
LAND CONSERVATION TRANSACTIONS

Tax Implications of Gifts of Land and Interests in Land

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***Tax Implications of Gifts of Land
and Interests in Land***

Judy Atkins
and
Ann Hillyer

Report No. 05-1
North American Wetlands
Conservation Council (Canada)

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The views expressed in this Report are those of the authors. Any errors and omissions are the responsibility of the authors.

THE PURPOSE OF THIS REPORT

A landowner who wants to protect ecologically sensitive land has several options available. The landowner might decide to grant a conservation easement, covenant or servitude¹ to a conservation organization or government organization. On the other hand, the landowner might decide to make a gift of the land itself to a conservation organization or to a government agency. Other donors may decide to make gifts of cash or property other than land to a conservation organization. All of these gifts may have tax implications for both the donor and recipient of the gift.

This Report is intended to provide a basic overview of the income tax system in Canada, primarily from the point of view of an individual (rather than corporate) taxpayer. It also gives an overview of the Ecological Gifts Program, a program offering income tax incentives for the protection of ecologically sensitive land. The program is made possible by the provisions of the federal *Income Tax Act* and is administered by Environment Canada. This Report is directed to landowners as potential donors, conservation organizations and other recipients of gifts, professionals and all others interested in protecting important ecological values and preserving critical habitat through gifts of land or interests in land.

GETTING PROFESSIONAL ADVICE

This Report offers educational information only. It does not constitute legal, tax or valuation advice in connection with specific properties or specific transactions. All examples are general and have been simplified to illustrate the information provided. It is intended to alert readers to tax related issues so they know to seek advice from an appropriate professional. Landowners considering measures to protect their land and conservancy organizations considering accepting gifts of land, conservation covenants or easements or other property should consult with professional advisors at the earliest opportunity.

NOTE: The information provided in this Report is introductory and for educational purposes only. This Report does not explain many of the intricacies of income tax legislation. The examples are simplified to illustrate particular principles. Specific transactions will have other income tax implications. In addition, transactions may have implications related to taxes such as goods and services tax, property transfer tax, and property tax, as well as other legal implications, none of which are discussed in this Report. The provisions of the *Income Tax Act* are subject to change. All information is current to December 31, 2004, and must be checked to ensure that it is up to date.

¹ Except where the context requires otherwise, the term “conservation easement” is used throughout this Report to refer to conservation easements, covenants and servitudes.

PART 1

BASIC PRINCIPLES OF INCOME TAXATION

Who is taxable?

All individuals and corporations are taxable unless they are specifically exempt from taxation. Partnerships are not taxable as entities. The partnership is treated as a conduit for income and individual or corporate partners are taxable. Trusts are taxable in their own right except that a trust is generally treated as a conduit to the extent that income is paid or payable to the beneficiaries of the trust.²

The following organizations are among those exempt from the payment of tax:³

- municipal authorities;
- corporations owned by the Crown or a municipality;
- registered charities;
- non-profit corporations for scientific research and experimental development;
- labour organizations;
- certain non-profit organizations; and
- various kinds of trusts including a qualifying environmental trust, formerly known as a mining reclamation trust.

What is taxable?

Income tax is a tax on income. In the Canadian tax system, income represents only gains or profits that are realized. It does not include the source of the income, such as the value of property that produces income. Nor does it include any increase in value of property that is not realized, for example, through the sale of the property or through a deemed disposition such as a charitable gift.

Because income represents only gains or profits, generally income is what remains after deducting any amounts spent to earn the income. Employment income, however,

² *Income Tax Act*, s. 104. The *Income Tax Act* is available on the Department of Justice website at <http://laws.justice.gc.ca/en/1-3.3/index.html>

³ *Income Tax Act*, s. 149(1).

is taxed on a gross rather than net basis. Only deductions specifically authorized in the *Income Tax Act* can be deducted from employment income.⁴

Income is classified by its source. For example, the *Income Tax Act* differentiates among income from an office or employment, income from a business, and income from property, including capital gains. Other taxable sources of income include pension benefits, death benefits, alimony and spousal maintenance, scholarships, research grants and prizes.

Each source of income is subject to its own set of rules under the *Income Tax Act* and is taxed according to those rules.

Gifts, inheritances and windfalls (for example, lottery winnings) are excluded from income for tax purposes. Some other kinds of income are exempt from taxation.⁵

When reporting income for income tax purposes, a taxpayer must calculate income at three different levels – total income, net income and taxable income.

Total income is all of the income within the meaning of the *Income Tax Act* that a taxpayer receives in the year. This includes employment income, rental income, commissions, pension income, investment income, business income and taxable capital gains. Total income from a source other than employment is income net of expenses required to earn the income.

Net income is total income less certain allowable deductions such as professional fees, union dues, RRSP contributions and child care expenses.

Taxable income is net income less certain allowable deductions such as capital losses and capital gains deductions.

An individual who is a Canadian resident, or deemed to be a Canadian resident, is taxed on all of his or her income from both inside and outside Canada. Non-resident individuals are taxed in Canada only on income from Canadian sources. Double taxation is eliminated in accordance with the provisions of bilateral tax conventions.

Tax rates and tax benefits

Federal tax rates for individuals vary from 16% to 29%⁶ of taxable income. The rates increase as the income increases.⁷ Provinces also impose income taxes. The provincial

⁴ See, for example, *Income Tax Act*, s. 8(1).

⁵ *Income Tax Act*, s. 81.

⁶ After 2001, these rates are indexed according to the formula contained in section 117.1 of the *Income Tax Act*.

⁷ *Income Tax Act*, s. 117(2).

rates are calculated either at rates set out in the provincial legislation or as a percentage of the federal tax rate. Provincial rates vary from province to province. There also may be federal and provincial surtaxes imposed in addition to these amounts.

The tax system incorporates a variety of exemptions from payment of tax, deductions from total income (that is, income net of expenses), and tax credits in the calculation of taxable income and tax payable. Exemptions, such as the principal residence exemption, result in the amount of income eligible for the exemption being tax free. This and other exemptions are discussed in greater detail below.

Tax benefits in the form of tax credits are available to individuals who meet the criteria for each kind of credit while deductions are generally available to corporate taxpayers. Tax credits available to individuals include the basic personal tax credit and tax credits in relation to the amount spent for tuition and medical expenses. Tax credits (deductions for corporations) are also available for charitable donations. Charitable donation credits are discussed in greater detail below.

Capital gains and losses

Capital property is property that, if disposed of, would give rise to a capital gain or loss.⁸ Depreciable property is also capital property. Depreciable property is property for which a taxpayer has been allowed a deduction under the regulations relating to capital cost allowance.

Capital property might be land or any other kind of property.⁹ Property, including land, that is inventory of a business (see discussion below) is not capital property. Unless land is inventory of a business, a disposition of land or a partial interest in land will be a disposition of capital property.

Gifts, the death of a taxpayer and the change in use of property are all dispositions or deemed dispositions for tax purposes. Consequently, a gift of capital property may give rise to a capital gain if the property has appreciated in value since the time the taxpayer acquired the property. The gift could also result in a loss. If the property is depreciable property and has been depreciated, a terminal loss or recaptured depreciation may arise upon disposition or deemed disposition. A gift of capital property to a qualified donee (including a registered charity) will generally give rise to a tax credit or deduction that will offset the amount of tax on the gain. In addition,

⁸ *Income Tax Act*, s. 54 (capital property).

⁹ Although land itself is not depreciable property, buildings on land may be depreciable property.

depending on the kind of property disposed of, there may be exemptions from taxation available.

Calculating gains and losses

Capital gains

The amount of a gain on the disposition of capital property is determined by subtracting the cost of the property to the taxpayer and the costs related to disposing of the property from the value of the property at the time of disposition. The original cost of the property with adjustments permitted by the *Income Tax Act* is called the adjusted cost base.¹⁰ The adjusted cost base is the cost of the property for the purpose of calculating whether or not there has been a capital gain.

Generally 50% of the gain must be included in the taxpayer's income for the year. The remaining 50% of the gain is not taxed.¹¹ In the case of certain gifts, including ecological gifts discussed in detail below, the amount of a capital gain that must be included in income is 25%. In certain cases where all of the proceeds of disposition are not receivable in the year of disposition, a reserve for deferred proceeds may be available to defer a portion of the capital gain to future years.

For more information, see Canada Revenue Agency's (CRA) Guide to Capital Gains, T4037, available on the CRA website at <http://www.cra-arc.gc.ca/>

Capital losses

A capital loss is a loss arising on the disposition of capital property.¹² For example, a disposition of property in an income-earning transaction, such as the sale of inventory, will not give rise to a capital loss since the property is not capital property.

A loss is generally the excess of the adjusted cost base of the capital property over the proceeds of disposition of the property less the costs of selling the property. Capital losses may be carried back three years and forward indefinitely to apply against capital gains realized in those years.

The deductible portion of the capital loss (the allowable capital loss) may be offset against taxable capital gains. The deductible portion of a capital loss is 50%.

¹⁰ *Income Tax Act*, s. 53 sets out the permitted adjustments.

¹¹ *Income Tax Act*, s. 38.

¹² See *Income Tax Act*, ss. 39(1), 111.

Calculating adjusted cost base of easements, covenants and servitudes

Determining the adjusted cost base of an easement, covenant or servitude¹³ placed on land after the acquisition of the land is not as straightforward as determining the adjusted cost base of the land itself. Since there is no original purchase price for the servitude, covenant or easement itself, there is no amount that can be clearly allocated to it. In addition, it is difficult to determine after the fact what the easement, covenant or servitude would have been worth at the time the land was purchased, particularly if some time has passed since the purchase of the land.

The *Income Tax Act* provides that where only part of a capital property is disposed of, the gain or loss on disposition is calculated by attributing as much of the adjusted cost base of the entire property to the part being disposed of as is reasonable.¹⁴ Canada Revenue Agency's (CRA) administrative position indicates that the cost of an easement or right of way can equal its proceeds of disposition where:

- the portion of the property in respect of which an easement or right of way was granted is not more than 20% of the area of the whole property; and
- the amount of compensation received is not more than 20% of the amount of the adjusted cost base of the whole property.¹⁵

The effect of this approach is that CRA will ignore capital gains where the easement or right of way covers only 20% of the property and is valued at 20% or less of the total value of the property.

In the case of ecological gifts, the *Income Tax Act* establishes a formula for determining the portion of the total adjusted cost base of the land that can reasonably be regarded as attributable to the easement, covenant or servitude.¹⁶ The formula, which applies to ecological gifts made after February 27, 1995, is:

$A \times B/C$ where

- A is the original adjusted cost base of the land before the easement, covenant or servitude
- B is the fair market value of the easement, covenant or servitude
- C is the fair market value of the land immediately before the easement, covenant or servitude was granted.

¹³ Easements, covenants and servitudes are discussed in greater detail in Parts 4 and 5 of this Report.

¹⁴ *Income Tax Act*, s. 43.

¹⁵ Interpretation Bulletin IT-264R and IT-264RSR (part dispositions).

¹⁶ *Income Tax Act*, s. 43(2). There is no such formula provided in the *Income Tax Act* for determining the formula of easements, covenants or servitudes that are not ecological gifts.

The *Income Tax Act* also provides that the taxpayer's adjusted cost base of the land itself is reduced at the time of the gift of an easement, covenant or servitude by the amount determined to be the adjusted cost base of the covenant.

No such formula is set out in the *Income Tax Act* for calculating the adjusted cost base of an easement, covenant or servitude that is not the subject of an ecological gift.

Example

A landowner purchased land in 1990 for \$100,000. In 2003, she donated a conservation easement to a conservancy organization. The donation qualifies as an ecological gift. The fair market value of the covenant was appraised at \$50,000. The value of the land immediately before the easement was granted was determined to be \$300,000. Using the formula the adjusted cost base of the easement is \$16,667 ($\$100,000 \times \$50,000 / \$300,000$).

Capital gains exemptions

The *Income Tax Act* creates several exemptions from liability for tax on a capital gain - the principal residence exemption, the exemption applicable to the gain realized on disposition of certain shares of a qualifying small business corporation and the exemption applicable to qualified farm property including certain shares of a family farm corporation or interests in a family farm partnership.

Principal residence exemption

The entire amount of a capital gain on the disposition of a principal residence is exempt from tax.¹⁷ There is no lifetime limit on this exemption. However, there may not be a full tax exemption available for principal residences located on more than half a hectare of land. The definition of "principal residence"¹⁸ limits the amount of land in relation to which the exemption may be claimed to one contiguous half-hectare unless the taxpayer can show that more of the land is necessary for the taxpayer's use and enjoyment of the residence as a residence.¹⁹ Consequently, if a taxpayer's principal residence is located on four hectares of land and the taxpayer

¹⁷ *Income Tax Act*, s. 40(2)(b).

¹⁸ *Income Tax Act*, s. 54 (principal residence). See section 54 for what qualifies as a principal residence.

¹⁹ The interpretation of "necessary" is the subject of a CRA administrative position as outlined in interpretation bulletins and technical interpretations as well as case law.

disposes of the entire property, any gain in the value of the land over and above the one half-hectare may be a capital gain.

To qualify as a principal residence, the residence must be “a housing unit, a leasehold interest in a housing unit or a share of the capital stock of a co-operative housing corporation acquired for the sole purpose of acquiring the right to inhabit a housing unit owned by the corporation” that is owned and ordinarily inhabited in the year by the taxpayer, the taxpayer’s spouse or a child of the taxpayer.

In order to qualify for the exemption, a taxpayer must designate a residence as his or her principal residence. After 1981, only one principal residence may be designated by the taxpayer or a member of the taxpayer’s family unit (including the taxpayer’s spouse and children under 18 years of age).

See Interpretation Bulletins IT 120R5, Principal Residence, and IT437R, Ownership of Property (Principal Residence), for more information about principal residences. Both are available on the CRA website at <http://www.cra-arc.gc.ca/>

Example

Lucy donates her principal residence located on 3 hectares of land to a local conservancy organization. It is not an ecological gift. She purchased the property for \$100,000. The fair market value of the property at the time of the gift is \$200,000. An appraisal allocated 80% of the value of the property to the principal residence and half-hectare of property.

Lucy has a total capital gain of \$100,000 at the time of the gift (fair market value of \$200,000 – adjusted cost base of \$100,000).

80% of the gain (\$80,000), the amount attributable to the principal residence, is exempt from tax and is not included in Lucy’s income for the year.

20% of the gain (\$20,000), the amount attributable to the additional 2½ hectares, is not exempt from tax. 50% of that \$20,000 (\$10,000) is included in Lucy’s income for the year.

Lucy receives a donation receipt for \$200,000 and can claim a tax credit based on \$200,000.

“Lifetime” capital gains exemption

Before February 22, 1994, up to \$100,000 in capital gains on the disposition of any capital property was exempt from tax in each taxpayer’s lifetime. In 1994, the government eliminated this exemption and provided that taxpayers could elect, as of February 22, 1994, to take any gains accrued to that point on capital property not yet disposed of by the taxpayer. This allowed taxpayers to take advantage of the \$100,000 exemption before it was eliminated and resulted in an increased cost base for any assets for which a taxpayer made the election. The claiming of this exemption in 1994 resulted in a deemed disposition for tax purposes of the property for which the exemption was claimed.

Although the \$100,000 general capital gains exemption has been eliminated, other capital gains exemptions continue to be available, including exemptions for dispositions of qualified farm property or shares of a qualified small business corporation. However, the maximum lifetime capital gains exemption is \$500,000. This includes any exemptions claimed under the previous \$100,000 exemption. It applies to the disposition of qualified farm property or shares of a qualified small business corporation. It does not relate to the principal residence exemption. If a taxpayer has already claimed the \$100,000 exemption, there is only a \$400,000 exemption remaining.

Individuals relying on this exemption should obtain professional advice as unforeseen consequences such as clawback of old age security or child tax benefit reduction may result in years when taxpayers use these exemptions.

Qualified farm property exemption

A capital gains exemption may be available on the disposition of qualified farm property.²⁰ Qualified farm property includes real property used by the taxpayer or a member of the taxpayer’s family to carry on the business of farming, certain shares of a family farm corporation, an interest in a family farm partnership and certain eligible capital property. Two distinct rules apply to the qualification of farm property depending on whether the property was acquired before or after June 18, 1987 and professional advice should be sought to determine which rule applies.

²⁰ *Income Tax Act*, ss. 110.6(1) (qualified farm property) and 110.6(2).

Example

In the example above, if Lucy's property satisfied these criteria and was a qualified farm property, it would be eligible for this exemption. There would be a capital gain, 50% of which Lucy would have to include in calculating her net income for the year. However, because of the qualified farm property exemption, Lucy could deduct the amount of gain in calculating her taxable income assuming she had not already claimed the total lifetime exemption of \$500,000 and the gain would not be taxable. She could still claim a tax credit.

Shares of a qualifying small business corporation

A similar exemption is available in relation to capital gains on the disposition of shares of a qualified small business corporation.²¹ Generally speaking, a qualified small business corporation is a Canadian-controlled private corporation, the assets of which are used in an active business carried on primarily in Canada. At the date of disposition of the shares, all or substantially all of the fair market value of the assets must relate to assets used in an active business carried on in Canada. For the 24 months preceding the disposition, 50% of the fair market value of the assets must have been used in an active business carried on primarily in Canada. The taxpayer or person related to the taxpayer must have been the only person to own the shares in the 24 months preceding the disposition of the shares.

The application of the \$500,000 capital gains exemption may be used to shelter up to \$500,000 of capital gains from certain property from income tax. As stated above, individuals relying on this exemption should obtain professional advice because unforeseen consequences such as clawback of old age security or child tax benefit reduction may result in years when taxpayers use these exemptions.

Inventory lands

As discussed above, land may be either capital property or inventory property. Dispositions of these two kinds of property are treated differently under the *Income Tax Act*. This section will discuss land that is inventory property.

²¹ *Income Tax Act*, ss. 110.6(1) (qualified small business corporation share) and 110.6(2.1).

What are inventory lands?

“Inventory” is “a description of property . . . the cost or value of which is relevant in computing a taxpayer’s income from a business for a taxation year”.²² “Business” is defined in section 248(1) as including “a profession, calling, trade, manufacture or undertaking of any kind whatever and . . . an adventure or concern in the nature of trade.” Generally, a taxpayer’s income from a business or property is the taxpayer’s profit from that business or property for the year (section 9(1)). Inventory is distinguishable from capital property which is defined above.

For the purposes of this Report, “inventory lands” are lands acquired by a taxpayer for the purpose of subsequent sale in the course of a business rather than for the purpose of producing rental, agricultural or other income, or for personal enjoyment. Inventory lands are lands acquired as inventory of a business; for example, lands held by a land developer that the developer intends to sell to others in the course of the developer’s business. Any gain in value of inventory lands is treated as profit rather than a capital gain when the land is sold or transferred.

Distinguishing between business income and capital gains

A gain arising on the sale of real estate will be business income, property income or a capital gain, depending on the circumstances. Gains from the sale of inventory lands are included in business income. Distinguishing between inventory and capital property is not always straightforward. Depending on the circumstances, even income from an isolated transaction could be taxed as income rather than a capital gain.

The *Income Tax Act* does not provide any guidelines about what inventory is. However, CRA has dealt with this issue in an Interpretation Bulletin²³ which identifies some of the factors considered by the courts in determining what is inventory. These factors include:

- the taxpayer’s intention at the time of purchase;
- feasibility of the taxpayer’s intention;
- geographical location and zoned use of the real estate;
- extent to which intention carried out by taxpayer;

²² *Income Tax Act*, s. 248(1).

²³ Interpretation Bulletin IT-218R, *Profit, Capital Gains and Losses from the Sale of Real Estate, Including Farmland and Inherited Land and Conversion of Real Estate from Capital Property to Inventory and Vice Versa*, available on Canada Revenue Agency website at <http://www.cra-arc.gc.ca/>

- evidence that the taxpayer's intention changed after purchase of the real estate;
- the nature of the business, profession, calling or trade of the taxpayer and associates;
- the extent to which borrowed money was used to finance the real estate acquisition and the terms of the financing, if any, arranged;
- the length of time the taxpayer held the real estate;
- whether other persons than the taxpayer share interest in the real estate and, if so, the nature of their occupations, their stated intentions and course of conduct;
- factors which motivated the sale of the real estate;
- evidence that the taxpayer and/or associates had dealt extensively in real estate.

The more closely a taxpayer's business is related to real estate transactions, the more likely that any gain on the sale of real estate will be business income. Building contractors and land developers therefore are more likely to find that gain derived from real estate transactions is business income rather than a capital gain.

For assistance in distinguishing between income from a business and capital gains, see Interpretation Bulletin IT-218R, *Profit, Capital Gains and Losses from the Sale of Real Estate, Including Farmland and Inherited Land and Conversion of Real Estate from Capital Property to Inventory and Vice Versa*, available on the CRA website at <http://www.cra-arc.gc.ca/>

Tax treatment of inventory lands

A taxpayer must include his or her "profit" when calculating income for the year from a business. Unlike capital gains, no portion of the profit or gain is exempt from tax. Income from a business includes gross income from the sale of inventory less costs related to acquiring and maintaining the inventory and other business expenses. The costs associated with inventory lands could include subdivision and development costs and financing charges.

Business expenses include accounting and legal fees, advertising expenses, insurance expenses, interest and bank charges, maintenance and repairs, and office expenses. The *Income Tax Act* does not specify the way in which business owners should calculate business income. Generally accepted accounting principles are applied to compute income from a business.

PART 2

CHARITABLE GIFTS

What is a charitable gift?

A gift under the *Income Tax Act* is a voluntary transfer of property without valuable consideration.²⁴ The transfer must be voluntary. Generally, any legal obligation requiring a donor to make a donation would result in the donation losing its status as a gift. For example, if a land developer is compelled, as part of obtaining development approval, to donate land for a park, the transfer may not be voluntary and, therefore, would not fall within the definition of “gift.”

A gift must be a transfer of property. Although “property” encompasses many kinds of things including cash, personal property, art, land, interests in land, shares in companies, and so on, it does not include services such as time, skills and effort.²⁵

The transfer of property must be made without the expectation of any benefit, advantage, right or privilege in return, unless the benefit or advantage is of nominal value. The benefit or advantage could be in the form of cash, other property or services. However, draft amendments to the *Income Tax Act* issued December 20, 2002 but not yet enacted will permit the issue of donation receipts in circumstances where an intention to make a gift is present but consideration is also received by the donor. These amendments will permit the practice of “split-receipting” by which, within certain limitations, a donation receipt may be issued for the difference between the fair market value of the property transferred to the donee and the benefit or advantage the donor receives for it.

Split-receipting

On December 20, 2002, CRA issued draft amendments to the *Income Tax Act* and proposed guidelines on “split-receipting” in relation to gifts under the *Income Tax Act*.²⁶ CRA has indicated that these guidelines may be followed pending amendments to the *Income Tax Act*.

²⁴ Interpretation Bulletin IT-110R3, Part I, section 3. This is based on the common law interpretation of “gift.” Sections 110.1 and 118.1 deal with gifts. See the new policy relating to split-receipting discussed below.

²⁵ Interpretation Bulletin IT-110R3, Part I, section 15(d).

²⁶ The proposed interpretational guidelines are contained in Income Tax Technical News, No. 26 at <http://www.cra-arc.gc.ca/E/pub/tp/itnews-26/itnews-26-e.pdf>, and the legislative proposals and explanatory notes relating to the amendments to the *Income Tax Act* can be found at <http://www.fin.gc.ca/toce/2004/ita04-introe.html/>

Split-receipting may apply in a situation in which a donor gives a gift to a qualified donee and receives some benefit in return. Under the proposed split-receipting amendments and guidelines, the donor receives a donation receipt for the value of the gift, minus the value of the advantage or benefit that was given in return. For example, if a person buys a ticket for a charity dinner and the cost of the ticket is \$500, but the actual cost of the dinner is only \$50, then the donation receipt is “split” so that the donation receipt would be for \$450 – the value of the ticket (\$500) minus the value of the dinner (\$50).

Under the new legislation, split-receipting will generally be permitted under the following circumstances:

- There must be a voluntary transfer of property with a clearly ascertainable value to a recipient qualified to receive the gift.

The recipient of the property must be qualified under the *Income Tax Act* to receive the kind of charitable gift that is being made. For example, under the *Income Tax Act* an ecological gift may be received by the federal government, a province, a municipality, a municipal or public body performing a function of government, or a registered charity that has as one of its main purposes, in the opinion of the Minister of the Environment, the conservation and protection of Canada’s environmental heritage.

- Any advantage or benefit received or obtained by the donor in making the gift must be clearly identified and the value of this advantage must be ascertainable.

If the value of the advantage cannot be ascertained, no charitable tax deduction or credit will be allowed. The amount of the advantage is the value, at the time the gift is made, of any property, service, compensation or other benefit that the donor has received or is entitled to receive, either immediately or in the future and either absolutely or contingently, as partial consideration for, or in gratitude for, the gift. For gifts made after February 18, 2003, the advantage also includes any limited-recourse debt²⁷ that the donor or any other person has incurred that relates to the gift.

- The donor must have a clear intent to give a gift that will enrich the recipient.

If the value of the advantage or benefit to the donor does not exceed 80% of the market value of the gift, the balance generally will be eligible for a tax credit or

²⁷ For the definition of limited-recourse debt, see draft amendments to the *Income Tax Act*, proposed subsection 143.2(6.1), and explanatory notes available at <http://www.fin.gc.ca/toce/2004/ita04-introe.html>. A limited-course debt includes, among other things, the unpaid principal of any indebtedness for which recourse is limited, even if that limitation applies only in the future or contingently.

deduction. Even where the value of the advantage to the donor exceeds 80% of the fair market value of the transferred property, the gift may still qualify for a tax credit or deduction if the donor can establish to the satisfaction of the federal Minister of National Revenue that the transfer was made with the intention to make a gift. However, CRA has not suggested any factor other than the percentage of value of the advantage to the donor (not greater than 80%) to indicate the intent of the donor.

- The eligible amount of the gift for which the donor may receive a tax deduction or credit must be recorded on the donation receipt together with the fair market value of the transferred property.

CRA also recognizes that recipients of gifts will sometimes give a token of gratitude or appreciation to the donor. These tokens will not, and have not historically, been regarded by CRA as an advantage or a benefit for the purpose of determining whether or not the value of the advantage or benefit received by the donor exceeds 80% of the value of the gift. As long as the advantage received by the donor does not exceed the lesser of (a) 10% of the value of the gift and (b) \$75, then the advantage is only a token of appreciation that will not be used to calculate the advantage received by the donor. However, if the token is either cash or something that may be easily redeemed such as a gift certificate, then the token must be included in the calculation of the donor's advantage gained by giving the gift.

When property subject to a mortgage is donated, all relevant encumbrances and charges on the property will need to be taken into account in determining the value of the gift. For example, if a donor donates a piece of land worth \$400,000 and the donee assumes an outstanding mortgage of \$200,000 at market rates and terms, then the donor will have received an advantage of \$200,000. Thus, the donor is eligible for a donation receipt of \$200,000 - the value of the land (\$400,000) minus the value of the advantage to the donor (\$200,000).

Mortgages may be neutral (at current market rates), "favourable" or "unfavourable." A favourable mortgage is one where the terms of the mortgage are better than the current market. An unfavourable mortgage is one where the terms of the mortgage are worse than the terms that could be obtained on a mortgage in the current market. For example, if the mortgage interest rate is higher than could be currently obtained, the mortgage would be unfavourable.

If the land in the above example were subject to an unfavourable mortgage, then the advantage received by the donor when the charity assumes the mortgage would be greater. For example, if the \$200,000 mortgage had a high interest rate and the donor would have to pay a third party \$250,000 to assume the mortgage, then the advantage to the donor would be \$250,000 and the donor's donation receipt would be for \$150,000 — the value of the land (\$400,000) minus the value of the advantage to the

donor of having the mortgage assumed by someone else (\$250,000). Conversely, if the land were subject to a favourable mortgage, the amount of the advantage would be less.

Split-Receipting – Example 1

- Donor owns land with a fair market value of \$500,000.
- Donor transfers the land to X Conservancy and receives \$300,000 in return for the transfer.
- The eligible amount of the gift and the amount of the donation receipt is \$200,000 – the value of the land (\$500,000) minus the value of the advantage received by the donor (\$300,000).

Split-Receipting – Example 2

- Donor transfers land to X Conservancy.
- The land is mortgaged for \$200,000.
- X Conservancy assumes the mortgage.
- The assumption of the mortgage by X Conservancy is the only advantage to the donor from the transfer.
- The land has a fair market value of \$500,000.
- The mortgage has an interest rate of 5% which is representative of the current market.
- The eligible amount of the gift and the amount of the donation receipt is \$300,000 – the value of the land (\$500,000) minus the value of the advantage received by the donor (\$200,000).

Types and timing of gifts

The tax treatment of a gift depends on the timing and the nature of the gift.

Gifts are classified as present or deferred. A present gift is one from which the recipient receives an immediate benefit while a deferred gift is an irrevocable gift from which the recipient will not derive a benefit until some time after the gift is given. For example, a gift of a remainder or residual interest in property after the end of a life estate is a deferred gift. Present and deferred gifts both give rise to tax consequences in the year the gift is made. However, there are differences in the way the value of present and deferred gifts is determined.²⁸ See Part 5 of this Report for a more detailed discussion of gifts of a remainder or residual interest in land.

²⁸ A present value must be determined for gifts that are deferred until a later date.

Tax treatment of a gift also depends on the kind of property given. A donor might give cash or other property such as land, interests in land, such as conservation covenants and easements, shares or personal property such as art or jewellery.

The *Income Tax Act* contains specific provisions relating to certain kinds of property. For example, there is a specific category for gifts of ecologically sensitive land as well as for gifts of certified cultural property. In addition, as discussed, dispositions of principal residences and qualified farm property may benefit from tax exemptions under the *Income Tax Act*.

Ecological gifts will be discussed in greater detail in Part 4 of this Report.

Deductions and tax credits for charitable gifts

An individual may claim a tax credit for the eligible amount of a charitable gift that satisfies the general and specific criteria in the *Income Tax Act* relating to that kind of gift. Corporations do not receive a tax credit for charitable gifts but may deduct the eligible amount of their charitable gifts from income. Corporations are subject to the same limitations and carry over provisions as individuals. These are discussed below.

To qualify for a tax credit or deduction, the gift must be made to a qualified donee which must be one of the following:

- a registered charity;
- a registered Canadian amateur athletic association;
- certain Canadian housing corporations;
- certain foreign universities and charitable organizations;
- a Canadian municipality;
- the United Nations or its agencies; or
- the federal or provincial Crown.²⁹

A “registered charity” is a charitable organization or foundation that meets the criteria set out in the *Income Tax Act*.³⁰ The recipient will give the donor a donation receipt for the value of the property donated.

The tax credit or deduction for charitable gifts is generally based on the lesser of (a) the total of the eligible amounts of the donor’s gifts and (b) 75% of the donor’s income. This 75% limitation does not apply to ecological gifts, cultural gifts or gifts made in the year of death, including those made in the donor’s will. Ecological gifts

²⁹ *Income Tax Act*, s. 118.1(1) (total charitable gifts).

³⁰ See *Income Tax Act*, s. 248(1).

will be discussed in greater detail in Part 4 of this Report. For charitable gifts of capital property, the amount on which the tax credit or deduction is based is the total of 75% of the donor's net income plus 25% of taxable capital gains plus 25% of recapture of any capital cost allowance arising as a result of the gift.³¹

The federal tax credit is calculated as 16% of the first \$200 of the total of the eligible amounts of charitable gifts in the year and 29% of any amounts over \$200, subject to the limitations explained above.³² The charitable gift tax credit is a federal tax credit and reduces the amount of federal tax payable.³³ The tax credit for the total amount of charitable gifts over \$200 gives rise to a tax credit at the highest marginal rate even though the donor may not be taxed at the highest rate.

A provincial tax credit may also be available. In British Columbia, for example, the combined value of the federal and provincial tax credit is 43.7% of the amount of the donation in excess of \$200. The impact of the tax benefits may be significantly greater when both federal and provincial tax benefits are taken into account.

Any amount of the donation receipt not used in the year of the donation may be carried forward for up to five years.³⁴ However, tax credits are non-refundable and may only be used to offset tax liabilities. If a taxpayer cannot or does not use the full value of donations within the time allotted, the taxpayer will lose any remaining benefit. In circumstances where this may occur, proper tax planning may mitigate the effect.

Example

Max has a net income of \$40,000 per year and receives an inheritance of \$45,000. He donates the entire amount of the inheritance to a registered charity.

The registered charity gives Max a donation receipt for \$45,000. In the year of the donation, he may use up to \$30,000 (75% of his income of \$40,000) as the basis for calculating a tax credit for that year.

The maximum federal tax credit available to Max would be $(16\% \times \$200) + (29\% \times \$29,800) = \$8,674$. This amount would be subtracted from the amount of federal tax otherwise payable on his income of \$40,000.

If Max used the entire amount of the tax credit in the year of the gift, he would have \$15,000 remaining of the donated amount to carry over for up to five years.

³¹ *Income Tax Act*, s. 118.1(1) (total gifts).

³² *Income Tax Act*, s. 118.1(3). After 2001, these rates are indexed according to the formula contained in section 117.1 of the *Income Tax Act*. All calculations in this Report will use the unadjusted rates set out in section 117(2) of the *Income Tax Act*.

³³ Donors should check with their tax advisers about available provincial tax credits.

³⁴ There is no carry forward period for gifts made in the year of death.

In the example, Max could use all or only some of the amount of his donation, depending on his circumstances, to claim a tax credit in the year of the gift and could carry the balance over for up to five years. The tax brackets applicable in the donor's province of residence should be considered in order to maximize the benefit derived from the federal and provincial donation credit.

Gifts of land and interests in land

As discussed above, land may be either capital property or inventory. Gifts of land are treated differently depending on whether the land is capital property or inventory.

A gift of land may be a gift of the land itself, so that title to the land is transferred to the recipient of the gift, or a gift of an interest in the land such as an easement, covenant or servitude. It might also be a gift of a remainder or residual interest in land. Interests in land are discussed in greater detail in Part 5 of this Report.

Gift of land that is capital property

A charitable gift of land that is capital property is considered under the *Income Tax Act* to be a disposition of the property and therefore could give rise to a capital gain. The gift also will result in a tax credit or deduction. Only the eligible amount of the gift will give rise to a tax credit or deduction. In a case where the donor receives some advantage in return for making the gift, the eligible amount of the gift will be the fair market value of the gift minus the value of the advantage received by the donor.

The tax credit or deduction is calculated as a percentage of the total value of the eligible amount of the gift up to a maximum of

75% of the taxpayer's income for the year, plus
25% of the taxable capital gain, plus
25% of recaptured capital cost allowance.³⁵

If the property has appreciated in value, the donor will realize a capital gain. Unless the gift qualifies for special tax benefits (for example, as an ecological gift or a gift of cultural property), 50% of the gain must be included in the donor's income for the year. However, the tax credit or deduction that the donor will be able to claim generally will more than offset the additional tax resulting from the gain.

³⁵ *Income Tax Act*, ss. 118.1(1) (total gifts). Donors should consult their tax advisor for information about capital cost allowance and the tax treatment of depreciable property.

Example

Sonia, who has a net income of \$55,000, donates a parcel of land she has owned since 1989 to a conservancy group. She bought the land for \$60,000 (the adjusted cost base). At the time of the gift, the land is appraised at \$200,000 which Sonia designates as the value of the gift, making the proceeds of disposition of the gift \$200,000.

There is a deemed capital gain of \$140,000 from the gift, 50% of which (\$70,000) is taxable and is added to her net income for the year. As a result, her total net income for the year is \$125,000.

Sonia receives a donation receipt for \$200,000, the fair market value of the land. As the calculation below shows, the amount on which she can calculate the tax credit is \$111,250.

75% of net income of \$125,000	\$93,750
Plus 25% of taxable capital gain of \$70,000	<u>\$17,500</u>
Tax credit calculated as a percentage of:	\$111,250

Sonia can claim a maximum federal tax credit of \$32,237 in the year of the gift.

Tax credit (16% of \$200) + (29% of \$111,050)	\$32,237
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If she is able to or chooses to claim the maximum tax credit, she can carry forward \$88,750, the balance of the donation, for up to five years. The tax benefit from the donation will offset the taxable capital gain and provide a significant additional credit against federal tax otherwise payable.

Sonia could choose to claim a lower tax credit in the year of the gift and spread the benefit of the donation more evenly over the next five years or in whatever way would provide her the maximum benefit.

Sonia's federal income tax payable for the year:³⁶

Net and taxable income without the donation	\$55,000
Federal tax payable (\$4,921 on \$30,754 plus 22% of the balance of \$24,246)	\$10,255
Net and taxable income with the donation	\$125,000
Federal tax payable without the tax credit (\$21,695 on the first \$100,000 plus 29% of the balance of \$25,000)	\$28,945

The maximum tax credit available to Sonia is \$32,237, more than the amount of federal tax payable. The tax credit would more than offset the additional amount of federal tax owing as a result of the gift and Sonia could carry some portion of the donation over to claim tax credits in future years.

³⁶ Using the unindexed tax rates in s. 117(2) of the *Income Tax Act*.

The *Income Tax Act* allows a donor of capital property to designate any amount between the adjusted cost base and fair market value of the property as the value of the gift. The designated amount is deemed to be the proceeds of disposition of the property and the gain is calculated on the basis of this amount. The designated amount is also deemed to be the fair market value of the property and the donation amount.³⁷ A donor who elects to use the adjusted cost base as the proceeds of disposition will have no gain and a donation amount (and donation receipt) equal to the adjusted cost base.

Example

In the example above, if Sonia designated the adjusted cost base of the property as the value of the gift, she would receive a donation receipt for \$60,000 and would have no capital gain. Her net income for the year would be \$55,000 and she could claim a tax credit based on 75% of her net income, or \$41,250. If she claimed the full credit available to her in the year of the gift, she would have a balance of \$18,750 to carry forward to future years (donation amount of \$60,000 minus \$41,250, amount claimed in the year of the gift).

Gifts of inventory lands

Gifts of inventory lands do not attract the same tax benefits as gifts of capital property. A donor of inventory lands must include the fair market value of the land donated in its income for the year. The donor may deduct from income the cost of the land and any other costs relevant to the land, such as financing costs, costs related to acquiring the land, ongoing maintenance costs and other allowable costs. All the profit derived from the disposition of inventory lands (selling price less cost of the land and other allowable costs) must be included in the taxpayer's income for the year. In the case of capital property on which there is a capital gain, however, only 50% of a capital gain must be included in income. For ecological gifts, the inclusion amount is 25% of the capital gain.

The result is that the tax implications of making a gift of land from inventory are essentially the same as those of making a cash donation. The *Income Tax Act* does not currently offer any tax incentives for businesses to donate inventory property such as land rather than cash.

³⁷ *Income Tax Act*, ss. 118.1(6) and 110.1(3). Amendments to these sections have been proposed in part to accommodate the changes resulting from the introduction of split-receipting. The amendments will address the fact that only a portion of the value of donated property may be eligible for a donation receipt.

Inventory Lands – Examples

Delightful Developments Ltd. donated 30 acres of land to a conservation organization. The land was part of a larger parcel Delightful bought with the intention of subdividing it into five-acre parcels. Delightful's costs attributable to the 30 acres were \$100,000. At the time of the gift, the fair market value of the land was \$250,000. The land is considered inventory of Delightful's business. Delightful has other income of \$800,000 from land sales for the year and other costs of \$600,000.³⁸

Example 1

Calculation of taxable income

Sales of land	\$ 800,000
Value of land donated	<u>250,000</u>
Gross income	1,050,000
Less costs (including \$100,000 costs associated with donated land)	<u>700,000</u>
Net income	350,000
Less deduction for donated land	<u>250,000</u>
Taxable income	100,000

Example 2

Calculation of taxable income

Instead of donating it, Delightful sells the land for fair market value and makes a cash donation of \$250,000 to the conservation organization.

Sales of land (and gross income)	\$1,050,000
Less costs as above	<u>700,000</u>
Net income	350,000
Less deduction for cash donation	<u>250,000</u>
Taxable income	100,000

³⁸ This example, like all others in this Report, is simplified for illustration purposes and does not take into account expenses, such as financing and acquisition costs, that Delightful could deduct from the fair market value in calculating its profit.

Example 3

Calculation of taxable income

Delightful donates land of the same value which is capital property, not inventory. The adjusted cost base of the land is \$100,000. The capital gain would be \$150,000 (fair market value of \$250,000 less adjusted cost base of \$100,000). Delightful must include 50% of the gain in income.

Sales of land	\$ 800,000
Taxable capital gain (50% of \$150,000)	<u>75,000</u>
Gross income	875,000
Less costs	<u>600,000</u>
Net income	275,000
Less deduction for donated land	<u>225,000³⁹</u>
Taxable income	50,000

The tax incentives therefore are greater for gifts of capital property.

For more information about gifts for the purposes of the *Income Tax Act* see *Gifts and Income Tax*, P113; *Gifts and Official Donation Receipts*, IT-110R3; *Gifts of Capital Properties to a Charity and Others*, IT-288R2; and *Gifts to a Charity of a Residual Interest in Real Property or an Equitable Interest in a Trust*, IT-226R available on the CRA website at <http://www.cra-arc.gc.ca/>

³⁹ 75% of net income plus 25% of taxable capital gains.

PART 3

REGISTERED CHARITIES

Organizations considering receiving gifts of land and interests in land will have a number of issues to address. The *Income Tax Act* imposes a number of restrictions and obligations on registered charities. Charitable organizations and foundations receiving or interested in receiving gifts of land or interests in land should seek advice from tax and legal advisers about obtaining charitable status, the tax consequences of the gifts and maintaining charitable status generally. Essentially, charitable organizations are those registered charities that carry out charitable activities or programs themselves whereas foundations raise funds in support of charitable organizations.

For more information about the requirements related to registered charities, see CRA publications including *Registered Charities and the Income Tax Act*, RC4108(E) 1204, and *Registering a Charity for Income Tax Purposes*, T4063(E) Rev. 01. For general information of interest to registered charities, see the *Registered Charities Newsletter*. All publications are available on the CRA website at <http://www.cra-arc.gc.ca/>

Charitable status

To be able to issue donation receipts for donations, an organization must be a registered charity within the meaning of the *Income Tax Act*.

A “registered charity” is

(a) a charitable organization, private foundation or public foundation, within the meanings assigned by subsection 149.1(1), that is resident in Canada and was either created or established in Canada, or

(b) a branch, section, parish, congregation or other division of an organization or foundation described in paragraph (a), that is resident in Canada and was either created or established in Canada and that receives donations on its own behalf,

that has applied to the Minister in **prescribed form for registration** and that is at that time registered as a charitable organization, private foundation or public foundation.⁴⁰ [emphasis added]

⁴⁰ *Income Tax Act*, s. 248(1).

Organizations with charitable status may issue donation receipts for charitable donations made to the organization. In addition, registered charities are exempt from the payment of income tax.⁴¹

The only entities that can receive ecological gifts are certain registered charities, Canadian municipalities and the federal or provincial Crown. As explained in Part 4, only registered charities which include in their purposes “the conservation and protection of Canada’s environmental heritage” or some similar statement of intent acceptable to the federal Minister of the Environment or the authority designated by the Minister are qualified to receive ecological gifts.

Along with the ability to issue donation receipts and attract donations come certain responsibilities and obligations. If registered charities do not comply with all relevant requirements, they risk losing their charitable status and may be subject to special taxes and other sanctions. These responsibilities and obligations are discussed in the next sections of the Report.

Disbursement Quotas

Every registered charity has a disbursement quota.⁴² A disbursement quota is the minimum amount of the charity’s income for the taxation year that must be applied to its charitable purposes rather than, for example, to fundraising, management and administration. Every charity should be aware of its disbursement quota because failing to fulfil the disbursement quota may result in loss of charitable status.

The general rule has been that a charitable organization must spend 80% of the amount for which it issued official donation receipts in the preceding year⁴³ on its charitable activities in the current year, less amounts in relation to gifts of capital by bequest or inheritance, gifts subject to a trust or direction that the gift or property substituted for it must be held for at least ten years, and gifts from registered charities.

Registered charities should be aware that certain gifts of capital property could interfere with the recipient’s ability to meet its disbursement quota. For example, depending on the charitable purposes of the charity, if a donor makes a gift of land and intends the recipient to hold the land for some time, the value of the land may be added to the amount of gifts received, thus raising the disbursement quota without providing any cash amounts to disburse. To avoid this result, the gift could be made subject to a ten year direction that it or substituted property be held for a period of at least ten years.

⁴¹ *Income Tax Act*, s. 149.

⁴² *Income Tax Act*, s. 149.1.

⁴³ Proposed amendments will change this to “eligible amount” of gifts to reflect the introduction of split-receipting.

What constitutes charitable activities or charitable purposes has been the subject of much litigation. Each charity must monitor its expenditures to ensure that the required percentage of its disbursements is made in relation to its charitable activities. Although a charity may engage in non-partisan political activities that are ancillary and incidental to its charitable activities, amounts spent on other political activities are not considered amounts spent on charitable activities and therefore will not assist the charity in meeting its disbursement quota.⁴⁴

In the 2004 budget, the federal government proposed a number of changes to the regulatory regime for charities, including the disbursement quota. The changes will be phased in starting in tax years beginning after March 22, 2004.⁴⁵ It is essential that each charity obtain professional advice about the effect of these proposed changes and about meeting its disbursement quota in light of its specific charitable purposes and activities.

Loss of charitable status

Registered charities risk losing their charitable status for, among other things,

- failing to meet their disbursement quota;
- failing to meet applicable statutory requirements;
- failing to file information returns;
- issuing donation receipts improperly;
- failing to keep proper books and records; and
- carrying on a business not related to the charity's business or, for private foundations, carrying on any business.

Because of disbursement quota requirements and the obligation to issue a proper donation receipt, charities have an obvious interest in determining a reasonable market value for property donated to them. A charity therefore should consider becoming involved with a donor in the valuation of a gift at the earliest opportunity in the donation process.

⁴⁴ *Income Tax Act*, ss. 149.1(1.1) and (6.2).

⁴⁵ The draft amendments, introduced September 16, 2004, may be found at http://www.fin.gc.ca/drleg/ITA1_08-04_1e.html. Explanatory notes on the draft legislation are located at http://www.fin.gc.ca/drleg/ITAn_08-04_2e.html#Income%20Tax%20Act.

Donation receipts

Registered charities have an obligation to issue a proper donation receipt. Part XXXV of the *Income Tax Regulations*, Receipts for Donations and Gifts, governs the content of receipts for donations and gifts. Donation receipts for gifts of property other than cash must contain, among other things,

- the day on which the donation was received,
- a brief description of the property,
- the name and address of the appraiser if an appraisal was done, and
- the fair market value of the property at the time the gift was made.

In addition, changes to the regulations resulting from the introduction of legislation permitting split-receipting require that donation receipts now contain the eligible amount of the gift.

Part XXXV of the Income Tax Regulations is available on the Department of Justice website at <http://laws.justice.gc.ca/en/I-3.3/C.R.C.-c.945/130884.html#rid-130998>

Interpretation Bulletin IT-110R3, June 20, 1997, *Gifts and Official Donation Receipts*, and *Gifts and Income Tax*, both available on the CRA website at <http://www.cra-arc.gc.ca/> also contain information about donation receipts.

Special taxes

As stated above, registered charities are exempt from the payment of income tax under Part I of the *Income Tax Act*. In some circumstances, however, they may be subject to special taxes.

For example, a charity or municipality that disposes or changes the use of an ecological gift without the approval of the Minister of the Environment or the Minister's designate may be liable to pay a tax equal to 50% of the fair market value of the gift at the time of the unauthorized disposition or change of use.⁴⁶ This tax could be imposed, for example, if land or a conservation easement is transferred from the recipient to another organization without approval.

⁴⁶ *Income Tax Act*, Part XI.2, s. 207.31.

Recipient registered charities or municipalities contemplating a disposition or change in use of property that was an ecological gift should contact the Ecological Gifts Program to obtain more information about how to request approval for a proposed disposition or change in use.

No such tax is imposed in relation to ecological gifts and related tax benefits administered under the provisions of the Quebec *Taxation Act*.

The *Income Tax Act* imposes a revocation tax if a charity's registration is revoked.⁴⁷ The amount of tax payable is equal to the fair market value of the assets of the charity on a specified valuation day plus the amount of donations for which donation receipts have been given or inter-charity gifts received between that valuation day and the day the tax is payable. This amount is reduced by the value of assets transferred to other registered charities, amounts spent on charitable activities and amounts used to pay debts and reasonable expenses.

Other taxes may be imposed on charitable foundations in relation to transfers of a significant amount of property by the charitable foundation intended to reduce the foundation's disbursement quota⁴⁸ or non-qualified investments of private foundations.⁴⁹ Registered charities should be aware of these and any other potential tax liabilities in carrying on their day to day activities.

⁴⁷ *Income Tax Act*, Part V, ss. 188(1) and (2).

⁴⁸ *Income Tax Act*, ss. 188(3) and (4).

⁴⁹ *Income Tax Act*, s. 189.

PART 4

ECOLOGICAL GIFTS

What is an ecological gift?

An ecological gift is a particular kind of charitable gift under the *Income Tax Act*. A number of specific requirements are associated with ecological gifts and donors of ecological gifts receive special tax benefits.

The *Income Tax Act* defines an ecological gift as

the fair market value of a gift ... of land, including a servitude for the use and benefit of a dominant land, a covenant or an easement, the fair market value of which is certified by the Minister of the Environment and that is certified by that Minister, or a person designated by that Minister, to be ecologically sensitive land, the conservation and protection of which is, in the opinion of that Minister, or that person, important to the preservation of Canada's environmental heritage, which gift was made by the individual in the year or in any of the five immediately preceding taxation years to

(a) Her Majesty in right of Canada or a province or a municipality in Canada, or

(b) a registered charity, one of the main purposes of which is, in the opinion of the Minister of the Environment, the conservation and protection of Canada's environmental heritage, and that is approved by that Minister, or that person, in respect of that gift.⁵⁰

Proposed amendments to the *Income Tax Act* ensure that the definition of "ecological gift" corresponds to changes resulting from the introduction of split-receipting. As a result of the proposed amendments "total ecological gifts" means the total of all amounts each of which is the eligible amount of a gift, that is, the fair market value of the property given minus any advantage to the donor in return for the gift. As with other charitable gifts, it is only the eligible amount of a gift (the fair market value of the property transferred minus the value of any advantage received by the donor) that gives rise to a tax credit or deduction.

⁵⁰ *Income Tax Act*, ss. 110.1(1)(d) and 118.1(1), definition of "total ecological gifts."

The Ecological Gifts Program is administered by Environment Canada. This section of the Report will describe the Ecological Gifts Program and explain the requirements associated with making an ecological gift.

Requirements

To qualify for the tax benefits associated with ecological gifts, the gift must satisfy all the criteria for an ecological gift. It must be a valid charitable gift.⁵¹ It must be a gift of ecologically sensitive land or an interest in ecologically sensitive land; the land must be certified as ecologically sensitive by the Minister of the Environment; the recipient must be approved to receive ecological gifts; and the fair market value of the land or interest in land must be certified by the Minister of the Environment. This section sets out the basic requirements for an ecological gift. The section headed Ecological Gifts Program Process will provide more detail about these requirements.

Ecologically sensitive land

To qualify as an ecological gift, land must be certified by the Minister, or a person designated by the Minister, to be ecologically sensitive land, the conservation and protection of which is, in the opinion of the Minister, or the Minister's designate, important to the preservation of Canada's environmental heritage. A gift of the land itself, a gift of a remainder interest in the land and a gift of an easement, covenant or servitude on the land each will qualify as an ecological gift as long as all the criteria are met.⁵²

Qualified recipient

The following are qualified to receive ecological gifts:

- the Crown in right of Canada,
- the Crown in right of a province or territory,
- municipalities in Canada, and

⁵¹ See Part 2 of this Report for information about charitable gifts generally, including the new rules governing split-receipting which also apply to ecological gifts.

⁵² See Part 5 of this Report for a discussion of interests in land.

- registered charities, one of the main purposes of which is, in the opinion of the Minister, the conservation and protection of Canada's environmental heritage, and which are approved by the Minister, or the Minister's designate.⁵³

Determination and certification of fair market value

In 2001, the *Income Tax Act* was amended to require that the fair market value of ecological gifts be certified by the Minister of the Environment.⁵⁴ As a result of these changes, Environment Canada established an Appraisal Review and Determination Process which involves review of appraisals of ecological gifts by an Appraisal Review Panel. The Panel makes a recommendation of fair market value to the Minister who determines the fair market value and issues a Notice of Determination of Fair Market Value. A donor who disagrees with the determination of fair market value can seek a redetermination of the fair market value. The Redetermination Committee of the Panel then reviews the fair market value and makes a recommendation of fair market value to the Minister who determines the value and issues a Notice of Redetermination of Fair Market Value. Once the gift has been made, the Minister issues a Statement of Fair Market Value certifying its fair market value.

The only specific guidance as to value in the *Income Tax Act* relates to the value of an ecological gift of a servitude, covenant or easement. The value of a servitude, covenant or easement is deemed to be the greater of its fair market value otherwise determined and the amount by which the fair market value of the land is reduced as a result of making the gift.⁵⁵ The latter method of valuation is known as the "before and after" method or the diminution in value method. It requires valuing the amount by which the fair market value of the land is reduced as a result of the making of an ecological gift of an easement, covenant or servitude.⁵⁶

Although the *Income Tax Act* offers little guidance on how to value ecological gifts, the Ecological Gifts Program has prepared *Guidelines for Appraisals* which are intended to assist appraisers in the preparation of ecological gift appraisals. The *Guidelines for Appraisals* include general recommendations for all ecological gifts, regardless of their fair market value. The most up to date version of the *Guidelines for Appraisals* is available on the Ecological Gifts Program website at <http://www.cws-scf.ec.gc.ca/ecogifts/>. The version that was current as of the date of this Report may be found in Appendix 1.

⁵³ *Income Tax Act*, ss. 110.1(1)(d) and 118.1(1), definition of "total ecological gifts."

⁵⁴ *Income Tax Act*, ss. 110.1(d) and 118.1(1), definition of "total ecological gifts." See also sections 118.1(10.2) - (10.4). Applicable to gifts made or proposed to be made after February 27, 2000.

⁵⁵ *Income Tax Act*, ss. 118.1(12) and 110.1(5). This is applicable to gifts made after February 27, 1995.

⁵⁶ See Ann Hillyer, Judy Atkins and John B. Miller, *Appraising Easements, Covenants and Servitudes: Guidelines for Valuation*, Ottawa: North American Wetlands Conservation Council (Canada), forthcoming publication, for a more comprehensive discussion of appraising interests in land.

Tax benefits

The *Income Tax Act* provides favourable income tax treatment for ecological gifts. As with other charitable gifts, donors will be able to claim a tax credit or deduction. In addition, ecological gifts benefit from a reduction in the normal taxable gain realized on the disposition of the property.

As explained in the general discussion of income tax above, corporate donors may deduct the amount of their gift directly from their taxable income, while the value of an individual's gift is converted to a non-refundable tax credit. The federal portion of the tax credit is calculated by applying a rate of 16% to the first \$200 of the donor's total gifts for the year and 29% to the balance.⁵⁷ There may also be provincial benefits available. For example, in British Columbia, the combined tax credit is 22% of the first \$200 and 43.7% of the balance of the donor's charitable gifts. However, unlike other charitable gifts, there is no limit in relation to the income of the donor applicable to the amount of donations of ecological gifts in a year that are eligible for the deduction or credit. As with other charitable gifts, any unused portion of the eligible amount of a donor's total ecological gifts may be carried forward for up to five years.

Donors of ecological gifts receive a reduction in the taxable capital gain realized on the disposition of the property. While for most gifts the taxable portion of the capital gain is 50%, in the case of an ecological gift the taxable portion is 25%.

Timing issues

A request for a determination of the fair market value of an ecological gift can be made to the Minister of the Environment before the gift is made, at the time of the gift or for up to 3 years after the end of the person's taxation year in which the gift was made.⁵⁸ However, the *Income Tax Act* requirements relating to ecological gifts must have been met when the gift was made.

The fair market value of an ecological gift as determined or redetermined by the Minister of the Environment is both the fair market value and the proceeds of disposition of the gift for all purposes relating to charitable gifts under the *Income Tax Act* for a period of two years after the determination or redetermination.⁵⁹ This fair

⁵⁷ *Income Tax Act*, s. 118.1(3). After 2001, these rates are indexed according to the formula contained in section 117.1 of the *Income Tax Act*. The unindexed rates are used in this Report.

⁵⁸ *Income Tax Act*, s. 118.1(10.3). A donor claiming tax benefits for an ecological gift after the year in which it was made may be required to file an amended tax return for the year in which the gift was made.

⁵⁹ *Income Tax Act*, s. 118.1(10.1). This is subject to the taxpayer designating another amount as permitted under the Act.

market value applies even if the donor subsequently makes a gift that is not an ecological gift. It is also the value for certain other purposes under the *Income Tax Act* unrelated to gifts.⁶⁰

Although a donor can apply for certification of the land as ecologically sensitive at the same time as application is made for a determination of the fair market value of the land (before the gift is made and for up to 3 years after the end of the person's taxation year in which the gift was made), the land must have met the criteria for ecological sensitivity at the time the gift was made. In addition, the recipient must have been qualified at the time of the gift to receive ecological gifts. If the donor requests a determination of fair market value after the gift is made, the donor must submit an appraisal of the fair market value of the ecological gift as of the time the gift was made, not as of the time the request is made.

If a donor requests a determination of fair market value before making the donation of an ecological gift, the effective date of the appraisal must be no earlier than six months before the application date.⁶¹ If the effective date of the appraisal is more than six months before the date, the Ecological Gifts Program requires the appraiser who completed the appraisal to verify in writing that there has been no material change in the use of the subject property, and no material change to the market in the area of the subject property. If the appraiser cannot verify both of these statements, either a new appraisal must be completed, or the appraiser who completed the original appraisal must update the original appraisal.

The Ecological Gifts Program advises donors to apply for a determination of fair market value as early in the year as possible – mid-September at the latest – if they want to know the certified value prior to making a gift in the current calendar year or intend to make use of the tax benefits of their donation in the current calendar year. The donation receipt can be used beginning in the year the donation was made and for up to five subsequent years.

Ecological gifts in the Province of Quebec

Ecological gifts made in the Province of Quebec or, in certain specific cases, in a region bordering Quebec by Quebec's residents, are subject to the benefits and requirements of both the federal *Income Tax Act* and the Quebec *Taxation Act*.⁶² The *Income Tax Act* and the Quebec *Taxation Act* contain similar provisions regarding ecological gifts. These benefits and requirements are implemented in a coordinated manner between the two governments.

⁶⁰ See s. 118.1(10.1).

⁶¹ Ecological Gifts Program's *Guidelines for Appraisals*. See Appendix 1.

⁶² R.S.Q., chap. I-3.

In accordance with administrative agreements, the Government of Canada and the Government of Quebec share responsibilities in the areas of recipient certification, certification of the ecological sensitivity of lands, and the determination of the fair market value of gifts.

As a delegated Certification Authority, the Ministère de l'Environnement du Québec is responsible for certifying the ecological sensitivity of land or servitudes offered as ecological gifts and for certifying the recipient. The certification of both the recipient and the ecological sensitivity of the gift is done using the *Visa for Donations of Pieces of Land or Easements Having an Ecological Value* which is the equivalent of the *Certificate for Donation of Ecologically Sensitive Land* issued by Environment Canada or other Certification Authorities for ecological gifts in other provinces.⁶³

In Quebec, Environment Canada is responsible for the process involving the review and determination of the fair market value, as described in this Report, as well as issuing the *Statement of Fair Market Value*.

When the fair market value of the ecological gift has been determined or redetermined, the federal Minister of the Environment issues a Notice of Determination of Fair Market Value or a Notice of Redetermination of Fair Market Value, as the case may be. Once the gift has been made, a Statement of Fair Market Value is issued jointly by the federal Minister of the Environment and the Ministère de l'Environnement du Québec⁶⁴ in accordance with the Quebec *Taxation Act* and administrative agreements.

If the donor wishes to appeal a redetermination of value of an ecological gift made in Quebec, the donor may appeal to the Tax Court of Canada and the Court of Quebec. The value determined by the Tax Court of Canada will serve for the purposes of the federal income tax return. The value as determined by the Court of Quebec will serve for the purposes of the provincial income tax return.

An unauthorized disposition or change of use of an ecological gift by the recipient is payable only in respect of the federal *Income Tax Act*. No such provisions exist under the Quebec *Taxation Act*.

Throughout this Report, all procedures and requirements for ecological gifts made in the Province of Quebec or by donors resident in Quebec should be read to include the procedures and requirements noted in this section.

⁶³ See *Taxation Act*, R.S.Q., c. I-3, ss. 710 and 7520.10. The certificates issued by the Quebec Minister of the Environment for ecological gifts made in Quebec are considered equivalent for all income tax purposes by the federal government.

⁶⁴ Official duplicate copies of the Statement of Fair Market Value will be issued where necessary to allow Quebec residents to file both federal and Quebec income tax returns.

Ecological Gifts Program Process

A number of steps are involved in making an ecological gift – finding a qualified recipient for the gift, having the land certified as ecologically sensitive, and having the fair market value of the gift certified.

Finding a recipient

Federal, provincial and territorial governments, Canadian municipalities and certain charitable organizations are qualified to receive ecological gifts.

To qualify as a recipient of an ecological gift, a charity must:

- be registered under the *Income Tax Act* as a charity in Canada whether it is working nationally, provincially or locally; and
- in the opinion of the Minister of the Environment, have as one of its primary purposes the conservation and protection of Canada's environmental heritage.

All other existing *Income Tax Act* rules regarding registered charities apply.

Registered charities must apply to Environment Canada for approval to receive ecological gifts.

Registered charities of a national nature may receive ecological gifts located in any province or territory. Charities of a provincial, regional or local nature normally receive gifts within the geographical area of their interest or concern.

A number of charitable organizations have been approved as eligible to receive ecological gifts. If the proposed recipient has not yet been approved as eligible to receive ecological gifts, application must be made for approval. In addition, the recipient must be approved in relation to specific gifts.

See the Ecological Gifts Program website, www.cws-scf.ec.gc.ca/ecogifts, or contact the nearest regional Program coordinator for more information about applications for approval to receive ecological gifts and for a list of charitable organizations that have been approved as eligible to receive ecological gifts.

Certifying land as ecologically sensitive

The land that is the subject of an ecological gift (either a gift of the land itself or a gift of an interest in the land) must be ecologically sensitive. Environment Canada has developed a national definition for “ecologically sensitive land.” The following national criteria for what constitutes “ecologically sensitive land” are:

- areas identified, designated or protected by a local, provincial, territorial, national or international system or body as ecologically significant or ecologically important;
- natural spaces of significance to the environment in which they are located;
- sites that have significant current ecological value, or potential for enhanced ecological value, as a result of their geographic proximity to other significant properties;
- municipal or rural lands that are zoned or designated for biodiversity objectives;
- natural buffers around environmentally sensitive areas such as water bodies, streams or wetlands; and
- areas or sites that contribute to the maintenance of biodiversity or Canada’s environmental heritage.

More refined definitions of ecologically sensitive lands have been formulated in Ontario, Prince Edward Island, Quebec and New Brunswick and may be developed in other provinces in the future. Provincial criteria are based upon provincial land management practices and legislative requirements.

See the Ecological Gifts Program website, www.cws-scf.ec.gc.ca/ecogifts for more information about provincial criteria.

The Minister of the Environment has designated a number of federal and provincial officials to certify land as ecologically sensitive. In addition, non-government individuals in some national and provincial conservation organizations have been designated by the Minister as certification authorities for gifts to their own organizations.

Contact the nearest regional coordinator of the Ecological Gifts Program or consult the Program website, www.cws-scf.ec.gc.ca/ecogifts, for a list of authorities designated to certify the ecological sensitivity of land that is the subject of an ecological gift or to determine the kind of information to provide to have land certified as ecologically sensitive.

There is no formal application form for a *Certificate for Donation of Ecologically Sensitive Land*. The donor or recipient should contact the nearest regional Ecological Gifts Program coordinator or a designated certification authority to determine the kind of information required to apply for a *Certificate*.

Review of the application and completion and signing of the *Certificate for Donation of Ecologically Sensitive Land* usually takes at least three weeks, providing there are no major issues to be resolved. Certificates are issued directly to the donor, with a copy to the recipient.

Certifying the value of the donation

The fair market value of all gifts under the Ecological Gifts Program must be determined and certified by the federal Minister of the Environment and, in Quebec, by the Quebec Minister of the Environment.

Applying for certification of fair market value

The donor of a property certified as ecologically sensitive must submit a signed *Application for Appraisal Review and Determination* together with three colour copies of an independent appraisal of the fair market value of the donated land or conservation easement covenant or servitude to the regional Ecological Gifts Program coordinator. For gifts of partial interests in land, a copy of the conservation covenant, easement or servitude must be included in the appraisal report. Similarly, any document creating a remainder or other similar interest must be included with the appraisal report.

See Appendix 1 of this Report for more information about engaging an appraiser. The Ecological Gifts Program *Guidelines for Appraisals* are reproduced in Appendix 1.⁶⁵

⁶⁵ See also Ann Hillyer, Judy Atkins and John B. Miller, *Appraising Easements, Covenants and Servitudes: Guidelines for Valuation*, Ottawa: North American Wetlands Conservation Council (Canada), forthcoming publication, for a discussion of appraising interests in land.

Determination of fair market value

All appraisals will be reviewed by one or more members of Environment Canada's Appraisal Review Panel. Appraisals must conform to the standards set by the Ecological Gifts Program as outlined in the Program's *Guidelines for Appraisals*. Upon completion of the review, the Appraisal Review Panel will provide the Minister of the Environment with a recommendation of the fair market value for the land or interest in land.

If the gift is an easement, covenant or servitude or a remainder interest (or gift of bare ownership of land in Quebec) and changes were made to the agreement after the appraisal was completed or after the *Application for Appraisal Review and Determination* was submitted to the Ecological Gifts Program, the donor must provide a copy of the final registered document to the Program together with confirmation from the appraiser who completed the appraisal report that there has been no change in value as a result of the changes to the agreement. The donor must also inform the Program of a change in size or other characteristic of a fee simple donation. In addition, if the value of the land has changed, an update to the appraisal must be provided and will also undergo review.

Following the review, the donor will receive a *Notice of Determination of Fair Market Value* indicating the fair market value that the federal Minister of the Environment is prepared to certify for the property. Generally, when the appraisal conforms to the *Guidelines for Appraisers*, the appraisal review will take no more than 90 days.

Within 90 days of receiving the *Notice of Determination of Fair Market Value*, the donor must:

- accept the fair market value as determined, notify Environment Canada in writing, and complete the donation process with the recipient;
- request, in writing, a redetermination by the Redetermination Committee of the Appraisal Review Panel at its next scheduled meeting; or
- withdraw from the Ecological Gifts Program and notify Environment Canada in writing (normally, donors may re-enter the process within two years at the same point at which they withdrew, subject to the provisions, including relevant time limits, of the *Income Tax Act*).

Contact the nearest regional coordinator of the Ecological Gifts Program or consult the Program website, www.cws-scf.ec.gc.ca/ecogifts, for more information about the process for determining and certifying the fair market value of an ecological gift.

Redetermination of fair market value

The Redetermination Committee meets up to three times a year to consider applications for redetermination of the fair market value of ecological gifts and will normally consider an application for redetermination within four months of the date on which the application is received.

Donors requesting a redetermination are not required to provide information in support of the request that was not provided in the first instance. However, if they choose, they may provide additional relevant information, including:

- additional written submissions by the appraiser in support of the estimate of value in the appraisal report;
- additional relevant valuation or market information such as
 - one or more additional appraisal reports;
 - information about market activity since the date of the original appraisal report;
- written submissions responding to the reasons for the determination of value provided with the *Notice of Determination of Fair Market Value of an Ecological Gift*.

After considering the redetermination request, the Redetermination Committee will recommend a fair market value to the Minister, generally within 60 days of the conclusion of the meeting.

The Minister of the Environment then will make a redetermination of the fair market value (either by confirming the value in the *Notice of Determination of Fair Market Value of an Ecological Gift* or by redetermining the value) and send the donor a *Notice of Redetermination of Fair Market Value of an Ecological Gift*.

Upon receiving the *Notice of Redetermination of Fair Market Value of an Ecological Gift*, the donor must advise the nearest regional office of Environment Canada in writing, within 90 days, whether the donor will

- accept the fair market value as set out in the *Notice of Redetermination of Fair Market Value of an Ecological Gift*, or
- withdraw the *Application for Appraisal Review and Determination* without prejudice to the donor's right to reapply in the future at the same point in the process.

Completing the ecological gift

Once the donor accepts the fair market value as determined or redetermined by the Minister, the Minister will issue a *Statement of Fair Market Value of an Ecological Gift* at the value set out in the *Notice of Determination* or *Notice of Redetermination of Fair Market Value of an Ecological Gift* upon receiving evidence, such as a registered transfer document and executed easement, covenant or servitude, if applicable, that the ecological gift has been made. The *Statement of Fair Market Value* will not be issued without this evidence. It is then the recipient's responsibility to issue an official donation receipt to the donor for the fair market value of the gift.

Appeals to Tax Court

Donors may appeal a redetermination of fair market value of the ecological gift, as set out in the *Statement of Fair Market Value of an Ecological Gift*, to the Tax Court of Canada.⁶⁶ The right of appeal to the Tax Court is not available for a determination in the first instance. The donor must first request and receive a redetermination from the Minister.

Appeals to the Tax Court of Canada must be filed within 90 days after the day on which the *Statement of Fair Market Value of an Ecological Gift* is issued and can only be made under the following conditions:

- the appeal must be filed by the donor;
- the donor must have made an irrevocable gift; and
- the Minister of the Environment must have issued a *Statement of Fair Market Value of an Ecological Gift*.⁶⁷

The Tax Court of Canada will confirm or vary the amount determined by the Minister. The value determined by the Court is then deemed to be the fair market value of the ecological gift determined by the Minister.⁶⁸

⁶⁶ *Income Tax Act*, s. 169(1.1).

⁶⁷ *Income Tax Act*, s. 169(1.1).

⁶⁸ *Income Tax Act*, s. 171(1.1).

PART 5

INTERESTS IN LAND

Easements, covenants and servitudes

It is possible to make a gift of a partial interest in land, such as an easement, covenant or servitude. These interests may be defined by statutes that describe their elements or may be interests that are creatures of the common law in common law jurisdictions.

Non-statutory easements, covenants and servitudes

In Canadian common law jurisdictions, private ownership of land means that the owner owns not the land itself but only a certain interest or estate in the land. In Canada, the land itself is owned by the Crown.⁶⁹ The concept of estates in land makes possible the fragmentation of ownership among different persons. The interest or estate associated with private ownership is the fee simple estate.

The fee simple estate consists of a “bundle of rights.” An owner of the fee simple estate in land has the right to

- sell, mortgage, lease or will the estate;
- use and occupy the land to the exclusion of others;
- give away some of the rights that are connected to the fee simple estate, for example, by granting an easement or covenant.

An easement is a right to use another person’s land, generally a right of passage over the land. In addition, an easement might prevent the owner of the land subject to the easement from doing certain things specified in the easement. An easement could also require the landowner to do certain things. At the same time, the easement provides a benefit to the owner of adjacent or nearby land, for example by allowing that owner to pass over the land against which the easement is registered.

A covenant is a promise. In property law, a common law covenant is a promise by one landowner to another to do, or not do, something in relation to his or her land.

⁶⁹ Subject to unextinguished aboriginal rights and title.

Generally, a covenant contains promises by a landowner in relation to uses of the land limiting or prescribing the uses to which the land will be put. Covenants are frequently used to control the use of property or to preserve it.

In the civil law of Quebec, a servitude is a charge or burden on one parcel of land for the benefit of another. It closely corresponds to an easement. As with an easement, the owner of the burdened land is required to tolerate certain acts of use by the owner of the land benefitting from the servitude or to abstain from exercising certain rights inherent in ownership.

Easements, covenants and servitudes that meet certain requirements run with the land and bind future owners of the land. In most jurisdictions, some of the restrictions, for example, the requirement for two pieces of property, one benefited by the covenant or easement, and one burdened by it, have been removed by statute for covenants or easements granted under the statute. Conservation easements, covenants and servitudes, a particular kind of statutorily-based easement, are discussed in the next sections.

Conservation easements, covenants and servitudes

Most jurisdictions in Canada have made legislative provision for easements, covenants or servitudes to be used for conservation purposes (referred to collectively as conservation easements).⁷⁰ A conservation easement is a particular kind of statutory instrument designed for conservation purposes and given legal authority to protect a range of ecological, cultural, heritage and other values, depending on the legislation. Generally, conservation easements can be granted in favour of a conservancy organization as well as a government agency. They can include restrictions on land use and impose positive obligations on landowners.⁷¹

Those interested in placing a conservation easement on their property should consult their legal advisers and an appropriate conservancy organization or government agency for more information about the options available in their province or territory.

⁷⁰ See Judy Atkins, Ann Hillyer and Arlene Kwasniak, *Conservation Easements, Covenants and Servitudes in Canada: a Legal Review*, Ottawa: North American Wetlands Conservation Council (Canada), 2004, Report No. 04-1 for a review of conservation easement legislation across Canada.

⁷¹ Common law covenants and easements or servitudes also may be used for conservation purposes. However, restrictions associated with those instruments, such as the requirement for two pieces of property, will still apply.

A conservation easement usually takes the form of a voluntary, written agreement between the landowner and an easement holder. It can cover all or part of a privately held parcel of property. In the agreement, the landowner promises to use the land in ways that are specified in the easement. For instance, the landowner might agree to provide specific protection for important habitat or agree not to subdivide the land. The easement holder holds the conservation easement and can enforce it if the owner does not abide by its terms.

The conservation easement is generally registered against title to the property which ensures that it binds future owners of the land, not just the current owner, since the conservation easement generally is intended to last permanently.

Example of a legislative scheme

Section 219 of the British Columbia *Land Title Act* sets out the kinds of provisions that can be included in a conservation covenant:

- provisions about the use of land or the use of a building on land;
- requirements that land must be built on in accordance with the covenant, cannot be built on except in accordance with the covenant, or cannot be built on at all;
- prohibitions against subdividing land at all or except in accordance with the covenant;
- where the covenant applies to more than one parcel of land, provisions that parcels of land designated in the covenant and registered under one or more titles are not to be transferred separately; and
- provisions that the land or a specified amenity in relation to the land be protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state in accordance with the covenant and to the extent provided in the covenant.

Section 219 states that covenants registered under that section may be of a positive or negative nature; that is, they may require the parties to do something with respect to the land, such as maintaining it in accordance with certain objectives, as well as prevent them from doing something, such as building or subdividing.

Section 219 also sets out who can hold conservation covenants:

- the Crown or a Crown corporation or agency;
- local government;
- any person designated by the Minister of Sustainable Resource Management.

This allows non-government organizations to hold conservation covenants.

Uses of conservation easements, covenants and servitudes

Conservation easements offer a cost effective alternative to purchasing land for the purposes of protecting its important features. This is because the owner of the land gives up some rights to the easement holder without the holder having to purchase the land from the owner. Like the land itself, conservation easements may be donated or sold.

The party that holds the conservation easement has the right to require the landowner to comply with the terms of the document. This provides the means to ensure that the protection described in the document is maintained permanently or for the duration of the easement if it is not intended to last indefinitely.

Depending on the legislative regime, the agreement embodying the conservation easement can be designed to protect or preserve a broad range of values by restricting some uses or activities and requiring other things to be done. These can include:

- preservation of conservation values;
- protection of habitat for plant and animal species, including rare and endangered species;
- maintenance of areas that have been restored due to past destructive land practices;
- requirements for maintenance to protect historic structures;
- protection of scenic corridors;
- restrictions on types of industrial activities;
- restrictions on subdivision;
- specifications permitting some uses and prohibiting or limiting other uses;
- requirements for the management of forest land in accordance with sound forestry and conservation practices;
- restrictions on the use of pesticides;
- protection for areas adjacent to streams, lakes and other water bodies.

The specific terms and conditions in a conservation easement will depend on the relevant legislative provisions, the type of land, the values to be protected, the

intentions of the parties, and the outcome of the negotiations between the parties to the agreement.

Benefits of conservation easements, covenants and servitudes

Generally, conservation easements can be used in a wide range of circumstances. Since a conservation easement is a written agreement between the parties, there is considerable flexibility in how the terms and conditions in the agreement are written. The easement can contain provisions designed specifically to address the particular needs of the land and the parties involved. A conservation easement is an effective tool because

- it can be individually tailored to address the particular ecological features or other assets or amenities of the land against which it is registered and the specific conservation objectives of the parties;
- a landowner can grant an easement protecting only those areas of the landowner's property with specific significance and can use the remainder of the property without restrictions;
- where easements can be held by non-government conservation organizations, these organizations can harness the considerable interest existing in communities in conserving many of the special spaces in their area, reducing some of the burden on government to conserve land;
- easements usually can be modified by the parties in the future to accommodate necessary changes;
- easements on ecologically sensitive land may qualify as ecological gifts and be eligible for the increased tax benefits associated with ecological gifts.

Retaining an interest in donated land

In common law jurisdictions and in Quebec, a donor can donate land but retain an interest in the land and the right to use it during his or her lifetime. As long as all relevant requirements for charitable gifts are met, this kind of donation will be eligible for tax benefits.

Life estates

As explained above, in common law jurisdictions of Canada (the territories and all provinces but Quebec), a person owns an estate or interest in land rather than the

land itself.⁷² Estates are classified according to the time the estate lasts. There are two estates of indeterminate length still in use in Canada, the fee simple and the life estate. The fee simple is the largest estate and the one generally associated with ownership of land. Fee simple may be divided into smaller (that is, shorter) estates, for example, successive life estates. The life estate or life interest exists only for the life of a person, either the life of the person to whom it is granted, known as the life tenant, or the life of some other person. Life estates may be created by deed, lease or will.

A life estate is created by express words of limitation; for example, “to A for life.” An estate for someone else’s life is created by words such as “to A for as long as B lives” or if a life tenant assigns his or her life estate to another person. If someone wishes to create a life estate, it is necessary to define the estate in the deed, lease or will in which it is created.

A life estate may be made determinable by using words that limit its duration or make it conditional. For example, a person in her will may leave her land to her husband “for his use and benefit during the remainder of his life or until his remarriage.” The husband’s life estate would end on his remarriage.

A life estate is an interest in land. The owner of the life estate is the owner of the land during the term of the life estate and, with some exceptions, has the same right to use and possess the land as the owner of the fee simple estate.

Life estates are distinguishable from licences which are contractual arrangements only and do not constitute interests in land. They are also distinguishable from leases which are transfers of the right to use and occupy real property from the lessor to the lessee, generally on certain conditions, for a defined term.

Remainder or residual interests

If a donor transfers land to a qualified recipient but retains a life estate, the interest or estate that is left after the life estate is the remainder or residual interest. For example, if a landowner transfers land “to A for life, the remainder to B in fee simple,” B’s interest is the remainder interest. A landowner may also choose to transfer land “to A for life, remainder to B for B’s life, remainder to C in fee simple.” Both B and C hold remainder interests. There are a number of rules governing what is a valid remainder interest. For example, a remainder interest may be legal or equitable, vested or contingent. A detailed discussion of remainder interests is beyond the scope of this Report.

⁷² For a more detailed discussion of interests in land and a variety of arrangements that could be made for land stewardship purposes, see Barbara Findlay and Ann Hillyer, *Here Today, Here Tomorrow: Legal Tools for the Voluntary Protection of Private Land in British Columbia*, Vancouver, BC: West Coast Environmental Law Research Foundation, 1994.

A remainder interest is an interest in land but it is a future interest. In other words, the right to possession or enjoyment of the land is postponed to a future time. However, although the right to possession and use is postponed, the remainder interest is a presently existing interest in the land and is therefore a part of the total ownership bundle of the land. The owner of the remainder interest, for example, has the present right to sell or transfer her interest.

Interests in Quebec

Although life estates are not a part of the civil law of Quebec, usufructuary rights have some of the same characteristics. The right of usufruct is defined in the *Civil Code of Quebec* as the right of use and enjoyment, for a certain time, of property owned by another as one's own, subject to the obligation of preserving its substance.

Usufruct may be created by agreement or by will or it may be created by operation of law. It may come to an end at the end of the life of the grantee or at the end of a set period. Like a life estate, it is a right that may be mortgaged, charged or otherwise transferred, unless there is a prohibition to the contrary in the terms of the grant.

The owner of the property has the right of bare ownership and when the usufruct is extinguished the bare ownership reverts to absolute ownership. As with a life estate, a donor could donate the bare ownership of land but retain usufructuary rights to use and enjoy the land during his or her lifetime.

Tax implications of retaining an interest in donated land

As explained above, a landowner may donate land but retain an interest in it. As long as it meets the requirements of the *Income Tax Act* and all other relevant requirements, a gift of the remainder interest or bare ownership of land will be a valid charitable gift. For example, a gift of the remainder interest or bare ownership will constitute a valid ecological gift if it meets all the requirements described in Part 4. Specifically, the donated land must be certified as ecologically sensitive, the recipient must be qualified to receive the gift and the remainder interest or bare ownership must be appraised and its value determined through the Appraisal Review and Determination Process. The relevant value will be the value of the remainder interest or bare ownership at the time of the gift.

Making this kind of gift allows landowners who want to conserve their land to live on the land during their lifetime and, on death, give the land to a conservation organization for protection in perpetuity. It also has the potential of providing tax benefits in the present.

The fact that the remainder interest is a future interest will be reflected in its value and, therefore, in the value of the gift. Tax benefits associated with the gift will be calculated on the present value of the remainder interest rather than the fair market value at the time the property is transferred (the end of the donor's lifetime). The present value is calculated by taking into account the fair market value of the property, current interest rates and the life expectancy of the person (or persons) holding the life estate.

For more information about the tax implications of charitable gifts of a remainder or residual interest in land, see Interpretation Bulletin IT-226R, Gift to a charity of a residual interest in real property or an equitable interest in a trust, available on the CRA website at <http://www.cra-arc.gc.ca/>

A gift of a life estate or right of usufruct does not qualify as an ecological gift since it terminates at the death of the life tenant or usufructuary, or at the end of a pre-established period of time. It therefore cannot be a gift in perpetuity, one of the criteria of an ecological gift.

When a donor makes an ecological gift of a remainder interest or bare ownership, the recipient must take reasonable steps to protect the land during the tenure of the life tenant or for the duration of the usufruct or use so that the ecological values are protected until the recipient takes full ownership and possession of the property. This could be accomplished by way of an agreement between the donor and recipient or any other parties involved.

APPENDIX 1

APPRAISALS AND THE ECOLOGICAL GIFTS PROGRAM

Prepared by J.B. (Jack) Miller, AACI, P.App., RI(BC), D.R. Coell & Associates Inc.

Engaging an appraiser

When preparing to engage the services of a real estate appraiser for a possible ecological gift appraisal assignment, a number of items should be considered to ensure that both the appraiser and client are fully aware of the purpose and intended use of the appraisal. Generally speaking, when an appraiser has a complete understanding of the potential assignment prior to actual engagement, the appraiser is better able to estimate delivery time, fees and expenses.

The following list of items has been prepared with input from a cross section of appraisers and recipient agency clients and is recommended for consideration when ordering an appraisal.

(A) Selecting an Appraiser:

- (1) Qualifications
- (2) Availability
- (3) Local knowledge
- (4) Experience/Ecological Gift Appraisal Training Course

(B) The Assignment:

Identify the interest to be appraised

- (1) Fee Simple Interest
- (2) Partial Interest
 - (a) Conservation Easement/Covenant
 - (b) Portion of Fee Simple (needs subdivision)

(C) Appraisal Requirements:

- (1) Appraisal Institute of Canada - "The Standards"
- (2) Environment Canada - Ecological Gifts Program - "Guidelines for Appraisals"

(D) The Engagement:

Provision of information to the appraiser

- (1) Location of property
- (2) Registered owner (copy of current title search)
- (3) Complete legal description
- (4) Identify size of property
- (5) Brief physical description, including improvements
- (6) Zoning information (if available)
- (7) Graphics, maps, plans, photos, etc.
- (8) Easement document (if draft - must be dated)
- (9) Assignment contacts for information and access to land
 - owner
 - recipient agency

(E) Report

- (1) Estimate of total fees and expenses
- (2) Estimated delivery date of completed report
- (3) Identify required number of copies of report

The more complete the communication and preparation process prior to the start of the assignment the more efficient and economical the experience.

See below for a **Sample Letter of Engagement** that may be of some guidance and assistance with this type of assignment.

Sample Letter of Engagement

ABC LAND CONSERVANCY

123 Main Street
Regina, Saskatchewan

January 12, 2003

Mr. John Doe, AACI
Pacific Real Estate Appraisers Ltd.
4456 South Avenue
Regina, Saskatchewan

Dear Mr. Doe:

RE: Appraisal of Smith Property - SW 34-28-13-W2

This letter will confirm our earlier correspondence and subsequent telephone conversations relative to our request for appraisal services involving the Smith property. The ABC Land Conservancy requires a Full Narrative Appraisal with respect to the current market value of the Conservation Easement as herein set out.

We are providing you with the following information to assist you with this assignment:

- Location Description
- Registered Owner (copy of title search)
- Legal Description
- Size of the Property
- Brief Physical Description (copies of maps, plans, photos or useful graphics)
- Conservation Easement (copy of complete document, dated if not finalized)
- Contact names and phone numbers for inspection

As you are aware, this appraisal will be used by the ABC Land Conservancy and Mr. and Mrs. Smith, the property owners, to facilitate a gift under Environment Canada's Ecological Gifts Program. The Ecological Gifts Program has some specific appraisal requirements which are set out in the Guidelines for Appraisals, a copy of which is attached to this letter. In addition, you are reminded that all appraisals must conform with the requirements of the Canadian Uniform Standards of Professional Appraisal Practice (The Standards).

In the case of this assignment, which involves a “partial interest” being a Conservation Easement, you must employ the before and after appraisal technique.

You should also be aware that this appraisal will be the subject of a review process in accordance with the Canadian Appraisal Standards and the Guidelines for Appraisal - Ecological Gifts Program, Environment Canada.

We confirm that your professional fees together with disbursements and expenses, will not exceed \$xxxxxx (exclusive of GST). Additionally, we confirm that your quotation incorporates a reasonable allowance for post appraisal discussion relative to clarification of the opinion of value which may be necessary during the Appraisal Review Process by Environment Canada.

Finally, we will require that 5 copies of the completed Appraisal Report be delivered to us no later than February xx, 2003.

Should you require any further information or clarification with respect to this assignment, please do not hesitate to contact the writer.

Yours very truly,

Harvey Green
Director of Land Conservancy

c. Mr. and Mrs. Smith

ECOLOGICAL GIFTS PROGRAM GUIDELINES FOR APPRAISALS

GUIDELINES FOR APPRAISALS The Ecological Gifts Program [As published by Environment Canada, July 2002]

Ecogifts and the Appraisal Review and Determination Process

Individuals and corporations who donate an ecological gift (or ecogift) to a qualified recipient are eligible for tax benefits under the *Income Tax Act*. Ecogifts are donations of land or partial interests in land that have been certified as ecologically sensitive. Partial interests may be in the form of conservation easements, covenants or servitudes.

Tax benefits are determined based on the fair market value of the gift⁷³ as certified by the federal Minister of Environment. Environment Canada administers the Ecological Gifts Program across Canada in partnership with various provincial governments, environmental charities and other federal government departments. Contact information for Ecological Gifts Program coordinators is provided at the end of this document.

To determine the fair market value of a gift, either the donor or the recipient must provide an appraisal⁷⁴ to Environment Canada along with an *Application for Appraisal Review and Determination*. The appraisal is reviewed by one or more qualified professionals from Environment Canada's Appraisal Review Panel. Following the review, the chair of the Panel recommends the fair market value to the Minister, who determines the value.

The Appraisal Review Panel

The Appraisal Review Panel reviews appraisals submitted by donors in support of donors' estimates of the fair market value of ecological gifts and makes recommendations to the Minister of the Environment about the fair market value. The Panel reviews each appraisal to determine:

- whether it meets the *Guidelines for Appraisals* contained in this document, and
- the basis for a recommendation to the Minister regarding the fair market value of the land or the easement, covenant or servitude and, in doing so, considers whether the analysis, opinions and conclusions in the appraisal under review are appropriate and reasonable and support the fair market value set out in the appraisal.

⁷³ The *Income Tax Act* provides, in the definition of "total ecological gifts," that the value of the gift is based on its fair market value.

⁷⁴ In the context of the Ecological Gifts Program, the term appraisal includes all types of valuation reports.

The *Guidelines for Appraisals* are intended to assist appraisers⁷⁵ in the preparation of ecogift appraisals, and include general requirements for valuation of all ecological gifts, regardless of their fair market value. The *Guidelines for Appraisals* provide a number of considerations that should be applied to different categories of gifts, general format requirements for appraisals, and contact details for program coordinators across Canada.

General Requirements for All Ecological Gifts

Appraisals for ecological gifts must conform with the requirements of the Canadian Uniform Standards of Professional Appraisal Practice (The Standards) or, in Quebec, Les normes de pratique professionnelle des évaluateurs agréés. All appraisers, whether or not they are members of the Appraisal Institute of Canada (AIC) or l'Ordre des évaluateurs agréés du Québec (OEAQ), are expected to be familiar with The Standards or, in Quebec, with Les normes de pratique professionnelle des évaluateurs agréés. A printed copy of The Standards is available by mail from the AIC. The document also can be downloaded free of charge from the AIC Web site at www.aicanada.org. Les normes de pratique can be obtained from the OEAQ Web site at www.oeaq.qc.ca.

All appraisals must be at arm's length. For example, appraisals done by the donor, by a close friend, family member or business associate of the donor, or by a corporation or partnership in which the donor holds a significant interest, are not acceptable. Similarly, appraisals done by the recipient are not acceptable.

To meet *Income Tax Act* requirements, all appraisals must include a definition of fair market value. The following definition of market value, taken from The Standards, is recommended:

... means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.

Implicit in this definition is the consummation of a sale as of the specified date and the passing of title from seller to buyer under conditions whereby:

- (1) buyer and seller are typically motivated;*
- (2) both parties are well informed or well advised, and acting in what they consider their best interests;*
- (3) a reasonable time is allowed for exposure in the open market;*
- (4) payment is made in terms of cash in Canadian dollars or in terms of financial arrangements comparable thereto;*
- (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.*

⁷⁵ In the context of the Ecological Gifts Program, the term appraiser includes the entire range of valuation professionals, regardless of their area of expertise or professional designation.

No unsupported assumptions will be permitted in the preparation of appraisals, including unsupported assumptions that have an impact on highest and best use. For example, a waterfront property can be valued to reflect a marina development, if that is the highest and best use, but the use cannot simply be assumed to be the highest and best use. The “highest and best use” is defined in The Standards as that reasonably probable and legal use of vacant land or an improved property which is physically possible, appropriately supported, financially feasible, and that results in the highest value.

Rule 11 of The Standards permits appraisers to identify any hypothetical conditions included in the appraisal. However, for the Ecological Gifts Program, hypothetical assumptions are not permitted except where necessary for a reasonable analysis of the subject property. When an appraiser determines that a hypothetical condition must be included in the appraisal, the condition must relate to a potential use that is reasonably anticipated and can be demonstrated through traditional planning and valuation analysis to be a probable occurrence.

The report must be straightforward and logical, so that the reasoning supporting the appraiser’s analysis and conclusions is clear. Unsubstantiated opinions and unsupported conclusions are not acceptable. Appraisers should be fully informed about the status of title (for example, rights of way, other easements, covenants or servitudes) and provide commentary on the effect on use and value of any encumbrances, charges or notations on title. Adjustments must be based on an analysis of relevant market data, and should be supported by information on the reason for and magnitude of the adjustment.

Unsubstantiated opinions and unsupported conclusions are not acceptable.

The Appraisal Review and Determination Process should reflect, rather than establish or influence, the fair market value of ecological gifts. Appraisals therefore must address value in terms of established valuation principles. Previous determinations of fair market value by the Minister are not acceptable as a basis upon which an appraiser estimates the value of an ecological gift.

Categories of Ecological Gifts

There are two categories of ecological gifts:

Category I: gifts that have a value of less than \$25,000 and are straightforward⁷⁶ to value; and

Category II: all other ecological gifts.

Category I

Appraisals for Category I ecological gifts may consist of pre-printed forms containing an itemized checklist, accompanied by tables with factual and market evidence. A brief narrative discussion, however, must supplement the form to provide the reasoning and support for the conclusions drawn, including the opinion of value. At a minimum, all of the points described in the *Guidelines for Appraisals* must be addressed.

If the gift is an easement, covenant or servitude, two forms may be necessary to reflect the “before and after” values of the subject property, with an explanation that the value of the gift is the difference between the two.⁷⁷

There is flexibility regarding the qualifications of an individual valuing an ecological gift in Category I; however the appraiser must be qualified and knowledgeable about market value. The appraisal must include a suitable description of the appraiser’s expertise as evidence of his or her competence to express an opinion of value.

Category II

Appraisals for Category II ecological gifts must include a full narrative report on the property being valued. If the gift is an easement, covenant or servitude, two reports may be necessary to reflect the “before and after” values of the subject property, with an explanation that the value of the gift is the difference between the two.

Appraisers of ecological gifts in this category must hold the designation of Accredited Appraiser Canadian Institute (AACI), Canadian Residential Appraiser (CRA), in Quebec,

⁷⁶ An example of a straightforward valuation would be a valuation of land (fee simple) that relies on a direct comparison approach, where adequate market data are available. Gifts of partial interests in land that are complex to value, circumstances requiring the income and cost approach, and cases where there is poor market evidence are more likely to be Category II ecological gifts.

⁷⁷ Regarding the valuation of partial interests of land, the *Income Tax Act* provides that the fair market value of an ecological gift of a servitude, a covenant or an easement to which land is subject is the greater of “the amount by which the fair market value of the land is reduced by” granting the servitude, covenant or easement, or the “fair market value otherwise determined of the gift.”

Chartered Appraiser (C.App./EA), or one of the acceptable designations listed in Schedule A. The designation must qualify the individual to value the specific ecological gift. For instance, an AACI may value all gifts, while a CRA may value only property types permitted by the CRA designation.

Mandatory Format for All Appraisals

Appraisals may be prepared in a variety of formats. However, all appraisals submitted with an *Application for Review and Determination* of the fair market value of an ecological gift—both Category I and II—must contain the following:

- **Letter of Transmittal:** The appraisal must be accompanied by a letter of transmittal from the appraiser. The letter must be printed on letterhead clearly indicating the name, address and type of business carried on by the appraiser and should contain the appraiser's conclusions, with references to attached exhibits and appendices.
- **Purpose and Scope:** The purpose of the appraisal is to establish the fair market value of the donation for the issuance of a tax receipt under the *Income Tax Act*. Valuations must be of the current fair market value of the land or interest in land in accordance with an acceptable definition of fair market value such as the definition from The Standards.⁷⁸ A definition of fair market value and the effective date of the valuation must appear in the appraisal.

The appraiser must specify the scope of the appraisal by describing the interest being valued, including fee, partial interest, non-realty interests, such as mineral or timber values, or any other interests.

- **Property Description:** The following information must be included:
 - the name and address of the present owner of the land or interest in land being valued;
 - the location and complete legal description of the land or interest in land being valued and that of any comparable property;
 - a declaration of the interest or interests being valued, for example, whether it is fee simple, partial interest, non-realty interests, such as mineral or timber values, or any other interests; and
 - exhibits such as maps, sketches, surveys, and photographs (colour is highly recommended).

⁷⁸ This definition is reproduced above.

- **Conservation Easements, Covenants or Servitudes:** In the case of a conservation easement, covenant or servitude, a copy of the full document with the property description, terms, restrictions and appendices must be provided. The document does not have to be registered at the time of the valuation but the appraiser must value the final version of the agreement. If any changes are made to the easement, covenant or servitude after the appraisal is completed, the appraiser must review the changes to determine if there is a change in value.

If the easement, covenant or servitude does not cover the total property, a copy of the survey, plan or sketch and an explanation must be provided.

- **Basic Information:** A full analysis and discussion of basic information must be included. Basic information includes all aspects that govern the appraiser's analysis of highest and best use, zoning, official plans, as well as restrictions that are already registered on the property and new ones that would result from an easement, covenant or servitude. All conclusions must be well supported.
- **Valuation Process and Rationale:** An explanation and justification of the valuation approach used and an explanation of the steps taken in conducting the valuation, including analysis, consultations and references, and current market context, must be provided along with appropriate documentation to support the estimate of fair market value.
- **Certification Statement:** If the appraisal is completed by a member of the Appraisal Institute of Canada (AIC) or l'Ordre des évaluateurs agréés du Québec (OEAQ), he or she must sign and include the Certification Statement in Table 1. If the appraiser is not a member of the AIC or OEAQ, he or she must sign and include the Certification Statement in Table 2. These Certification Statements are to be included in their entirety. Appraisers must ensure that all statements in the appraisal are consistent with the statements in the Certification Statement.
- **Appraiser's Qualifications:** The appraisal should provide information on the appraiser, including the appraiser's market knowledge, experience and competence (education, professional qualifications, employment and business affiliations, and association with other appraisers or experts, or steps taken to ensure competency, such as an association with another appraiser or expert in such matters or commissioning a supplementary report). The report should also state whether the appraiser has completed the AIC or OEAQ Regional Training Workshop for the valuation of ecological gifts.

In provinces that require a licence to establish the fair market value of real property, such as Nova Scotia and New Brunswick, appraisers must have that licence in addition to their approved professional designation (AACI, CRA, C.App./EA, or the appropriate designation from one of the professional associations listed in Schedule A).

- **Appraiser's Signature:** The appraiser must sign the original appraisal or a colour photocopy with his or her name printed below the signature.
- **Currency:** The appraisal must specify the currency of the estimated fair market value assigned to the ecological gift if it is not in Canadian dollars.

Advice for Donors and Recipients

Although not mandatory, donors and recipients should consider providing a second appraisal for ecological gifts that have a high fair market value or that are particularly complex to value. In these circumstances, a second appraisal will likely expedite the Appraisal Review and Determination Process.

Donors and recipients should also consider following the procedures outlined for Category II ecological gifts when submitting applications involving complex valuations, regardless of the fair market value of the ecological gift.

Environment Canada strongly recommends that recipients issue the donation receipt after the *Statement of Fair Market Value* has been issued by Environment Canada.

Timing of Appraisals – Before September 30, 2002

Up to September 30, 2002, the timing of appraisals submitted with an *Application for Appraisal Review and Determination* will be dealt with on a case by case basis and the following guidelines will apply:

- if the fair market value has not changed from the effective date of the appraisal, the appraisal can be accepted and reviewed without further documentation from the original appraiser;
- if it is not clear whether the fair market value has changed, Environment Canada will notify the donor that the appraiser who completed the appraisal must verify in writing that there has been
 - no material change in the use of the subject property, and
 - no material change to the market in the area of the subject property;
- if there is a concern that there may have been a material change in use or to the market in the area of the subject property, Environment Canada will notify the donor that the appraisal must be updated by the original appraiser or the donor must have a new appraisal completed.

The requirements for the timing of appraisals set out in the sections below are effective after September 30, 2002.

Timing of Appraisals – Before the Gift is Made

Where the donor submits an *Application for Appraisal Review and Determination* to Environment Canada before making the donation of an ecological gift, the effective date of the appraisal must be no earlier than six months before the date that the donor submits the *Application for Appraisal Review and Determination*. This applies whether the donor submits an *Application for Appraisal Review and Determination* at the same time as an application to have the gift certified as ecologically sensitive or after receiving a *Certificate for Donation of Ecologically Sensitive Land* or, in Quebec, a letter of intention for the *Visa pour dons de terrains ou de servitudes ayant une valeur écologique*.

If the effective date of the appraisal is more than six months before the date the donor submits an *Application for Appraisal Review and Determination* to Environment Canada, the appraiser who completed the appraisal must verify in writing that there has been

- no material change in the use of the subject property, and
- no material change to the market in the area of the subject property.

If the appraiser cannot verify both of these statements, either

- a new appraisal must be completed, or
- the appraiser who completed the original appraisal must update the original appraisal.

In these circumstances, the donor must submit with the *Application for Appraisal Review and Determination* either the new appraisal or the updated appraisal together with the original appraisal.

Timing of Appraisals – After the Gift is Made

If a donor has already made a gift of land or of an easement, covenant or servitude, the donor has three years from the end of the taxation year in which the donor made the gift to make a request for a determination of the fair market value of an ecological gift. This allows a donor to take advantage of the tax benefits of an ecological gift after the gift has been made.

If the gift has been made, the donor must submit an appraisal along with an *Application for Appraisal Review and Determination* to Environment Canada. The effective date of the appraisal must be

- no more than six months before the date of the gift, or
- the date of the gift if the appraisal is completed after the date of the gift.

If the effective date of the appraisal is more than six months before the date of the gift, the appraisal may be used if the appraiser verifies in writing that, between the date of the original appraisal and the date of the gift, there was

- no material change in the use of the subject property, and
- no material change to the market in the area of the subject property.

For More Information

For more information on the Ecological Gifts Program, contact the regional coordinator nearest you. A complete list of contacts is found on page 66. New publications, announcements and training workshops will be posted on the national Web site at www.cws-scf.ec.gc.ca/ecogifts.

TABLE 1

[Environment Canada, 2002]

<p style="text-align: center;"><i>Certification Statement</i> <i>Members of the Appraisal Institute of Canada (AIC) or</i> <i>Members of l'Ordre des évaluateurs agréés in Quebec (OEAQ)</i></p> <p>I certify to the best of my knowledge and belief that:</p> <ol style="list-style-type: none">1. the statements of fact contained in this report are true and correct;2. the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal impartial, and unbiased professional analyses, opinions, and conclusions;3. I have no (or the specified) present or prospective interest in the property that is the subject of this report, and no (or the specified) personal interest with respect to the parties involved;4. I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment;5. my engagement in and compensation for this assignment were not contingent upon developing or reporting predetermined results, the amount of the value estimate, or a conclusion favouring the client;6. my analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with The Standards or Les normes de pratique in Quebec;7. I have the knowledge and experience to complete the assignment competently;8. no one provided significant professional assistance to the person(s) signing this report. (If there are exceptions, the name of each individual providing significant professional assistance and the extent of that assistance must be stated);9. as at the date of this report the undersigned has fulfilled the requirements of The Appraisal Institute of Canada Mandatory Recertification Program for designated members or a similar program offered by l'Ordre des évaluateurs agréés du Québec;10. the undersigned personally inspected the subject property on (specify date property was personally inspected) or, the undersigned did not inspect the property;11. based upon the data, analyses and conclusions contained herein, the market value of the interest in the property described, as at (insert date), is estimated at (insert value);12. I acknowledge that Environment Canada can rely on the opinion, (regardless of who commissioned the report), and that the purpose of the report is to establish the fair market value of the donation for the issuance of a tax receipt under the <i>Income Tax Act</i>;13. I acknowledge that Environment Canada can make additional copies of this report for review purposes;14. signature and date of certification;15. (if more than one person signs, this certification must clearly specify which individuals did and which individuals did not make a personal inspection of the appraised property.)
--

TABLE 2

[Environment Canada, 2002]

Certification Statement
Non-members of the Appraisal Institute of Canada,
Non-members of the Ordre des évaluateurs agréés in Quebec

I certify to the best of my knowledge and belief that:

1. the statements of fact contained in this report are true and correct;
2. the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal impartial, and unbiased professional analyses, opinions, and conclusions;
3. I have no present or prospective interest in the property that is the subject of this report, and no personal interest with respect to the parties involved;
4. I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment;
5. my engagement in and compensation for this assignment were not contingent upon developing or reporting predetermined results, the amount of the value estimate, or a conclusion favouring the client;
6. my analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Canadian Uniform Standards of Professional Appraisal Practice (The Standards) or Les normes de pratique in Quebec;
7. I have the knowledge and experience to complete the assignment competently;
8. no one provided significant professional assistance to the person signing this report. (If there are exceptions, the name and qualifications of each individual providing significant professional assistance and the extent of that assistance must be stated);
9. where applicable, as at the date of this report the undersigned has fulfilled all mandatory recertification requirements of the professional association with whom the undersigned holds his or her designation;
10. the undersigned personally inspected the subject property on (specify date property was personally inspected);
11. based upon the data, analyses and conclusions contained herein, the market value of the interest in the property described, as at (insert date), is estimated at (insert value);
12. I acknowledge that Environment Canada can rely on the opinion, (regardless of who commissioned the report), and that the purpose of the report is to establish the fair market value of the donation for the issuance of a tax receipt under the *Income Tax Act*;
13. I acknowledge that Environment Canada can make additional copies of this report for review purposes;
14. signature and date of certification.

ECOLOGICAL GIFTS PROGRAM
National Secretariat and Regional Coordinators

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Mount Pearl, NL A1N 4T3
Tel: (709) 772-8033
Fax: (709) 772-5097
E-mail: kim.mawhinney@ec.gc.ca

SCHEDULE A

Professional Associations and Acceptable Designations

American Society of Appraisers

- Accredited Senior Member (ASA) –Rural Property Appraisal Option

American Society of Farm Managers and Rural Appraisers

- Accredited Rural Appraiser (ARA)

Appraisal Institute

- Member Appraisal Institute (MAI)
- Senior Residential Appraiser (SRA)

Royal Institution of Chartered Surveyors

- Member Royal Institution of Chartered Surveyors (MRICS)
Chartered Valuation Surveyor
- Fellow Royal Institution of Chartered Surveyors (FRICS)
Chartered Valuation Surveyor

APPENDIX 2

REFERENCES AND RESOURCES

Useful websites

The following websites contain publications about income tax or about protecting private land.

Canada

Canada Revenue Agency <http://www.cra-arc.gc.ca/>

Canadian Wildlife Service <http://www.cws-scf.ec.gc.ca/>

Ducks Unlimited Canada, especially Institute for Wetland and Waterfowl Research
<http://www.ducks.ca/iwwr/>

Ecological Gifts Program www.cws-scf.ec.gc.ca/ecogifts

The Land Centre (Real Estate Foundation of British Columbia) <http://www.landcentre.ca/>

The Land Conservancy of BC <http://www.conservancy.bc.ca/>

Land Trust Alliance of British Columbia <http://landtrustalliance.bc.ca/public/>

Nature Conservancy of Canada <http://natureconservancy.ca/>

North American Wetlands Conservation Council (Canada) <http://wetlandscanada.org>

Stewardship Canada <http://www.stewardshipcanada.ca/>

West Coast Environmental Law Association <http://www.wcel.org/>

Wildlife Habitat Canada <http://www.whc.org/>

United States

Land Trust Alliance <http://www.lta.org/>

National Trust for Historic Preservation <http://www.nationaltrust.org/>

The Nature Conservancy <http://www.tnc.org/>

Trust for Public Land <http://www.tpl.org/>

Useful publications

Andrews, William J. and David Loukidelis. 1996. *Leaving a Living Legacy: Using Conservation Covenants in BC*. West Coast Environmental Law Research Foundation. Contact West Coast Environmental Law Research Foundation, 1001 - 207 West Hastings Street, Vancouver, BC, V6B 1H7.

Atkins, Judy, Ann Hillyer and Arlene Kwasniak. 2004. *Conservation Easements, Covenants and Servitudes in Canada: A Legal Review*. Report No. 04-1. North American Wetlands Conservation Council (Canada). Ottawa, Ontario.

Attridge, Ian C. 1997. *Conservation Easement Valuation and Taxation in Canada*. Report No. 97-1. North American Wetlands Conservation Council (Canada). Ottawa, Ontario.

Canada Revenue Agency. *Capital Gains*, T4037, available on the Canada Revenue Agency website at <http://www.cra-arc.gc.ca/>

Canada Revenue Agency. *Gifts and Income Tax*, P113, available on the Canada Revenue Agency website at <http://www.cra-arc.gc.ca/>

Canada Revenue Agency. *Gifts and Official Donation Receipts*, Interpretation Bulletin IT-110R3, available on the Canada Revenue Agency website at <http://www.cra-arc.gc.ca/>

Canada Revenue Agency. *Gifts of Capital Properties to a Charity and Others*, Interpretation Bulletin IT-288R2, available on the Canada Revenue Agency website at <http://www.cra-arc.gc.ca/>

Canada Revenue Agency. *Gifts to a Charity of a Residual Interest in Real Property or an Equitable Interest in a Trust*, Interpretation Bulletin IT-226R, available on the Canada Revenue Agency website at <http://www.cra-arc.gc.ca/>

Canada Revenue Agency. *Income Tax Technical News*, no. 26, December 24, 2002 (Proposed Guidelines on Split-Receipting) at <http://www.cra-arc.gc.ca/E/pub/tp/itnews-26/itnews-26-e.pdf> and <http://www.fin.gc.ca/toce/2004/ita04-introe.html>

Canada Revenue Agency. *Part Dispositions*, Interpretation Bulletin IT-264R, IT-264SR, available on Canada Revenue Agency website at <http://www.cra-arc.gc.ca/>

Canada Revenue Agency. *Profit, Capital Gains and Losses from the Sale of Real Estate, Including Farmland and Inherited Land and Conversion of Real Estate from Capital Property to Inventory and Vice Versa*, Interpretation Bulletin IT-218R, available on Canada Revenue Agency website at <http://www.cra-arc.gc.ca/>

Canada Revenue Agency. *Registered Charities and the Income Tax Act*, RC4108(E) 1204, available on the Canada Revenue Agency website at <http://www.cra-arc.gc.ca/>

Canada Revenue Agency. *Registering a Charity for Income Tax Purposes*, T4063(E) Rev. 01, available on the Canada Revenue Agency website at <http://www.cra-arc.gc.ca/>

Denhez, Marc. 2003. *Giving Nature Its Due: Tax Treatment of Environmental Philanthropy: Recent Improvements, Remaining Barriers and Current Opportunities*. Sustaining Wetlands Issues Paper, No. 2003-1. North American Wetlands Conservation Council (Canada). Ottawa, Ontario.

Denhez, Marc. 1992. *You Can't Give It Away: Tax Aspects of Ecologically Sensitive Lands*. Sustaining Wetlands Issues Paper, No. 1992-4. North American Wetlands Conservation Council (Canada). Ottawa, Ontario.

Environment Canada. 2003. *The Canadian Ecological Gifts Program Handbook 2003*. Canadian Wildlife Service, Environment Canada. Gatineau, Quebec.

Findlay, Barbara and Ann Hillyer. 1994. *Here Today, Here Tomorrow: Legal Tools for the Voluntary Protection of Private Land in British Columbia*. West Coast Environmental Law Research Foundation. Vancouver, British Columbia. Contact West Coast Environmental Law Research Foundation, 1001 - 207 West Hastings Street, Vancouver, BC, V6B 1H7.

Green Legacies: A Donor's Guide for B.C. Stewardship Series. Victoria: Habitat Conservation Trust Fund, 2002.

Hillyer, Ann, Judy Atkins and John B. Miller. [Forthcoming]. *Appraising Easements, Covenants and Servitudes: Guidelines for Valuation*. North American Wetlands Conservation Council (Canada). Ottawa, Ontario.

- Hillyer, Ann and Judy Atkins. 2004. *Giving It Away: Tax Implications of Gifts to Protect Private Land*. West Coast Environmental Law Research Foundation. Vancouver, British Columbia. Contact West Coast Environmental Law Research Foundation, 1001 - 207 West Hastings Street, Vancouver, B.C., V6B 1H7. Also available on website: <http://www.wcel.org>
- Hillyer, Ann and Judy Atkins. 2000. *Greening Your Title: A Guide to Best Practices for Conservation Covenants*. West Coast Environmental Law Research Foundation. Contact West Coast Environmental Law Research Foundation, 1001 - 207 West Hastings Street, Vancouver, B.C., V6B 1H7. Also available on website: <http://www.wcel.org>
- Kwasniak, Arlene. 1997. *Conservation Easement Guide for Alberta*. Environmental Law Centre. Edmonton, Alberta.
- Kwasniak, Arlene. 2001. *Alberta's Wetlands: A Law and Policy Guide*. Environmental Law Centre, for the North American Waterfowl Management Plan. Edmonton, Alberta.
- Kwasniak, Arlene and Donna Tingley (eds). 1999. *A Legacy of Land: Conservation Easements and Land Stewardship: Conference Proceedings*. Environmental Law Centre. Edmonton, Alberta.
- Kwasniak, Arlene (ed.). 1994. *Private Conservancy: The Path to Law Reform*. Proceedings and additional material from the Environmental Law Centre's Conference on Private Conservancy held January 13, 1994. Edmonton, Alberta.
- Ontario Nature Trust Alliance. 1999. *Land Securement Manual*. Contact Ontario Nature Trust Alliance, c/o Federation of Ontario Naturalists, 355 Lesmill Road, Don Mills, Ontario, M3B 2W8.
- Silver, Thea M., Ian Attridge, Maria MacRae and Kenneth W. Cox. 1995. *Canadian Legislation for Conservation Covenants, Easements and Servitudes: The Current Situation*. Report No. 95-1. North American Wetlands Conservation Council (Canada). Ottawa, Ontario.