
CBA/OBA 2008 NATIONAL CHARITY LAW SYMPOSIUM

NEW THOUGHTS ON GIFTING

Toronto – May 7, 2008

**Gifts of Environmentally Sensitive Land:
What You Need to Know and How to Use Them**

By Karen J. Cooper, LL.B. LL.L., TEP

© 2008 Carters Professional Corporation

CARTERS.ca

CARTERS PROFESSIONAL CORPORATION

Société professionnelle Carters

Barristers, Solicitors & Trade-mark Agents

Affiliated with **Fasken Martineau DuMoulin LLP**

Avocats et agents de marques de commerce

Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

Offices / Bureaux

Ottawa (613) 235-4774

Mississauga (905) 306-2791

Orangeville (519) 942-0001

Toll Free: 1-877-942-0001

By Appointment / Par rendez-vous

Toronto (416) 675-3766

London (519) 937-2333

Guelph (519) 838-2004

Vancouver (877) 842-0001

www.charitylaw.ca

CBA/OBA 2008 NATIONAL CHARITY LAW SYMPOSIUM
NEW THOUGHTS ON GIFTING
Toronto - May 7, 2008

**Gifts of Environmentally Sensitive Land:
What you Need to Know and How to Use Them**

By Karen J. Cooper, LL.B., LL.L, TEP
© 2008 Carters Professional Corporation



CARTERS PROFESSIONAL CORPORATION
BARRISTERS, SOLICITORS & TRADE-MARK AGENTS
Affiliated with Fesken Martineau Duboulin LLP

Offices in Ottawa, Mississauga & Orangeville
Locations also in Toronto, London, Guelph & Vancouver
Toll Free: 1-877-942-0001

www.carters.ca
www.charitylaw.ca

OVERVIEW

- I. Introduction
- II. Basic Requirements of an Ecological Gift
- III. Tax Benefits
- IV. Example
- V. Other Issues

2

I. INTRODUCTION

- Private lands are becoming increasingly important to the protection of Canada's environmental heritage and biodiversity
- The *Income Tax Act* ("ITA") provides favourable treatment for gifts of ecologically sensitive land and partial interests in land through the Ecological Gifts Program ("EGP")
- The EGP was introduced in 1995 as a tool for encouraging the conservation of habitat and biodiversity across Canada

3

- As of March 2008, 652 ecological gifts totalling 112,199 hectares and valued at over \$379 million have been made in Canada
- Nearly half of these gifts contain habitats designated as having national, provincial, or regional importance, and many include rare or threatened habitats that are home to species at risk
- The tax benefits are substantial, similar to gifts of publicly-listed securities

4

II. BASIC REQUIREMENTS

- An ecological gift is a particular type of charitable gift under the ITA and a number of specific requirements are associated with ecological gifts
- For donors to receive the tax benefits of an ecological gift, the ITA imposes the following requirements:

5

1. Eligible Recipient:

- Territorial, provincial or federal departments or agencies
- A municipality
- An approved registered charity whose main purpose is the conservation and protection of the environment

6

2. Ecologically Sensitive Land:

- The land, including a servitude, covenant or easement, must be ecologically sensitive and its conservation and protection important to the preservation of Canada’s environmental heritage
- Environment Canada has developed a definition of “ecologically sensitive land,” which is based on national, provincial or territorial criteria that are outlined in *The Canadian Ecological Gifts Program Handbook 2005* and updated on the Environment Canada website
- The Minister of the Environment, or his designate, will issue a *Certificate for Donation of Ecologically Sensitive Land* (or, in Quebec, a *Visa pour dons de terrains ou de servitudes ayant une valeur écologique*)

7

3. Certified Fair Market Value:

- The fair market value (“FMV”) of the gift must also be certified
- The FMV of an easement, covenant or servitude may be determined using the “before and after” method of valuation, e.g. the FMV of the gift is the value of the land before the grant minus the FMV of the land after the grant
- The donor must submit an independent appraisal of the FMV of the donation to Environment Canada, along with a signed application form

8

- The appraisal is reviewed by the Appraisal Review Panel, which makes a recommendation of FMV to the Minister of the Environment
- The Minister then determines the FMV
- The donor may accept the Minister’s determination of FMV or seek a redetermination by the Redetermination Committee of the Appraisal Review Panel
- The Minister then either confirms the value previously determined or redetermines the value, taking into account the recommendation of the Redetermination Committee
- If the donor still does not agree, the donor may appeal to the Tax Court of Canada (within 90 days)

9

- To claim an ecological gift, donors must include the following in their income-tax returns:
 - A *Certificate for Donation of Ecologically Sensitive Land* (or *Visa* in Quebec)
 - A Statement with respect to the fair market value of the gift
 - An official receipt for income tax purposes from the recipient

10

III. TAX BENEFITS

- Some of the tax benefits of an ecological gift are the same as for all gifts:
 - Corporate donors deduct the amount of the ecological gift directly from their taxable income, while an individual receives a non-refundable tax credit for his/her donation
 - Any unused portion of the donor's ecological gifts may be carried forward for up to five years

11

- However, ecological gifts also benefit from tax benefits which are more significant and similar to those available for gifts of publicly listed securities:
 - The taxable capital gain realized on disposition of property is nil
 - Corporate donors will benefit from the inclusion of the entire amount of the capital gain in the donating corporation's capital dividend account
 - The upper donation limit has been removed

12

- Proposed split receipting amendments will also apply to ecological gifts:
 - The definition of “total ecological gifts” will refer to the “total of all amounts each of which is the eligible amount of a gift of land” which, in turn, will cause proposed new subsections 248(30) to (33) to apply to ecological gifts
 - However, proposed amendments relating to the imposition of a deemed fair market value in certain transactions, do not apply to ecological gifts

13

IV. EXAMPLE: Outright Donation

Susan is the owner and operator of a small consulting firm in Kingston and earns \$80,000 a year. Thirty years ago she purchased an undeveloped two hectare property on an island in the Thousand Islands for \$200,000. The property, which has water frontage and magnificent views of the St. Lawrence and the Islands, has a FMV of \$600,000 today. Although not particularly large, the island is home to a number of important species of birds, pitch pine and beach fern.

14

Susan has decided not to build her retirement home on the island but would like to ensure that the natural features on the property will be permanently protected. Impressed by the efforts of the Canadian Thousand Islands Heritage Conservancy in working with local landowners to link fragmented shorelines and island habitats, Susan decides to donate her land to the Conservancy as an ecological gift.

15

Environment Canada has certified that the land meets its criteria regarding ecological sensitivity and that the FMV is \$600,000:

Capital gain	\$400,000	(\$600,000 - \$200,000)
Taxable capital gain	\$0	
Self-employment income	<u>\$80,000</u>	
Taxable income	\$80,000	
Income tax payable (Calculated using 2007 rates)	\$36,800	
Claim eligible amount (\$473,010 remains for future use)		\$126,990
Donation tax credit	<u>\$36,800</u>	
Net tax payable	\$0	

16

V. OTHER ISSUES

1. Gifts of Partial Interests

- **The definition of ecological gifts provides for gifts “of land, including a servitude for the use and benefit of a dominant land, a covenant or an easement”**
- **Approximately half of all ecological gifts to date have been “partial interests in land” such as conservation easements, covenants or servitudes**
- **Quite often gifts of partial interests in land are made because the landowner wants to retain the right to use the land or to ensure that others will continue to be able to live on the land**

17

- **Generally, the land is made subject to a legal agreement (usually in the form of a covenant, easement or servitude) in favour of an eligible recipient that protects the property's conservation value by permanently placing terms and conditions on its use**
- **For example, the agreement may prevent the land from being subdivided into smaller lots, protect trees from being cut, or prevent the construction of any new buildings**
- **The agreement must ensure that the restrictions put on the property are followed in perpetuity, regardless of who owns the underlying land**
- **“Before and After” method of valuation**

18

2. Gifts of Inventory

- **Gifts of land held on account of inventory that meet the requirements of the EGP will also qualify as ecological gifts**
- **The elimination of any taxable capital gain and the inclusion of the capital gain in the capital dividend are benefits that do not apply**
- **The proceeds of disposition deemed to arise from the gift will be included in taxable income, although it will likely be offset by a corresponding deduction or tax credit**

19

3. Gifts by U.S. Residents:

- **U.S. residents who donate Canadian land to a U.S. 501(c)(3) land trust (not and eligible recipient) may trigger tax in Canada since the resulting taxable capital gain would be included in the calculation of the non-resident's taxable income earned in Canada pursuant to subparagraph 115(1)(a)(iii)**

20

- **Ss. 110.1(3) & 118.1(6) of the ITA allow a donor to designate proceeds of disposition in respect of a gift that are between the adjusted cost base of the property immediately before the gift and the FMV of the gift in order to avoid triggering a taxable capital gain**
- **These provisions will apply to a gift made to a "prescribed donee" who provides an undertaking that the property will be held for use in the public interest (Nature Conservancy, and maybe American Friends of Canadian Land Trusts)**

21

4. Disposition or Change of Use Without Authorization

- The ITA imposes a special tax on recipients that receive ecological gifts and then dispose of them or change their use without the authorization of the EGP
- The amount of the tax is 50% of the FMV of the property at the time of the unauthorized disposition or change in use
- The tax is intended to help ensure protection of ecologically sensitive land for the long term and to deter municipalities and registered charities from disposing of or changing the use of an ecological gift without approval

22

CONCLUSION

- Individual and corporate landowners interested in protecting nature by donating ecologically-sensitive land, or interests in that land, to an environmental charity will receive substantial income tax benefits in addition to the satisfaction of knowing that they have made a real contribution to greening their environment

23

DISCLAIMER

This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2008 Carters Professional Corporation



CARTERS PROFESSIONAL CORPORATION
 BARRISTERS, SOLICITORS & TRADE-MARK AGENTS
 Affiliates with Fasken Martineau DuFresne LLP

Offices in Ottawa, Mississauga & Orangeville

Locations also in Toronto, London, Guelph & Vancouver

Toll Free: 1-877-942-0001

www.carters.ca
www.charitylaw.ca
