



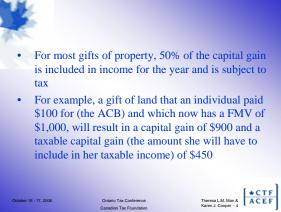
# B. ELIMINATION OF TAXABLE CAPITAL GAINS IN RESPECT OF CERTAIN GIFTS

1. Budget 2006

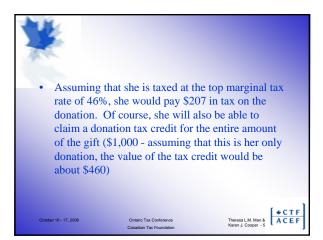
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- May 2, 2006, the government announced the elimination of tax on capital gains incurred on the donation of publicly listed shares and ecologically sensitive property
- Generally, a gift of property will trigger a capital gain if the FMV of the property exceeds its adjusted cost base (ACB)

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- Now, with the Budget 2006 measures, a donation of publicly traded shares or an ecological gift with an ACB of \$100 and a FMV of \$1,000 will result in no taxable capital gain
- Therefore, the entire amount of the donation tax credit of \$460 will be available to be used against other sources of income
- This makes donations of such property even more attractive than cash, since the cost of the donation to individual in the first place was only \$100

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### 2. Flow-Through Shares

- Flow-through shares (sometimes referred to as "FTS") are tax-based financing incentives available only to the oil and gas and mining sectors
- The current rules effectively permit corporations to renounce or "flow-through" income tax deductions associated with certain activities to shareholders in exchange for the sale of their shares

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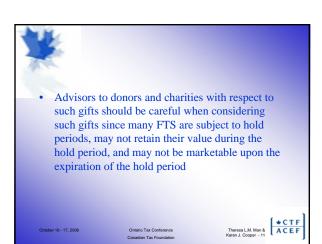
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# 1

- Assume that the investor, instead of purchasing non-FTS securities, acquires \$1,000 of FTS of a publicly listed corporation
- Over the course of the exploration period, the investor will be entitled to \$1,000 in flowed-through deductions related to the exploration expenses resulting in tax savings of about \$460 (assuming again a 46% marginal tax rate)

16-17,2008 Ontario Tax Conference Theresa L.M. Ma. & Canadian Tax Foundation Katern J. Cooper - 9 Assuming that the value of the shares remains \$1,000, the investor will be entitled to a donation tax credit in respect of the \$1,000 donation, which results in another tax savings of about \$460, and will not be taxed on the capital gain As a result, the investment and, thereafter, donation to charity of \$1,000 will have only cost the investor/donor \$80 Theresa L.M. Man & ACER Ontario Tax Conferen Canadian Tax Foundat



# 3. Valuation • Determine the date of the gift of publicly traded shares: certificate hand-delivered to the charity - gift made when the charity receives and accepts gift certificate is mailed to the charity - deeming rule in paragraph 248(7)(a) applies to deem the charity to receive the certificate on the day it was mailed, provided that the charity accepts the gift Theresa L.M. Man & ACE Karen J. Cooper - 12 Ontario Tax Confere Canadian Tax Found



 electronic transfers - CRA has indicated that as a general rule the date of a gift of electronically transferred shares is the date the shares are received in the charity's account

• Because the Act does not provide guidance in determining how a gift of shares should be valued, CRA has accepted the use of the closing bid price of the share on the date it is received or the mid-point between the high and the low trading prices for the day, whichever provides the best indicator, given the circumstances, of fair market value on normal and active market trading

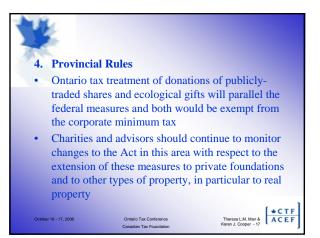
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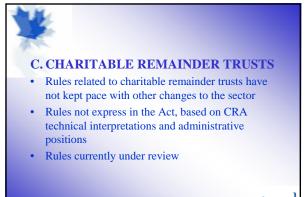




• With respect to ecological gifts, the date of the gift will be the date that the gift is completed, usually when title to the land is transferred or a conservation easement is registered, and the fair market value of the gift is determined by the Minister of the Environment, who issues a certificate which is applicable for the two-year period following the determination

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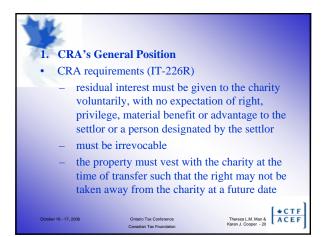




A charitable remainder trust is an irrevocable trust which has been created by a settlor/donor who gifts a residual (or remainder) interest in a property to a trust for the benefit of a registered charity or qualified donee (collectively referred to in the remainder of this section as a "charity") while retaining the right to use and enjoy the property, including the right to receive income from the property for a specified period (usually the settlor's life)

The settlor receives an immediate donation tax
 receipt

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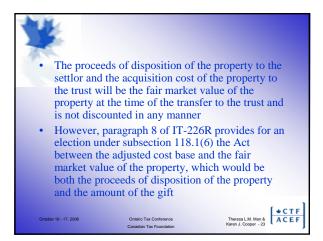


- Transfers of private corporation shares or units in a mutual fund trust may be very difficult to value
- It is CRA's view that when property is transferred to a charitable remainder trust, it is the entire property, consisting of both the life interest and the residual interest, which is transferred to the trust and which results in a disposition of the entire property for the purpose of determining whether the settlor has realized a capital gain or loss

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- 2. Benefits of Making a Gift through a Charitable Remainder Trust
  The donor is able to immediately claim a
- The donor is able to immediately claim a donation tax deduction or credit in respect of a deferred gift while continuing to enjoy the property or receive income therefrom
- If a testamentary trust, the settlor can provide for an income beneficiary during their lifetime, while at the same time guaranteeing a significant donation to charity and providing the estate with some tax relief

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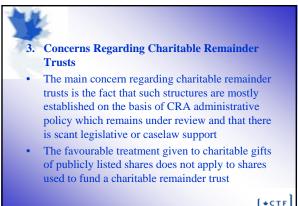
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- Assets transferred to a charitable remainder trust during the settlor's lifetime will not form part of the settlor's estate and will not be subject to probate fees
- Since the assets pass to the charity under the terms of the trust agreement, the donation will not be considered a testamentary gift and will not be subject to provincial dependant's relief legislation

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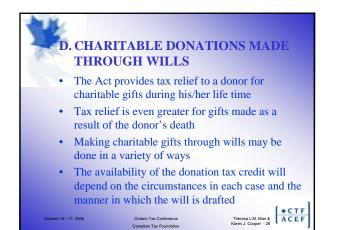


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- CRA's administrative positions with respect to some of the issues surrounding charitable remainder trusts may not be correct
- Is it the entire property which is disposed of to the trust? This disregards the bundle of rights theory of property where the donor retains the right to use the property all that has been disposed of to the trust is the future interest to be granted to the charity
- Questions remain concerning the impact of a residual gift through a charitable remainder trust on the donor's donation limit
- What is the cost to the trust of the transfer?





1. Benefits of Making Charitable Gifts by Will • Subsection 118.1(5) deems a gift made by an individual's will to have been made by the individual immediately before death • Subsection 118.1(4) provides that a gift made in the year of death is deemed to have been made in the year immediately prior to death to the extent that the tax credit for the gift has not been claimed in the year of death Theresa L.M. Man & CT Karen J. Cooper - 29 ntario Tax Conference Inadian Tax Foundation

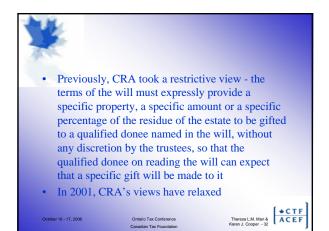
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- Donation tax credit may be claimed in the individual's terminal tax return or in the year immediately prior to death
- Donations made in the year of the donor's death • and the immediately preceding year could be deducted up to 100% of the deceased's income in those years
- Where a gift made as a result of a person's death does not satisfy the requirements under subsection 118.1(5), the estate or the testamentary trust may be entitled to a charitable donation credit pursuant to subsection 118.1(3) Theresa L.M. Man & ACEF

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- In other situations, a gift made from a testamentary trust to a charity may not be treated as a gift, but may be treated as a distribution in satisfaction of the charity's income interest in the trust or as a distribution in satisfaction of the charity's capital interest in the trust
- 2. Application of Subsection 118.1(5)
- Little case law dealing with what would constitute a gift made by will pursuant to subsection 118.1(5)
- Has been in accordance with CRA's interpretation

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- **3.** Gifts Made by a Testator without involving any Trusts
- For example:

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- outright legacies and bequests
- gifts made from the residue of an estate where there is no intervening life interest
- gifts over to charities in the event that the beneficiaries under the will predecease or disclaim the gifts

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# i) Discretion of trustees to choose charities CRA previously did not permit trustees to choose from a list of charities to receive gifts from the estate In 2001, CRA changed its view Now acceptable for a will to stipulate that a specific amount be gifted to charity and provide a list of charities to which donations be made, with the trustees having a discretion to determine the amount to be given to each named charity,

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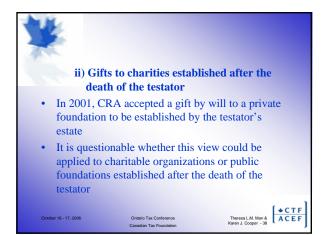
provided that:

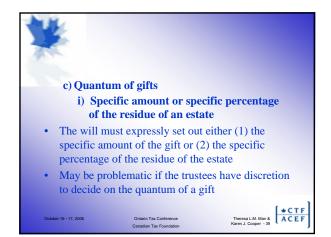


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- the actions taken by the executor are reasonable and in accordance with the terms of the will
- the donation is made to a charity
- Also acceptable that where the terms of a will direct the trustees to donate a specific amount to a charity without identifying any charity in the will, and the will allows the trustees to have full discretion to decide which charity would receive the gift

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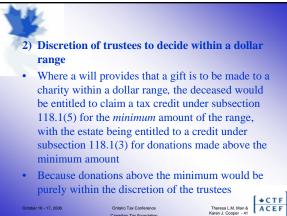


## 1) Discretion of trustees to reduce specific amount listed

Where the will provides for specified amounts to • be given to a number of specified charities, but the executors are given the power to *reduce the* amounts, as necessary, in the event that there are insufficient funds available to make all charitable bequests after the payment of all fees and expenses in the administration of the estate, the actual amount donated by the estate would qualify as gifts made by the will

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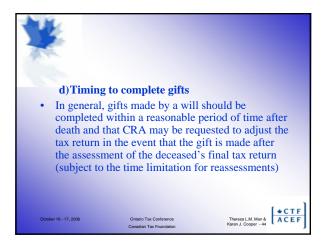
3) Use of formula to calculate the residue and trustees' discretions • The will may provide for the donation of a specific percentage of the residue of an estate to a charity • In some situations, acceptable for the will to provide for a formula determining the amount of the residue of the estate Theresa L.M. Man & CT Karen J. Cooper - 42

### ii) Quantum of in specie gifts

• CRA generally requires that the will must expressly set out the specific amount or a percentage of the residue of the gift

- In a 2004 technical interpretation, pursuant to the terms of the will, a surviving spouse selected which pieces of artwork she wished to have from a collection of artwork owned by the testator, with the remaining pieces to be donated to an art gallery within 36 months after the testator's death
- Acceptable because the executor did not have any discretion on whether the painting will be donated

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## e) Form of property to be donated

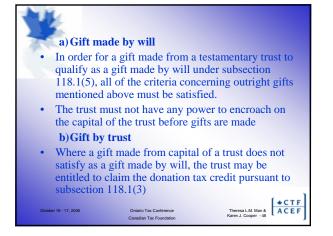
- CRA generally requires the will to clearly specify what is to be paid from the estate
- Possible for trustees to have discretion to decide the form of property to be donated, unless the will specifies otherwise
- e.g.
  - the will stipulates that a specific amount to be gifted to a charity, without stipulating as to the form of the gift
  - the will permits a gift to be made in cash or in specie
  - f) Conditions attached to gifts

### Conditions attached to gifts are acceptable 6 - 17, 2006

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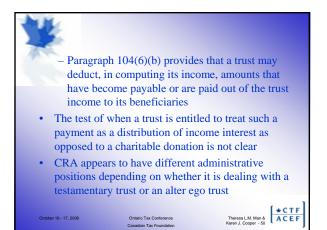




### c) Distribution in satisfaction of income and/or capital interest of charity vs. donations

- When a payment is made from income of a testamentary trust, it is sometimes permissible for such payment to be recognized as a distribution in satisfaction of the charity's income interest in the trust.
  - The trust may deduct such payment under subsection 104(6) when calculating the income of the trust, instead of claiming a donation tax credit for that year under subsection 118.1(3)

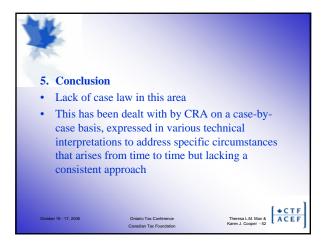
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### Testamentary trusts

- Trustees are allowed the discretion to choose whether to treat a discretionary distribution from the trust to a charitable beneficiary as a gift or a distribution in satisfaction of the charity's income interest
- Alter ego trusts
  - Where the trust agreement empowers the trustees to make a gift and the trustees exercise this power, it would be appropriate for subsection 118.1(3) to apply
  - Where the charity is an income beneficiary and a distribution is made out of the trust's income, subsection 104(6) would apply Theresa L.M. Man & ACEF

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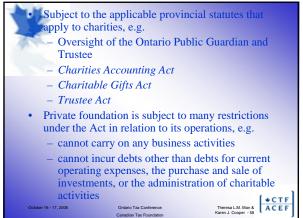


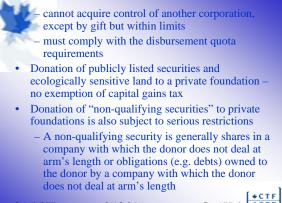












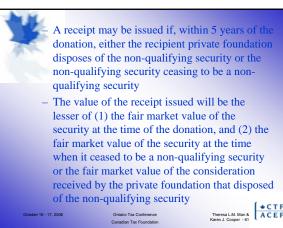
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Also include other non-arm's length transactions Does not include a security that is listed on any of the prescribed stock exchanges set out in **Regulation 3201** Does not include "excepted gifts," which is a share donated to either a public foundation or charitable organization (but not a private foundation) with which the donor deals at arm's length, and the donor deals at arm's length with each director/trustee of the recipient charity When a donor donates a non-qualifying security to a private foundation, a donation tax receipt will not be issued at the time when the donation is made

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For a donor who has made a gift of nonqualifying security and has realized a gain from the gift, the donor may claim a reserve under subsection 40(1.01) during the 5 year period until the gift is deemed to have been made

• Gifts of private company shares by a donor who controls the company and gifts of debts (such as a promissory note issued to the donor by the donor's company) in respect of a donor's corporation are non-qualifying securities and will be subject to the rules Theresa L.M. Man & A C Karen J. Cooper - 62 Canadian Tax F

- Another restriction on private foundations involves rules concerning loan backs and nonqualified investments
- A donor would need to be careful not to inadvertently violate the loan back provisions

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Private foundations holding non-qualified • investments will be subject to a penalty tax if the interest payable to the foundation does not meet a minimum rate of return



# 3. Factors to Consider when Establishing a **Private Foundation**

- Is there any charity that the donor would feel comfortable donating to that would meet the donor's philanthropic desires and achieve the donor's tax and estate planning?
- What would be the charitable objects of the private foundation and what types of charitable causes would the foundation support?
- What should be the legal form of the private foundation?
- Under what jurisdiction should the foundation be incorporated? Theresa L.M. Man & ACEF

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• How should the foundation be structured? Who would be on the board and how would the donor exercise control on the foundation? Does the donor have other trusted family members who can sit on the board? • Will the foundation receive funds from the donor, family members or other individuals? Will the foundation hold endowed funds or grant endowed gifts?

Will the foundation be a passive funder or will the foundation carry on active charitable programs?

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