



NOVA SCOTIA **NATURE** TRUST

**Cross-Border Conservation Gifts:  
Fact Sheet for Land Trusts**

**October 2006**

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Version 1.000 06-10-31

## Purpose

More and more Canadian land trusts are working with U.S. residents to protect important conservation land in Canada. Such “cross-border” gifts of conservation land, remainder interest and conservation easements involve complex legal and taxation issues, and important procedural issues on both sides of the border. The purpose of this fact sheet is to provide an overview of cross-border conservation gifts for Canadian land trusts. **This fact sheet is not intended to provide legal, financial or other advice. Land trusts and their donors must seek independent, professional advice.**

## Unique Aspects of Cross-Border Conservation Gifts

Land trusts working on cross-border conservation gifts require a solid understanding of both Canadian and U.S. tax law and procedural requirements for conservation gifts. Cross-border gifts present a number of unique circumstances, some of which may be unfamiliar for land trusts:

- ✓ U.S. donors might expect a U.S. tax benefit for their gift (as they would receive for a conservation gift within the U.S.). This simply may not be possible with a cross-border gift. They may in fact face tax obstacles.
- ✓ 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 organization receiving the gift (i.e. the donee), and on the nature and type of gift, because of combined U.S. and Canadian tax laws.
- ✓ There is a deemed capital gain on gifts of land and interests in land (i.e. conservation easements and remainder interests) in Canada. There is therefore potential capital gains tax, just as if the property or easement had been sold. This concept may be new to U.S. donors and their advisors.
  - In certain circumstances (where the donee is a Canadian charity, government agency or a U.S. organization with special status in Canada as a *prescribed donee*), the U.S. donor may be able to reduce or eliminate the tax on capital gains (through a special election under the Canadian Income Tax Act, or through the Ecological Gifts Program for Canadian donees).
  - Gifts to other U.S. charities (i.e. who are not *prescribed donees*) result in full capital gains (and usually capital gains tax), which the donor may not be able to reduce or avoid.
- ✓ If the donor has Canadian-source income, gifts to Canadian charities may provide income tax deductions on the donor’s U.S. tax return against Canadian-source income, as permitted under the income tax treaty between Canada and the U.S. Alternatively, conservation gifts to certain U.S.-based charities can provide a tax benefit against U.S.-source income.
- ✓ 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 in which the easement is held.

- ✓ For conservation easements, Canadian land trusts should take steps to qualify with the Internal Revenue Service as a *publicly-supported charity* before accepting such gifts (even if the gift is first made to a U.S. organization, then transferred to the Canadian land trust), or the donor could face gift taxes and significant estate tax problems. Because the donee does not meet U.S. tax law criteria for *qualified conservation contributions*, the estate may be taxed as if there are no restrictions in place on the land, creating a huge estate tax problem for the heirs.
- ✓ Internal Revenue Service 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 and also for cash and securities to the Canadian charity.
- ✓ 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 similar to 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.
- ✓ 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.
- ✓ It would be prudent to ensure that appraisals meet both U.S. and Canadian requirements (as outlined in the Ecological Gifts Program), including timing requirements. Recent amendments to U.S. tax law have increased penalties for overstated appraisals.
- ✓ A donor is required to file income tax returns and forms in both Canada and the U.S.
- ✓ Canadian land trusts may be able to involve U.S. conservation partners in important conservation gifts from U.S. landowners to reduce certain tax impediments to cross-border giving.
  - The organization must seek professional advice and ensure it is not acting merely as an "agent" or "flow-through" for the Canadian land trust.
  - Steps may need to be taken to enable a U.S. organization to hold land or a conservation easement in the specific province or territory where the property is located.
  - There is a new U.S. organization and program being set up specifically to help Canadian land trusts and U.S. donors with cross-border conservation gifts (the American Friends of Canadian Land Trusts). It is hoped that working through this organization's cross-border conservation program, donors could benefit both from U.S. income tax benefits and avoidance of Canadian capital gains tax.

- ✓ Consequences for not completing transactions properly could 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 in Canada by Canadian donors, some of the following steps may be required for cross-border conservation gifts:

1. The Canadian donee seeks recognition as a “qualified donee” by the Internal Revenue Service (i.e. recognition as a *publicly-supported charity*, not a private foundation).
  - a. Application for an employer identification number with the Internal Revenue Service.
  - b. Application for recognition as a publicly-funded charity (*Form 8734- Support Schedule for the Advance Ruling Period*). The income tax treaty between Canada and the U.S. recognizes Canadian charities as equivalent to a 501(c)(3) organization, but by default assumes it is a private foundation, rather than a *publicly-supported charity*. Recognition as a *publicly-supported charity* means that the charity is a “qualified organization” under Section 170(h) of the Internal Revenue Code. It can then receive gifts of conservation easements and remainder interests as “qualified conservation contributions.” Such status avoids potential estate tax problems for the donor. It can also provide donors with enhanced deductibility against their Canadian-source income. Such recognition does not mean the charity is actually a U.S. charity that can provide income tax deductions against U.S.-source income—this is only possible for U.S.-based charities.

*(Note: this recognition is required to receive a cross-border conservation easement, even if it is first being donated to a U.S. partner organization with potential transfer to the Canadian land trust in future. The easement must be transferred to a “qualified donee” or the donor’s income tax deduction is disallowed, and the easement may be ignored in assessing estate tax, creating a potential devastating estate tax problem for the donor’s heirs).*

2. U.S. donee completes steps necessary to hold land or conservation easement in the province/territory of the gift.
  - a. This may involve steps such as amending provincial legislation, applying for recognition under provincial legislation, or registering with the registry of joint stock companies.
3. Baseline study completed, meeting all U.S. tax code requirements under Internal Revenue Code Section 170(h) requirements for *qualified conservation contributions*.
4. Title work completed.
  - a. For conservation easements, all mortgages must be removed or subordinated to the easement’s terms (i.e. if the bank forecloses on the mortgage, the easement will remain intact) as required by U.S. tax law.

5. Conservation easement drafted, meeting both local easement and/or tax legislation requirements, and requirements under U.S. tax law. See the sample *Cross-border Conservation Easement Template* listed in the *Additional Resources* section below.
  - a. Land trusts should be familiar with the requirements for *qualified conservation contributions* under 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 land trust or U.S. conservation partner, to meet these requirements (for the reasons discussed above)
  - b. Such specific requirements relate to the following: the donee (i.e. the donee must be a “qualified donee” which includes being recognized as a *publicly-supported charity*, term of the easement (must be perpetual), conservation purpose (must meet specific conservation purposes test), 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. Meeting these requirements entails both specific wording in the easement document and additional steps not typically required for conservation easements in Canada.
6. Appraisal acquired, meeting both U.S. requirements for *qualified conservation contributions* and Canadian appraisal requirements.
  - a. Because of the complexity and potential scrutiny by both the U.S. and Canadian governments of cross-border gifts, it is recommended that all appraisals meet the key appraisal requirements of 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 appraisal must be completed within 60 days preceding the donation date or by the date of filing the next U.S. tax return.
  - d. U.S. tax law requires the appraisal to be commissioned by the donor, not the donee (to ensure deductibility of the gift for the donor).
  - e. 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.
  - f. Recent amendments to U.S. tax law in 2006 have increased the 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 updated or a letter provided by the appraiser verifying the currency of the valuation, to meet both Canadian and U.S. appraisal timing requirements.
7. Ecological Gift approval and appraisal review completed (if the donee is a Canadian charity or government agency, qualified as an Ecological Gifts recipient, and if the gift meets program requirements).
  - a. Certificate for Donation of Ecologically Sensitive Land.



whether the donee provided goods or services in consideration for the gift (and the value of any consideration).

11. Canadian Tax Return Filed.

- a. Canadian Tax Receipt attached (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](http://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.

12. U.S. Income Tax Return Filed.

- a. *Internal Revenue Service Form 8283--Noncash Charitable Contributions* included with the return, signed by the appraiser and the donee. See sample Internal Revenue Service Form 8283 listed under *Additional Resources* below. The form must include an appraisal summary defining the gift, the fair market value (before and after the gift for conservation easements), clarification that the donation meets Section 170(h) requirements for *qualified conservation contributions*, the conservation purpose, and certain statements by the appraiser. The donor must include specific statements concerning baseline documentation, ownership of nearby land, and regulatory approval or contractual obligations related to the donation.
- b. The full appraisal must be attached for gifts over \$500,000 in value.
- c. Donee gift acknowledgement letter attached, as discussed.

### 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 “donee” or recipient of the gift, 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) <ul style="list-style-type: none"> <li>through Ecological Gifts Program or</li> <li>through election to reduce “disposition” value under Section 118(1) of the Income Tax Act</li> </ul> Income tax deduction for Canadian-source income on U.S. tax return <ul style="list-style-type: none"> <li>deduction at highest level available (50% of adjusted gross income for easements or cash, 30% for land or securities)</li> </ul> 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 (must be a <i>U.S.-based</i> charity)
Other Canadian charities	Opportunity to reduce /eliminate capital gains tax (Canada) <ul style="list-style-type: none"> <li>through Ecological Gifts Program or</li> <li>through election to reduce “disposition” value under Section 118(1) of the Income Tax Act</li> </ul> Income tax deduction for Canadian-source income on U.S. tax return <ul style="list-style-type: none"> <li>deduction at lower level (30% for cash, 20% for securities or land)</li> </ul> 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 <i>U.S.-based</i> 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 (also a recognized as a “prescribed donee” in Canada)	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 <ul style="list-style-type: none"> <li>through election to reduce “disposition” value under Section 118(1) of the Income Tax Act</li> </ul> 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 tax-wise, but may not be an option for a specific conservation gift (i.e. there may not be a prescribed donee willing/able to accept the gift)</i>	A U.S. charity may not be eligible to hold conservation easements in some provinces at present No benefit against Canadian-source income
Other U.S. charity	Income tax deduction against U.S. income <ul style="list-style-type: none"> <li>deduction at highest level available (50% of adjusted gross income for easements or cash, 30% for land or securities)</li> </ul> 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 attempts to summarize and simplify complex tax scenarios for illustration purposes. Land trusts 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**

Cross-border conservation gifts are complex, time and resource-intensive, involving overlapping yet distinct requirements of multiple federal and provincial/territorial agencies.

Fortunately, there is a growing body of resources (some listed below), support mechanisms, experience and expertise to assist land trusts in Canada in ensuring a smooth process for cross-border conservation gifts. The Nova Scotia Nature Trust's *Cross-Border Conservation Kit*, including a more in-depth technical guide to cross-border conservation gifts, fact sheets for donor advisors and appraisers, and cross-border conservation easement template, may provide helpful background information. The *American Friends of Canadian Land Trusts* is creating a program to assist and support Canadian land trusts with cross-border conservation gifts. See [www.nsnt.ca](http://www.nsnt.ca) for updates on the tool kit and *American Friends of Canadian Land Trusts*.

## ***Additional Resources***

### **Reference Materials**

*Cross-Border Conservation Gifts Toolkit, 2006.* Bonnie Sutherland. Nova Scotia Nature Trust (available through [www.nsnt.ca](http://www.nsnt.ca) or by calling (902) 425-5263)

*A Guide to Cross-Border Conservation Gifts by U.S. Residents.* (includes sample form 8283).

*Cross-Border Conservation Gifts by U.S. Residents: Fact Sheet for Appraisers.*

*Cross-Border Conservation Gifts by U.S. Residents: Fact Sheet for Donors.*

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

*Cross-Border Conservation Easement Template.*

### **Key Statutes and Regulations**

Internal Revenue Service Internal Revenue Code Section 170(h)

U.S. Treasury Regulations 1.170A14

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

Income Tax Act (Canada) Regulations 3504

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*Funding for this cross-border conservation resource was generously provided by:*

The Davis Conservation Foundation, Donner Canadian Foundation, EJLB Foundation, Environment Canada's EcoAction Community Funding Program and Ecological Gifts Program, George Cedric Metcalf Charitable Foundation, Norcross Wildlife Foundation, and the Salamander Foundation