. If the Canadian organization has not been deemed a publicly-supported charity, the donor could face gift taxes and estate tax problems because the donee does not meet U.S. tax law criteria for *qualified conservation contributions*. Even though an enforceable easement has been donated, the donor's estate could be taxed as if there are no restrictions on the land, resulting in an unanticipated estate tax burden for the heirs¹². For more information on securing recognition as a publicly-supported foreign charity, see the fact sheet on the topic at <https://conservecanada.org>.
- IRS recognition as a *publicly-supported charity* also increases the deduction limits applicable for the donor's Canadian-source income for any gifts of land, remainder interest, conservation easement, cash and appreciated securities to the Canadian charity.
- ✓ Testamentary gifts (i.e. through a will) of cash, land and conservation easements to Canadian charities may provide a U.S. estate tax deduction similar to a testamentary gift to a U.S. charity¹³.
- ✓ The tax rules for "bargain sales", known in Canada as "split-receipt donations"¹⁴ are different in the U.S. and Canada. The differences are numerous and complex and therefore beyond the scope of this fact sheet.

Steps and Procedures

- ✓ U.S. donors must obtain special clearance from the Canada Revenue Agency prior to donating land, remainder interest, or conservation easement¹⁵ by completing a "Request by non-resident for a Certificate of Compliance related to the disposition of Taxable Canadian Property". If this clearance is not obtained, then Canadian capital gains tax must be withheld when the property or interest is transferred, or the *donee* may be liable for the withholding.
- ✓ 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. In all cases, both tax authorities will have some role in the gift process.
- ✓ U.S. tax law contains specific appraisal requirements for all conservation gifts¹⁶. 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 *Appraisal Fact Sheet*, available on the Resources page at <https://conservecanada.org>).

- ✓ Donors are required to file income tax returns and forms (including IRS Form 8283 for noncash contributions) in both Canada and the U.S. regardless of whether the donee is American or Canadian.
- ✓ Property tax consequences for donating conservation easements vary significantly across Canada. Some provinces provide incentives for conservation such as tax reductions or rebates, while others impose potential tax penalties or even increase property taxes. Be sure to investigate the statutes and regulations that will apply to the specific property.
- ✓ Canadian land conservation organizations and American landowners may want to consider a collaboration with AFCC to facilitate important conservation gifts. It can offer potential income tax benefits in the U.S. and remove or minimize the threat of Canadian capital gains taxes on the gift.
- ✓ Other U.S. land trusts could conceivably accept cross border gifts but would only be able to offer the U.S. income tax benefits. Other considerations for a U.S. charity that is considering a partnership to protect land in Canada:
 - The organization must seek professional advice and ensure the IRS will not deem that it is acting as an “agent” or “flow-through” for the Canadian land trust. Either could result in the U.S. organization losing its charitable status.
 - U.S. organizations may need to take steps to be legally permitted to hold land or conservation easements in the specific province or territory where the property is located.
- ✓ Consequences for not completing transactions properly could range from forfeiting significant tax savings, or a hefty Canadian capital gains tax on the gift for the donee, to unanticipated gift and/or estate tax problems for the donor.

Impact of Donee on Taxation Outcomes

The income, gift, and estate tax implications of cross-border conservation gifts of land, conservation easements and remainder interests depend on the donee and the nature of the gift. The following simplified scenarios summarize some of the key potential tax outcomes for cross-border gifts with each of four types of donees.

Scenario 1: Donee is a Canadian charitable organization and recognized by the IRS as a *publicly-supported charity* (see above). There is no U.S. federal or state income tax deduction/benefit against U.S. income; however, there is a potential tax deduction against Canadian-source income. Under rules in effect in early 2013, the deduction limits are 30% of adjusted gross income for gifts of land, 50% for gifts of cash, and 50% for conservation easements. There is potential Canadian capital gains tax liability, even though the real property interest is donated. However, the donor has two possible options to reduce or eliminate the Canadian capital gains tax on the gift:

- a) If the donee is a Canadian charity or government agency (or *prescribed donee*, such as AFCC), under Section 118 of the Canadian Income Tax Act, a donor may reduce the *deemed disposition value* to anywhere between the adjusted cost base and the fair market value, thereby reducing or eliminating the capital gain and associated tax.

- b) Capital gains tax on the gift may be eliminated by making the donation through the Canadian Ecological Gift Program (EcoGifts). The gift must be accepted by the federal Ecological Gifts Program and must be donated to Canadian charitable organization or government agency that is a certified EcoGift recipient.

It is important that the Canadian donee be recognized as a *publicly-supported charity* for the landowner/U.S. taxpayer to claim the deductions summarized above against his Canadian-source income. Deduction limits are reduced in the absence of classification by the IRS of public support status, as discussed in “Scenario 2”, below.

Scenario 1 avoids payment of Canadian capital gain taxes on the gift, provides a deduction against Canadian-source income but does not generate any tax deduction against U.S. income on the donor’s U.S. income tax return. Therefore, it is best suited to donors with little or no U.S. income or relatively high Canadian income, and who need to protect themselves and their heirs from both Canadian capital gains taxes and future U.S. gift and estate taxes.

Scenario 2: Donee is a Canadian charity that is not recognized as a *publicly-supported charity* by the IRS, and therefore automatically deemed by the IRS to be a private foundation under U.S. income tax regulations. There is no U.S. federal or state income tax deduction/benefit against U.S. income; however, there is a potential tax deduction against Canadian-source income. The donor’s deductions against Canadian-source income are reduced as compared to Scenario 1 (i.e. 20% for gifts of land, 30% for gifts of cash).

There is no U.S. income tax deduction available for conservation easements to a donee that is deemed to be a private foundation, and there is potential gift tax liability, plus a risk of estate tax problems. The reduced market value caused by the gift of a conservation easement and resultant perpetual restrictions on development may be completely ignored when the IRS values the donor’s estate.

The donor can reduce or eliminate the capital gains tax using the options listed in Scenario 1, above.

Scenario 2 avoids payment of Canadian capital gain taxes on the gift, provides a deduction - but at a lower rate than Scenario 1 - against Canadian-source income but does not generate any tax deduction on the donor’s U.S. income tax return. Therefore, it may work for donors with little or no U.S. income or relatively high Canadian income, who wish to avoid paying Canadian capital gains taxes on their gift. It may be the only option where the Canadian charity is either unable or unwilling to secure recognition by the IRS as a publicly supported charity. This scenario is best suited to gifts of fee title because of potential gift and estate tax issues related to gifts of conservation easements.

Scenario 3: Donee is a U.S. charity qualified under Section 170(h) of the Internal Revenue Code, but not recognized as a *prescribed donee*. The donor would receive an income tax deduction against U.S. income resulting from the gift to a qualified U.S. nonprofit. The donor would enjoy higher deduction limits than available under the previous scenarios - 50% for conservation easements or cash, and 30% for land or appreciated securities.

There will however be a deemed Canadian capital gain if the property value has appreciated thereby creating a potential Canadian tax liability – *even if the real property interest is donated*. There is no option to reduce or eliminate the capital gains tax.

Scenario 3 may make sense for donors with low exposure to Canadian capital gains tax liability, for example, if the property has a high adjusted cost base and/or the donor recently purchased it. U.S. income tax and estate benefits would both be available because the gift is made to a qualified U.S. conservation organization.

Scenario 4: Donee is a U.S. charity, such as AFCC, which is also recognized as a *prescribed donee* under the Canadian Income Tax Act.¹⁷ The gift would be an eligible income tax deduction against U.S. income resulting from the gift to a qualified U.S. nonprofit. The donor would enjoy higher deduction limits than available under the previous scenarios - 50% for conservation easements or cash, and 30% for land or appreciated securities.

In addition, Canadian capital gains on the gift could be reduced or eliminated through the Canadian Income Tax Act Section 118.1 election, described in Scenario 1(a).

Scenario 4 provides the ideal financial circumstances for donors with sufficient U.S. income to use a tax deduction and who are donating appreciated property. The combination of preferred tax status in both countries can have a significant effect on a donor's after-tax results because it offers the full complement of U.S. income and estate tax deductions. Donated conservation easements to this type of donee are fully considered in U.S. estate tax valuations.

Note: AFCC is the only organization with dual recognition as a U.S. charity and prescribed donee under the Canadian Income Tax Act regulations, whose mission is to partner with Canadian conservation entities, government agencies and First Nations.

Key Steps for Cross-Border Conservation Gifts

In addition to standard procedures that must be followed for conservation gifts in Canada made by Canadian donors, some or all the following additional steps may be required for cross-border conservation gifts:

1. If the donation will be a partial interest, the Canadian donee seeks recognition as a *qualified donee* by the IRS by securing recognition as a *publicly-supported charity*, rather than automatically being considered a private foundation. (Necessary for Scenario 1 above and if the gift is an easement granted to AFCC with the expectation that it will be transferred to a Canadian partner in the future.)

Explanation - For gifts from a U.S. taxpayer to a Canadian donee of partial interest in land (such as conservation easements or remainder interests), to be eligible for gift and estate tax deduction, and U.S. income tax deduction against Canadian-source income, such gifts must meet certain requirements for *qualified conservation contributions*. They must be: comprised of a qualified real property interest; made to a qualified organization; and made exclusively for qualified conservation purposes.

A qualified organization may be a public agency, or a Canadian registered charity that is recognized by the IRS as publicly supported 501(c)(3) organization, whose primary purposes include the conservation of land or natural resources. (See AFCC's fact sheet on securing such recognition for the process for becoming a qualified organization.)

The donee of a gift of a partial interest in land must be a "qualified organization", whether a Canadian or U.S. charity. Accordingly, Canadian land trusts that plan on accepting these types of gifts should become a "publicly-supported charity" in the U.S. to ensure the gift is tax-deductible in the U.S. against Canadian source income, protects the donor from gift tax, and ensures that the easement's effect on property value is considered in estate tax calculations upon the donor's death. Donations to a qualified organization also benefit the donor by increasing the level of deductibility of the gift against either the donor's U.S. or Canadian income.

Qualified gifts may only be transferred to qualified organizations, so even if the original easement gift was made to a U.S. charity such as AFCC, the Canadian organization must become a qualified donee before it receives a transfer of any cross-border conservation easement. Otherwise, the donor may lose his prior tax deduction, and the U.S. partner risks losing its charitable status.

2. U.S. charities that intend to accept gifts of Canadian land, as contemplated in Scenario 3, above should investigate whether they need permission to hold land or conservation easements in the province/territory where the land is located. This may involve such steps as getting listed with the local registry of joint stock companies, applying for recognition under provincial legislation, or amending provincial conservation easement legislation to allow a U.S. organization to hold a conservation easement in that jurisdiction.
3. Draft conservation easement documents to meet both provincial Canadian easement and/or tax legislation requirements, and requirements of U.S. Internal Revenue Code Section 170(h) for qualified conservation contributions.
 - a. Canadian land conservation organizations should be familiar with the requirements for *qualified conservation contributions* under Section 170(h) of the Internal Revenue Code and Treasury Regulations 1.170A-14. It would be prudent for all cross-border conservation easements, whether donated to a Canadian land trust or U.S. conservation partner, to meet these requirements (for the reasons discussed above), which includes both specific wording in the easement and additional steps not required for typical easements within Canada.
 - b. In order for a gift to be a qualified conservation contribution under U.S. guidelines it must be made for one or more of the following purposes: the preservation of land for outdoor recreation by, or the education of, the general public; the protection of relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; the preservation of open space (including farmland and forest land) where such preservation is for the scenic enjoyment of the general public and will yield a significant public benefit; the preservation of open space pursuant to a clearly delineated Federal, State or local government conservation policy with significant

public benefit. Last, the conservation purpose must be protected in perpetuity. Limited term easements are not acceptable in the U.S.

- c. The U.S. tax code requires that specific topics be addressed the conservation easement document including: inconsistent uses, transferability of the easement to other donees, 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.
 - d. There are also specific requirements related to mineral interests. Ideally, the landowner/donor controls the mineral rights associated with the conserved property. If the mineral rights have been severed and are owned by a separate party, a letter from a geologist or other expert will be required indicating that the likelihood of future mining is “so remote as to be negligible.” An easement seeking to protect a property with severed minerals may be donated without securing this letter however it will not be a qualified conservation contribution and therefore not tax deductible in the U.S.
4. Prepare a Baseline study that meets Internal Revenue Code Section 170(h) requirements for *qualified conservation contributions* in the required timeframe. (Contact AFCC to obtain a template baseline document.)
 5. Complete title work, including mortgage subordination, as required by Internal Revenue Code Section 170(h). This means that all mortgages (and other liens) must either be removed or subordinated to the easement’s terms. Subordination makes the easement superior to the mortgage so that if the lender forecloses on the mortgage, the easement will remain in full force and effect.
 6. Secure an appraisal of the property rights to be conveyed in accordance with both U.S. and Canadian appraisal requirements. (For further information on requirements, see the Appraiser Fact Sheet available at <https://conservecanada.org>)
 - a. Because of the complexity and potential scrutiny by both the U.S. and Canadian taxing authorities of cross-border gifts, gifts to Canadian charities (as contemplated in Scenarios 1 and 2, above) should be accompanied by appraisals that meet the requirements of the Ecological Gifts Program.
 - b. U.S. tax law includes specific requirements for appraisals used to justify tax deductions. For further information on requirements, see the Appraiser Fact Sheet available at <https://conservecanada.org>)
 - c. To meet U.S. tax law requirements, the appraisal must be completed no earlier than 60 days before the donation date and no later than the date the donor files his U.S. income tax return.
 - d. For the gift to be deductible against U.S. income the appraisal must be commissioned by the **donor**, not the donee.
 - e. U.S. tax law prohibits certain fee arrangements with the appraiser including fees based on the value of the donor’s tax deduction or a percentage of the appraised value.

- f. U.S. tax law established penalties for appraisers, donees and donors for overstated appraisals, and have tightened requirements for appraisals.
 - g. Because of the additional time required to complete all the steps for cross-border gifts, the appraisal may need to be completed early in the process and then updated by the appraiser to verify (or modify) that valuation is accurate at the time of the gift.
7. Secure Ecological Gift approval and appraisal review (if donee is a Canadian charity or government qualified as an EcoGift recipient and gift meets program requirements)
- a. *Certificate for Donation of Ecologically Sensitive Land.* The Minister of the Environment (or designate) must certify that the land is ecologically sensitive, by completing this certificate.
 - b. *Application for Appraisal Review and Determination.* The donee submits the property appraisal and an application form which the Minister verifies after review by Environment Canada's Appraisal Review Panel. Once reviewed, the Minister will issue a *Notice of Determination of Fair Market Value* that indicates the value for which the Minister intends to issue a certificate, usually within 90 days and equal to the appraised value. The donor then has 90 days to finalize the donation or request an appeal of the determination. If accepted, the Minister issues a *Certificate of Fair Market Value*. Note: the appraisal review process may take time, and the delay may result in the need for an appraisal update or new appraisal.
 - c. *Tax Return Filing.* The donor submits the Certificate for Donation of Ecologically Sensitive Land, the Certificate of Fair Market Value, and the charitable donation receipt issued by the Canadian donee with the Canadian tax return for the year in which the gift is made.

Note: An appraisal update may be required depending on timing of approval process

8. Apply for Certificate of Compliance for Non-Resident Disposition of Real Estate to inform CRA of the donor's intent:
- a. Application (Form T2062) (see *CRA Document 72-17R4* for guidance).
 - i. Declaration of Proceeds of Disposition. If the donee is a Canadian charity, government agency or a "prescribed donee" under Canadian Income Tax Act Regulations 3504, the prospective donor may make an election to avoid (or reduce) capital gains tax owing on the gift under Section 118(1) of the Canadian Income Tax Act. The donor must decide what value to claim as the "disposition value" for the gift based on his/her tax circumstances. The disposition value can be any value between the adjusted cost base and fair market value, thereby reducing or eliminating the capital gains tax.
 - ii. Substantiation of value (an appraisal or other documentation satisfactory to the Minister).
 - iii. Letter from the donee indicating that they are a registered charity, that they intend to accept the gift of conservation real estate, and that they will issue a charitable tax receipt for the gift.

- iv. Undertaking provided (for prescribed donees only) stating that the property will be used for conservation purposes and will be held for use in the public interest.
 - b. Payment of a portion of Canadian capital gains tax or provision of security satisfactory to the Minister (i.e. evidence that there is no tax owing. The letter discussed above should suffice as 'security').
 - c. Certificate of Compliance provided by the Minister (T2068).
 - i. Without the Certificate, the donee, by accepting real property from a non-resident, may be liable for payment of a portion of the Canadian capital gains taxes arising from the disposition. The certificate should therefore be issued prior to any deed transfer or signing of conservation easement.
9. Supply Canadian Charitable Gift Receipt stating the disposition value (for Canadian donees).
- a. For a U.S. donee, a letter should be drafted including key information required for a Canadian tax receipt under Section 3501 of the Income Tax Act including: name and address of the charity, date of donation, date receipt issued, name and address of donor including first name and initial, amount of cash donation, authorized signature. For noncash gifts, also include a description of the property, fair market value of the property, name, and address of the appraiser. For split-receipt donations ("bargain sales"), the letter should include the full value of the property, the "advantage," (i.e. any money paid for the property) and the gift portion (i.e. the difference between fair market value and what was paid for the property). See *CRA website for sample tax receipts and required contents* www.cra-arc.gc.ca)
10. Supply a Gift Substantiation Letter in accordance with an IRC Section 170(f)(8) if donee is a U.S. charity, together with a Canadian tax receipt. For cross-border conservation gifts, it would be prudent even for a Canadian donee to provide such a letter to satisfy IRS requirements.
- a. The letter should include verification that the donee is a charity, that it is recognized as a "publicly-supported charity" by the IRS, its U.S. tax identification number, a description of the gift, and an indication of whether the donee provided goods or services in consideration for the gift (and the value of any consideration).
11. File Canadian Tax Return, as appropriate.
- a. Canadian Tax Receipt attached. See *CRA website for sample Canadian tax receipts with required contents* (www.cra-arc.gc.ca).
 - b. Final payment of capital gains tax (if taxes owing) or declaration 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 attached.
 - 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.

12. File U.S. Income Tax Return, as appropriate. Items to be included with the return include:

- a. *Internal Revenue Service Form 8283--Noncash Charitable Contributions* should be included with the return, signed by the appraiser and the donee. Form 8283 documents that a noncash charitable contribution has been made, the details of which are included in a full narrative appraisal. Components of the Form 8283 are:
 - i. Name and taxpayer identification number of the donor (social security number if donor is an individual or employee identification number if donor is a partnership or corporation);
 - ii. Description of the property;
 - iii. Summary of the physical condition of the property;
 - iv. Manner of donor's acquisition of the property (purchase, gift, etc.) and the date of donor's acquisition;
 - v. Donor's adjusted cost base in the property;
 - vi. Name, address, and tax identification number of the donee;
 - vii. Date the donee received the property or interest in property;
 - viii. Name, address and tax identification number of the appraiser or appraisers (if more than one);
 - ix. Appraised fair market value of the property interest on the date of contribution;
 - x. An appraisal summary defining the gift, the fair market value (generally an assessment of the value "before and after" the gift for appraisals conservation easements), and certain declarations by the appraiser pertaining to interests in the transaction, and the fee arrangement and stating that the appraisals prepared by the appraiser are not being disregarded by the IRS, that the appraisal was prepared for income tax purposes, and that the appraiser understands he/she may be subject to penalties for significant misstatement must also be included. *(Note: the IRS has instituted significant penalties for appraisers, donors and charities involved in misstatements of appraised value).*
 - xi. Statements by the donor including verification that the donation meets Section 170(h) requirements for "qualified conservation contributions", and the conservation purpose; statements concerning baseline documentation, ownership of nearby land, regulatory approval or contractual obligations related to the donation, when and how the donor acquired the property;
 - xii. Signature of donee, acknowledging receipt of the gifted property.
- b. The full appraisal, prepared in accordance with IRS guidelines, must be attached for gifts over \$500,000 in value (but is generally recommended for all gifts).
- c. A copy of the recorded conservation easement, if applicable.
- d. Donee gift acknowledgement letter, as described in sections 9 and 10 above.

Summary

Cross-border conservation gifts are transactions involving a U.S. taxpayer who owns and donates a Canadian property, or an interest in such real property. These transactions must address tax regulations and laws from two countries, and the province in which the property is located. Furthermore, the characteristics of the parcel of land, each donor's financial circumstances, the donee's tax status and organizational capacity combine to make every gift unique.

American Friends of Canadian Conservation was created in 2006 by conservation professionals from Canada and the U.S. to overcome the obstacles to cross-border donations. With its favored tax status in both countries and mission based on partnership with Canadian land trusts and government agencies those obstacles were removed. American landowners who are interested in protecting their special Canadian properties and achieving their financial objectives can now do so.

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

The conservation communities of both countries owe a tremendous debt of gratitude to the Nova Scotia Nature Trust and its supporters for undertaking the research and writing of the original cross-border instructions.

Additional Resources

Individuals interested in obtaining more information on cross-border conservation gifts are directed to the resources listed below:

Available at <https://conservecanada.org>

Save Some Green: a handbook for U.S. taxpayers who own property in Canada

American Friends of Canadian Conservation: Fact Sheet for Donors

American Friends of Canadian Conservation: Fact Sheet for Appraisers

American Friends of Canadian Conservation: Fact Sheet for Land Conservation Organizations

American Friends of Canadian Conservation: Conservation Lands Program

American Friends of Canadian Conservation: Overview for Conservation Organizations

American Friends of Canadian Conservation: Fact Sheet on Applying for Public Charity Status

Other Canadian Publications

Ecological Gifts Program website: www.cws-scf.ec.gc.ca/egp-pde/

The Canadian Ecological Gifts Program Handbook. <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/ecological-gifts-program/publications/canadian-handbook.html>

Presentation on Ecological Gifts and Appraisals, Ontario Land Trust Alliance 2014. <http://olta.ca/wp-content/uploads/2014/11/Ecological-Gifts-Program-Dawn-Laing-and-Dave-Babineau-Environment-Canada.pdf>

Gifts of Capital Properties to a Charity and Others. Bulletin IT-288R2. Canadian Revenue Agency.

Information Circular, IC-72-17R5 Procedures Concerning the Disposition of Taxable Canadian Property by Non-Residents of Canada - Section 116. Canada Revenue Agency.

<http://drache.ca/articles/donation-of-land-by-non-resident/>

U.S. Publications

Charitable Contributions, Publication 526, U.S. Treasury Department

Federal Tax Law of Conservation Easements. Stephen J. Small, 1997.

Federal Tax Law of Conservation Easements, Second Supplement. Stephen J. Small, 1996.

Federal Tax Law of Conservation Easements, Third Supplement. Stephen J. Small, 2000.

Information on the United States-Canada Income Tax Treaty. Publication 597. U.S. Department of the Treasury

The Conservation Easement Handbook, Second Addition. L. Byers, et. al., Land Trust Alliance, 2005.

Stephen J. Small *Preserving Family Lands: Book I (Essential Tax Strategies for the Landowner)*, 3d ed. (Boston, M.A.: Landowner Planning Centre, 1998).

Stephen J. Small *Preserving Family Lands: Book II (More Planning Strategies for the Future)*, (Boston, M.A.: Landowner Planning Centre, 1997).

Stephen J. Small *Preserving Family Lands: Book III (New Tax Rules and Strategies and a Checklist)*, (Boston, M.A. Landowner Planning Centre, 2002).

C. Timothy Lindstrom *A Tax Guide to Conservation Easements* (Island Press, 2008)

David J. Dietrich and Christian Dietrich *Conservation Easements* (American Bar Association, 2011)

Other

Guidance Relating to Article XXI of the United States-Canada Income Tax Convention, Notice 99-47. U.S. Department of the Treasury.

Key statutes related to cross-border conservation gifts

Canadian Revenue Agency

Section 115 (*Taxable Gain on Disposition of Real Property and Election to Reduce Capital Gains Taxes*)

Section 116 (*Capital Gains Tax and Non-resident Dispositions of Real Estate*)

Section 118 (*Taxable Gain on Disposition of Real Property and Election to Reduce Capital Gains Taxes*)

Regulation 3504 (*Prescribed Donees*)

U.S. Internal Revenue Code

Section 170(h) (*Qualified Conservation Contributions/Conservation Easement Requirements*)

Treasury regulations 1.170A14 (*Qualified Conservation Contributions/Conservation Easement Requirements*)

Sections 2055, 2703, 2036, Treasury Regulations 20.2055 and 25.2703-1 (*Estate Taxes*)

Section 2522, Treasury Regulation. § 25.2522-1 (2003) (*Gift Taxes*)

I.R.C. § 170(f)(3)(B) (2004). (*Donations of partial interest in land*)

I.R.C. § 170(f)(4) (2004); § 170(f)(11)(2004). (*Appraisal Requirements*)

I.R.C. § 501 (2004). (*Publicly-supported charity*)

I.R.C. § 509 (2004). (*Public support test*)

I.R.C. § 2031 (2004). (*Gross Estate-Special Estate Tax Deductions for Conservation Easements within U.S.*)

I.R.C. § 6114 (2004). (*Treaty-based return positions*)

Treasury Regulation § 1.170A-12 (*remainder interests and conservation valuation*)

Treasury Regulation § 1.170A-13 (2003). (*Appraisal Requirements*)

Pension Protection Act. 2006. (*Section 1219 Appraisal Penalties*) (*Section 1206 Enhanced Deductions for Conservation Easements*)

Convention between the United States of America and Canada with respect to Taxes on Income and on Capital (*Canada-U.S. Tax Treaty and Deductions Against Canadian-Source Income*)

Footnotes

¹ **Ecological Gifts Program** – An Ecological Gift is a donation of land or an interest in land that has been certified as “ecologically sensitive” by the federal Minister of the Environment or the Minister’s designate, in accordance with the provisions of the Canadian Income Tax Act, that is donated to a Canadian charity or government agency eligible to accept Ecological Gifts, and that otherwise meets the requirements of the Act that give rise to special tax benefits. Favourable tax treatment for Ecological Gifts includes the provision of a tax credit and a reduction in the taxable capital gain realized on the disposition of the property. Unlike in the case of other charitable gifts, there is no limit to the amount of charitable donations eligible for the credit. Any unused portion of the gift may be carried forward for up to five years. Section 38(a.2)(i) of the Income Tax Act indicates the inclusion rate for capital gains is 25%. The federal 2006 budget reduced the capital gains inclusion rate on Ecological Gifts from 25% to zero. This eliminates capital gains tax on Ecological Gifts retroactive to May 2, 2006 (this change announced in the budget has not yet been changed in law). Donors can also reduce their capital gain by designating the amount of the gift to be a lower amount, between its fair market value and its adjusted cost base (i.e. the original purchase price). This designated amount is also used to calculate the tax benefit. While this is great news for Canadian donors, unfortunately this measure will not benefit U.S. donors seeking a U.S. tax deduction (against U.S. income), as the donee must be a Canadian charity to be eligible under the Ecological Gifts Program. Further information on the Ecological Gifts Program can be obtained from Habitat Conservation Division, Canadian Wildlife Service Environment Canada Ottawa ON K1A 0H3, or from the Canadian Ecological Gifts website.

² **Prescribed Donee (Canada)** – A prescribed donee is an organization, as listed under section 3504 of the Canadian Income Tax Act Regulations, to which individuals who are non-residents of Canada may make a gift of capital property and elect to reduce or eliminate capital gains on their gift under section 118 of the Income Tax Act. American Friends of Canadian Conservation has such status, making it able to provide the ideal tax scenario to donors of cross-border conservation gifts: a tax deduction against U.S. income, and avoidance of Canadian capital gains tax.

³ **Section 118 Election (Canada)** – Under Section 118.1(6) of the Canadian Income Tax Act, a donor, whether Canadian or non-resident, may elect to choose a disposition value anywhere between the fair market value of the gift of land or conservation easement, and the adjusted cost base, in order to eliminate or reduce any capital gains tax owing on a gift. The donee must be a Canadian charity, government or a *prescribed donee*.

⁴ **Canada-U.S. Income Tax Convention** – Article XXI(5) of the tax treaty allows U.S. donors to claim a charitable donation deduction for U.S. tax purposes for donations to Canadian registered charities, against their Canadian-source income up to the amount that would be allowed under the percentage limitations of U.S. laws. Under the tax treaty, bequests to Canadian charities provide the same estate tax deductions as bequests to U.S. charities. Claiming such treaty benefits may be subject to the taxpayer to reporting requirements on Form 8833, pursuant to Internal Revenue Code 6114. See more about *Deduction Limits* below.

⁵ **Deduction Limits (US)**—Gifts to private foundations (including Canadian charities that have not been recognized by the I.R.S. as *qualified donees*) have a deduction limit of certain percentage of the donor’s adjusted gross income (20% for most gifts of capital property including fee simple donations of land, and 30% for gifts of cash). By applying for designation as a qualified donee, the Canadian charity can accept conservation easements by Americans and still meet the necessary income and estate tax requirements under U.S. tax law. The deduction limit increases to 30% for gifts of capital property and 50% for gifts of cash.

Under new legislation passed in August 2006 and expired in 2011 (*Under the Pension Protection Act of 2006 Section 1206*), special tax deduction rules apply for certain “qualified conservation easements that meet IRS requirements under Section 170(h) of the Internal Revenue Code.” Under the previous tax rules, such donations were restricted to a deduction of 30% of adjusted gross income with a carry-forward of five years. Under amended legislation, this deduction was raised to 50% of adjusted gross income, and the carry-forward is fifteen years. This new legislation has expired but efforts are underway to secure an extension. See ww.lta.org for current information on this new tax benefit.

⁶ **Carryover Limits for Fee Property (US)** – See Internal Revenue Code Section 170(b)(1)(B).

⁷ **Carryover Limits for Conservation Easements (US)** – See Internal Revenue Code Section 170(b)(1)(E).

⁸ **Form 8283, Appraisal Summary Requirement (US)** – See Internal Revenue Code Section 170(f)(11) requirement, also contained in Treasury Regulation Section 1.170A-13(c), that, in the case of contributions of property for which a deduction of more than \$5,000 is claimed, the taxpayer must obtain a qualified appraisal and attach to the return for the taxable year in which such contribution is made such information regarding such property and such appraisal as the Secretary may require (i.e. the Form 8283, appraisal summary).

⁹ **Qualified Conservation Contribution (US)**—These are contributions of a qualified real property interest to a qualified organization, exclusively for conservation purposes under the Internal Revenue Code Section 170(h) and 1.170A (a) of the Treasury Regulations. To qualify for U.S. income, estate and gift tax benefits, gifts of partial interest in land (i.e. easements and remainder interests for conservation purposes) must meet these requirements, which range from meeting specific conservation purposes, to restrictions on donees, transferability and exercise of reserved rights, to requirements for baseline documentation.

¹⁰ **Tax Benefits for Gifts of Partial Interest in Land** – To be eligible for U.S. income tax benefits (Internal Revenue Code Section 170 (h) and Regulations 1.170A-14), to avoid U.S. gift tax (Internal Revenue Code Section 2522 and Regulations 25.2522) and to ensure that the gift provides estate tax benefits (Internal Revenue Code Section 2055 and Regulations 20.2055), gifts of partial interest in land must be given to a *qualified donee*, and must be a *qualified conservation contribution* within the meaning assigned by section 170 (h) (1) of the Internal Revenue Code and by § 1.170A-14 (a) of the Treasury Regulations to Internal Revenue Code section 170 (h). This means that Canadian charities accepting conservation easements

by Americans must first be recognized by the IRS as a *qualified donee* which in turn requires the donee to be recognized as a *publicly-supported charity*. See more below under *Deduction Limits*.

¹¹ **Application for Recognition as a Publicly-Funded Charity (U.S.)**—Under U.S. tax law, gifts to private foundations (including Canadian charities that have not been recognized by the I.R.S. as *qualified donees*) have a deduction limit of certain percentage of the donor's adjusted gross income. By applying for designation as a qualified donee, the Canadian charity can increase the deduction limit (see more on *Deduction Limits* below). Such status is also needed to accept conservation easements, to ensure the donor does not face gift taxes and estate tax problems as a result of the gift.

To receive a determination that a charity is not a private foundation, the charity must complete Internal Revenue Service *Form* 1023 which requires a record of funding sources over the last five years (if the Canadian charity was in existence 5 years or more) to demonstrate that the Canadian charity meets the public support test for the 5-year. The charity should first apply for an Employer Identification Number using *Form SS-4: Application for Employer Identification Number*.

¹² **Estate Tax on Qualified Conservation Contributions (US)**—Internal Revenue Code section 2703 provides that the value of property for U.S. estate tax purposes shall be determined without regard to restrictions on the right to sell or use the property. However, Regulation 25.2703-1(a)(4) provides that such a restriction does not include a perpetual restriction on the use of real property that qualified for a charitable deduction for U.S. gift tax or estate tax purposes.

¹³ **Estate Tax Deductions for Gifts to Canadian Charities (US)**—Under Internal Revenue Code Section 2055, a charitable deduction would generally be allowed for testamentary gifts to Canadian charities that would, if they were U.S. organizations, meet the requirements for a charitable organization for U.S. tax purposes.

¹⁴ **Split Receipt Donation (Canada)**—The Income Tax Act allows for a donation receipt in circumstances where an intention to make a gift is present, but the donor also receives some benefit (or “advantage”). The donor's tax credit is based on the eligible amount of the gift. Such a conservation gift is often called a *bargain sale* in the U.S. Further resources on split receipting include Environment Canada's *Ecological Gifts Program Handbook*, and environment Canada's fact sheet, *Confirmation that Ecological Gifts are Eligible for Split-Receipting* and “Proposed Guidelines on Split Receipting.” Income Tax Technical News, No. 26, December 24, 2002.

¹⁵ **Clearance Certificate for Non-Resident Disposition of Land (Canada)**—Where the donor is a U.S. resident disposing of Canadian real estate (whether through sale or gift), the Canadian Income Tax Act Section 116 (1), includes provisions for the CRA to secure payment of tax on capital gains. The donor must notify the CRA of a planned or completed property disposition (before they dispose of the property or within ten days after the disposition). The donor must pay a portion of the capital gains tax (or provide security satisfactory to the Minister), prior to receiving a Certificate authorizing the disposition. The process entails completing a “Request by non-resident for a Certificate of Compliance related to the disposition of Taxable Canadian Property” (Canada Revenue Agency Form 2062E). A useful reference is the Canada Revenue Agency document 72-17R4 Procedures Concerning the Disposition of Taxable Canadian Property by Non-Residents of Canada-Section 116.

¹⁶ **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).

¹⁷ **Prescribed Donee Status of American Friends of Canadian Land Trusts.** American Friends of Canadian Land Trusts was designated a prescribed donee on September 23, 2010 in regulations amending Section 3504(c) of the Income Tax Regulations (Charitable Donations) to add “American Friends of Canadian Land Trusts” (now known as “American Friends of Canadian Conservation”) to the list of prescribed donees under the regulations. P.C. 2010-1112 September 23, 2010.