THE CANADIAN BAR ASSOCIATION
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Registered Canadian Amateur Athletic Associations and Charities Matters

NATIONAL CHARITIES AND NOT-FOR-PROFIT LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Charities and Not-For-Profit Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Charities and Not-For-Profit Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The June 2011 Budget proposes sweeping changes to the regulatory regime affecting registered charities and qualified donees, and in particular Canadian Registered Amateur Athletic Associations (RCAAAs). In Annex 3 of the June 2011 Budget, the part entitled "Regulatory Framework for Registered Canadian Amateur Athletic Associations – Exclusivity of Purpose and Function" invited stakeholders to provide feedback on the introduction of an 'exclusivity of purpose and function' test for RCAAAs by August 31, 2011.

This submission is made by the Charities and Not-For-Profit Law Section of the Canadian Bar Association (the CBA Section). The CBA Section deals with law and practice relating to the regulation and administration of charities and not-for-profit organizations in Canada. This submission primarily addresses the changes proposed to the regime relating to RCAAAs. It also addresses other aspects of the June 2011 Budget, including new governance requirements for charities, new rules regarding tax assistance for returned gifts, and expansion of the regulatory regime for many qualified donees.

II. NEW REGULATORY REGIME FOR RCAAAS

The June 2011 Budget proposes to amend the *Income Tax Act* rules dealing with RCAAAs as follows:

1. Require that the purpose and function be exclusively the promotion of amateur athletics on a nation-wide basis in Canada, and no longer permit an RCAAA to qualify if is purpose and function are only primarily the promotion of amateur athletics;
2. Require an RCAAA to devote all of its resources to the exclusive purpose and exclusive function of the association, except as permitted under the equivalent of subsection 149.1(6.2) as it applies to registered charities in respect of political activities;
3. Subject RCAAAs to a "related business" rule, similar to the rules now applicable to registered charities;
4. Subject RCAAAs to the rules now applicable to registered charities dealing with conferral of undue benefits;

5. make available to the public certain information about RCAAAs, in the same manner as applies to registered charities;
6. Permit RCAAAS to carry on limited non-partisan political activities;
7. Subject RCAAAs to other sanctions applicable to registered charities.

The CBA Section is not convinced the proposed changes to the regime for RCAAAs are necessary.

Existing rules for revocation of registration enable CRA to deal with tax shelter arrangements. This is evident from the revocations of registration of many RCAAAs in recent years.

The purpose of the proposed changes is unclear. In particular, it is not clear whether the changes are intended to prevent RCAAAs from participating in abusive tax shelter arrangements (which depends on their status as qualified donees) or to limit the exemption available to RCAAAs. If the changes are intended to limit the ability of RCAAAs to participate as qualified donees in abusive tax shelter arrangements, the proposals should be more specific and more targeted. However, if changes are to be made, the CBA Section has specific comments on a number of points as set out below.

In summary, in relation to RCAAAs, the CBA Section is of the following views:

1. The proposals to require RCAAAs to have the exclusive purpose and exclusive function of promoting amateur athletics in Canada on a nation-wide basis and to require them to devote all of their resources to their exclusive purpose and exclusive function (except as permitted for limited political activities) are unnecessary, will have unintended consequences, will create uncertainty, will limit the scope for CRA to adopt practical administrative policies and will restrict the ability of RCAAAs to promote amateur athletics while engaging in ancillary activities.
2. If a rule is introduced to prevent RCAAAs from carrying on any business other than a related business, the rules should be clarified and coordinated with existing rules. There should be deeming rules to make it clear that an RCAAA will not run afoul of the exclusivity test if it does carry on a related business.
3. If rules are introduced for RCAAAs dealing with conferral of undue benefits, they should be limited to the situations in which similar rules apply to registered charities, with particular reference to the relationship between the "beneficiary" and the RCAAA. In addition, the rules should be coordinated with existing rules applicable to RCAAAs, with an acknowledgement that an NPO (and therefore an RCAAA) can make its income payable to or otherwise available for the benefit of a member whose primary purpose and function is the promotion of amateur athletics in Canada.
4. If rules are introduced to prevent RCAAAs from carrying on political activities except to a limited extent, they should be coordinated with existing rules. There should be deeming rules to make it clear that an RCAAA will not run afoul of the exclusivity requirements for an RCAAA or for an NPO if it carries on limited non-partisan political activities.

5. In any event, there should be no limit on the ability of RCAAAs to carry on political activities and therefore no new rules should be needed to permit RCAAAs to carry on limited non-partisan political activities.
6. The proposals in the June 2011 Budget will adversely affect many existing RCAAAs and will prevent them from continuing to qualify for registration, despite the fact that they were formed and have operated under the current rules without creating any of the problems that the proposals are apparently intended to address.

These points are discussed in more detail below.

A. Exclusive Purpose and Exclusive Function

The CBA Section is not aware of any specific problems that have arisen under the current rules respecting RCAAAs. Current rules give RCAAAs flexibility and require them to have as a primary purpose and primary function the promotion of amateur sport on a nation-wide basis.

If changes are required for RCAAAs to prevent abuse, they should not simply mimic the rules that apply to registered charities.

The June 2011 Budget material refers to the fact that registered charities are required to operate exclusively for charitable purposes. The objective appears to be to make the RCAAA rules as similar as possible to the registered charity rules, bearing in mind that an RCAAA cannot be a "charity".

To qualify for status as an RCAAA, an organization must meet the requirements in subsection 248(1). By definition, an RCAAA is a person described in paragraph 149(1)(l) that has as its primary purposes and its primary function (under the proposals this will be changed to exclusive purpose and exclusive function) the promotion of amateur athletics in Canada on a nation-wide basis, that has applied to the Minister and been registered, if its registration has not been revoked.

To be a person described in paragraph 149(1)(l), the organization must meet the following criteria:

(a) it must not be a charity in the opinion of the Minister;
(b) it must be organized and operated exclusively for a purpose other than profit;
(c) no part of its income can be payable to or otherwise available for the personal benefit of any member, unless the member is an organization the primary purpose and function of which is the promotion of amateur athletics in Canada.

Based on the current proposal, it appears that an organization can qualify under paragraph 149(1)(l) if its members receive income or benefits out of income if they are organizations whose primary purpose and primary function (as opposed to exclusive purpose and exclusive function) are the promotion of amateur athletics in Canada, whether on a nation-wide basis or otherwise and whether they qualify as RCAAAs or not[1].

RCAAAs are not analogous to registered charities. The legal principles governing them are different and the underlying concept behind RCAAAs is that of an NPO subject to additional requirements. This is unlike the regime for registered charities, which is based on common law principles and restrictions that do not apply to RCAAAs. The Supreme Court of Canada has held that promotion of sport is not a charitable purpose or activity.[2]

To be described in paragraph 149(1)(l), an organization must be organized and operated exclusively for purposes other than profit. The current rules ensure that RCAAAs, whose primary purpose and primary function must be promotion of amateur athletics in Canada on a nation-wide basis, are prevented from having a "for profit purpose", even if all of the purposes are not necessarily the promotion of amateur athletics.

It is questionable whether an RCAAA with an exclusive purpose and exclusive function will be able to have ancillary purposes or carry on ancillary functions, as it can when its primary objective is promoting amateur athletics. Unlike the common law rules for charities (which recognize ancillary purposes and activities), the treatment of RCAAAs is purely a matter of tax policy. There will be uncertainty if an RCAAA has no latitude to have even a *de minimis* purpose and function that, while still not-for-profit, is not the promotion of amateur athletics. For instance, the promotion of physical health as an adjunct to promoting amateur athletics should not disqualify an RCAAA in determining whether its purpose and function are exclusively the promotion of amateur athletics.

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1 CRA has recently addressed the scope of the exemption under paragraph 149(1)(l) and the type of organization that is "described in" 149(1)(l) for purposes of the definition of RCAAA. For instance, CRA has said that an organization will not be eligible for the exemption under (and therefore presumably will not be an organization described in) paragraph 149(1)(l) if it carries on activities with a view to making a profit, even if any excess of revenues over expenses is used in furtherance of its non-profit purposes. The CBA Section plans to make submissions to CRA with respect to the scope of the exemption in paragraph 149(1)(l), with reference to relevant jurisprudence, separately.

2 *A.Y.S.A. Amateur Youth Soccer Association v. CRA,* 2007 DTC 5527.

Similar issues will arise with respect to social activities, fundraising activities, etc. of RCAAAs, since both their purpose and their function are relevant.

CRA has issued policy statements dealing with its approach to the current rules. For instance it has stated that to qualify for registration as an RCAAA, an organization must operate mostly, if not entirely, for the following objects:

(a) To regulate a sport and the way it is played;

(b) To promote the sport;

(c) To oversee a structure of local clubs and regional and provincial bodies involved in the sport;

(d) To operate a training program that brings promising athletes from the grass roots level to national and international levels through various qualifying competitive events;

(e) To operate a national team to participate at international competitions;

(f) To stage and sanction local, regional, provincial and national competitions;

(g) To act as a Canadian representative of an international federation controlling the sport;

(h) To provide a training and certification program for coaches and referees;

(i) To carry out fundraising activities and re-distribution of funds for local, regional and provincial member organizations.[3]

CRA has also stated that the following national organizations are eligible for registration:

(j) Multi-sport, national, international level events, such as the Olympics and the Commonwealth or Canada games;

(k) Facilities for training athletes that are an outgrowth of an Olympic, Commonwealth or Canada games;

(l) Multi-sport training centres which meet certain criteria.

The proposed changes could limit the ability of CRA (or preclude it from being able) to continue this approach. Any involvement of professional athletes in activities of or promoted by the association (such as the Olympics or Commonwealth Games) may not meet the test of exclusivity of promotion of amateur athletics or devotion of all resources to that exclusive purpose and function. The loss of leeway under the current test based on a primary purpose and primary function will lead to unintended and undesired results.

The requirement for an RCAAA to have as its exclusive purpose and exclusive function the promotion of amateur athletics will focus more attention on the meaning of "function". This is less

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[3] *Charities Policy Statement* CPS-011. "Registration of Canadian Amateur Athletic Associations", October 28, 1996.

of a concern under the current "primary function" rule. Having an exclusive purpose and exclusive function is different from being "constituted and operated exclusively" (as in the case of a charitable foundation) and being "organized and operated exclusively" (as in the case of an NPO).

The Ontario Assessment Review Board dealt with the meaning of "primary function" in the context of characterization of real estate for municipal tax purposes under the *Assessment Act*. The relevant definition is "service organization", an organization whose "primary function" is to provide services to promote the welfare of the community and not only to benefit its members.[4] The organization in question was a registered charity that owned real estate. In furtherance of its objects and in cooperation with other community groups with similar objects, it granted them non-exclusive licences to use its real estate. It argued that it was a service organization.

The Board held that "function" implies some form of activity and represents what an organization actually does, not what its objectives are. The Board differentiated between objectives or purposes, on one hand, and how they are achieved, on the other hand, holding that "function" is the operative basis undertaken to achieve an end, objective or purpose. The Board rejected the organization's argument that "function" was synonymous with "objective", stating that in its ordinary meaning "function" more closely relates to "use" than "objective", and a property is "used", whereas an organization "functions". The Board held that the organization was a service organization providing services and not a landlord leasing real estate.

"Function" therefore must mean something other than "activities", but its precise meaning in the context of RCAAAs is unclear. While the meaning has not been of much relevance while an RCAAA has been required only to have a primary function, it will be more relevant. Legitimate aspirations of many RCAAAs will be restricted if the proposed change is made, with no leeway for a function that may be ancillary to the main function of promoting amateur athletics.

B. Related Business

Under the rules applicable to registered charities, a private foundation is liable to have its registration revoked if it carries on any business. A public foundation and a charitable organization are liable to have their registration revoked if they carry on a business that is not "a related

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4 *Harmony Hall v. MPAC, Region No. 9*, 43 M.P.L.R. (3d) 141 (OARB). Other cases dealing with income tax address the function of a property, but not the function of an entity.

business of that charity". A "related business in relation to a charity" (but not necessarily "of a charity") includes a business that is unrelated to the objects of the charity if substantially all persons employed by the charity in the carrying on of that business are not remunerated for that employment.

Ostensibly, the definition of related business in "relation to" a charity is intended to address whether a business is a related business "of the charity". However, the wording is not the same. Further, a related business in relation to a charity might not be a related business of the charity. Under subsection 149.1(6), a charitable organization is deemed to be devoting its resources to charitable activities carried on by it to the extent that it carries on a "related business". Presumably this means a related business "in relation to" that charity or a related business "of that charity". Similar issues may arise for RCAAAs, depending on the wording. The proposal to require an RCAAA to devote all of its resources to its exclusive purpose and its exclusive function (subject to the exception for political activities) should be addressed through the extension of subsection 149.1(6) or the addition of a new rule, providing that an RCAAA will be deemed to be devoting its resources to its exclusive purpose and its exclusive function to the extent that it carries on a "related business".

It appears that the June 2011 Budget proposals will add similar rules for RCAAAs. It is not clear if these rules will be incorporated into the existing rules for registered charities in section 149.1. It may be that new rules will be added in Part I and/or Part V dealing with RCAAAs on a standalone basis. New provisions under which registration can be revoked or sanctions can be imposed could be used. These could include revocation and sanctions under Part V for carrying on a business that is not a related business "in relation to the charity", as contemplated in subsection 188.1(1) (or conferring an undue benefit, as discussed below, as contemplated in subsection 188.1(4)).

In the same way that the rules dealing with charitable organizations deem carrying on a related business to be carrying on charitable activities, the rules should deem an RCAAA that carries on a related business to be promoting amateur athletics.

Although the June Budget proposals appear to draw an analogy between registered charities and RCAAAs, the commentary does not differentiate between charitable foundations and charitable organizations. Charitable organizations must devote all of their resources to their charitable activities and a deeming rule is required to deal with related business. Charitable foundations must

be constituted and operated exclusively for charitable purposes, but there is no similar rule pursuant to which a public foundation that carries on a related business is deemed to be constituted and operated for charitable purposes (although "charitable purposes" is defined to include the disbursement of funds to qualified donees).

The proposal to require an RCAAA to devote all of its resources to its exclusive purpose and its exclusive function appears to be synonymous with requiring it to devote all of its resources to the promotion of amateur athletics in Canada on a nation-wide basis, since this will be the only purpose and only function for which the RCAAA will be able to be organized and operated as an NPO.

Administratively, CRA recognizes that registered charities can carry on activities that are ancillary to their charitable purposes. The jurisprudence also supports this view.[5]

Similar reasoning applies for an NPO and even if the rules applicable to RCAAAs are amended to require an RCAAA to have as its exclusive purpose and its exclusive function the promotion of amateur athletics, it will still be possible for an RCAAA to have ancillary purposes and ancillary functions, as long as they are merely a means of fulfilling the purpose and function of promoting amateur athletics and are not an end in and of themselves.

However, if an activity reaches the point that it becomes a purpose, CRA could argue that the organization is not constituted and operated exclusively for charitable purposes. Similarly, it could argue that an organization is not organized and operated exclusively for purposes other than profit in the case of an NPO. The administrative positions recently announced by CRA appear to be aimed at preventing Not for Profit Organizations (NPOs), (including RCAAAs) from carrying on commercial activities if they intend to make a profit. This seems to be contrary to the concept that an RCAAA can be an NPO if it is organized and operated exclusively for purposes other than profit and yet at the same time can carry on a "business" as long as the business is "related" (presumably "in relation to" or perhaps as "a related business of" the RCAAA).

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5 In *Vancouver Society of Immigrant and Visible Minority Women v. MNR et al*, [1999] 1 SCR 10.the Supreme Court dealt with the distinction between charitable purposes and charitable activities and the requirement that a charity must be organized and operated exclusively for charitable purposes, stating that the pursuit of a purpose which would be non-charitable in itself may not disqualify an organization from being considered charitable if it is pursued only as a means of fulfillment of another, charitable, purpose and not as an end in itself.

The same type of rule applicable to registered charities should deem a business that is "unrelated" to the purpose and function of the RCAAA to be related if substantially all of the persons employed act as volunteers.

The proposals will extend the related business test to an RCAAA that carries on a business that is not "related to the purpose and function" of the association. CRA has issued guidance on the meaning of related business and the circumstances where a registered charity will be regarded as carrying on a business and, if it is carrying on a business, carrying on a "related business". This guidance does not specifically deal with "in relation to" or "of" the charity. It is unclear whether that guidance will be adapted for RCAAAs, substituting for relatedness to the purposes of a registered charity's relatedness to the purpose and function of an RCAAA. The administrative approach for charities may not necessarily be appropriate for RCAAAs. The current guidance requires that a business must be linked and subordinate to the charitable purposes. Extending this approach to RCAAAs would require the business to be linked and subordinate to the non-profit exclusive purpose of promoting amateur athletics in Canada on a nation-wide basis. There will inevitably be uncertainty about the application of the new rules as administered by CRA, creating problems for RCAAAs that raise revenue from activities that promote amateur athletics but may not be "related" if paid employees are involved.

AN RCAAA will be required to have only one purpose and one function, which must be exclusively the promotion of amateur athletics in Canada on a nation-wide basis, while it also must be organized and operated exclusively for purposes other than profit. The related business exception suggests that it might otherwise be possible to have an exclusive purpose and exclusive function that is the promotion of amateur athletics while trying to make a profit from carrying on a related business. This may run counter to the requirements for an NPO, in view of CRA's administrative position. CRA might argue an association is not an NPO, even if it can meet the RCAAA tests.

C. Undue Benefits

The June 2011 Budget proposals appear to extend the concept of undue benefits beyond the individuals who qualify as a "beneficiary" within the meaning in subsection 188.1(5) as it relates to registered charities. The proposals refer to the conferral of an undue benefit on any person, but the rules applicable to registered charities are limited to circumstances in which an undue benefit is conferred on a person defined as the "beneficiary", although the definition appears to be inclusive and not necessarily exhaustive.

Subsection 188.1(5) refers to the amount of any gift or income, rights, property or resources of the charity that is paid, payable or assigned or otherwise made available for the personal benefit of any person who is a proprietor, member, shareholder, trustee or settlor of the charity, who has contributed or otherwise paid to the charity more than 50% of its capital or who deals not at arm's length with such a person or with the charity, as well as any benefit conferred on a beneficiary (as so defined) by another person at the direction or with the consent of the charity, if that benefit would, if it were not conferred on the beneficiary, be an amount in respect of which the charity would have a right. It is not clear if the June 2011Budget proposals will extend undue benefits to gifts made by RCAAAs.

Under proposed amendments to paragraphs 149.1(2)(c), 149.1(3)(b.1) and 149.1(4)(b.1), registration can be revoked if a registered charity makes a disbursement as a gift. This can be done in relation to a gift other than a gift made in the course of carrying on its charitable activities or to a qualified donee. An undue benefit is conferred under subsections 188.1(4) and (5) if any gift is made or benefit conferred on a beneficiary unless the amount is reasonable consideration for property acquired by or services rendered to the charity or it is a gift made or benefit conferred in the course of a charitable act in the ordinary course of the charitable activities carried on by the charity, unless it can reasonably be considered that eligibility to receive the benefit relates solely to the relationship of the beneficiary to the charity.

There is also an exception for a gift to a qualified donee. Extending the concept of undue benefit to RCAAAs raises issues about the scope of similar exceptions. By definition in paragraph 149(1)(l), an NPO (including an RCAAA) can make its income payable to or otherwise available to a member that is a club, society or association the primary purpose and function of which is the promotion of amateur athletics in Canada. The member need not be an NPO or an RCAAA.

The undue benefit rules for RCAAAs should contain exceptions similar to those for registered charities. They should allow RCAAAs to make gifts and confer benefits in carrying out their purpose and function of promoting amateur athletics and to make gifts to qualified donees. If a carve out similar to that for charities is used, a specific reference should be made to the situation contemplated in paragraph 149(1)(l) where the RCAAA confers a benefit on a member organization that promotes amateur athletics. Otherwise the carve out in the equivalent of paragraph 188.1(5)(b) based on the relationship between the member as beneficiary and the RCAAA would catch a benefit contemplated in paragraph 149(1)(l). This concept should be

coordinated with paragraph 168(1)(f), under which registration of an RCAAA can be revoked if it accepts a gift subject to an express or implied condition that it will make a gift to any person, club, society or association.

The June 2011 Budget proposals to extend sanctions for conferring undue benefits to RCAAAs should be limited to the same categories of beneficiaries that apply to registered charities (excluding members that promote amateur athletics as referred to in paragraph 149(1)(l)). They should not extend to conferring a benefit on "any person", as appears to be contemplated.

D. Political Activities

The June 2011 Budget proposals suggest that RCAAAs will be generally prohibited from carrying on political activities. This proposal is not appropriate or necessary.

In the alternative, if a prohibition is contemplated against engaging in political activities, except as expressly permitted, at a minimum, the scope of this prohibition should be made clearer.

The June 2011Budget commentary states that consistent with the regime for registered charities, certain "related activities" will be permitted for RCAAAs and they will be permitted to carry on related business activities. Related business activities include selling merchandise related to their sport, and engaging in limited non-partisan political activities.

Unlike registered charities, which are governed by the common law of charities, there is no legal restriction on the ability of an NPO (including an RCAAA) to carry on political activities. In fact, many NPOs and RCAAAs engage in political advocacy.

The scope and purpose of the proposed change are unclear. The proposal appears to contemplate permitting RCAAAs to engage in "related business activities" and to engage in limited non-partisan political activities, apparently based on the theory that engaging in any political activities is currently prohibited.

There is no reason based on tax policy why an RCAAA (or an NPO for that matter) should be prohibited from engaging in political activities. There is no analogy between registered charities and RCAAAs on this point. The common law restricts the use of charitable property, but there is no restriction on property owned by an NPO, including an RCAAA.

The Notice of Ways and Means Motion suggests there will be a deeming rule similar to subsection 149.1(6.2) to permit an RCAAA to carry on political activities to a limited extent while meeting the exclusivity of purpose and exclusivity of function test for an RCAAA. However, there does not appear to be any rule that will deem an RCAAA to meet the requirement to be an NPO, and deem it to be organized and operated exclusively for that purpose and function.

Clause 29(c)(iii) of the Notice of Ways and Means Motion refers to sanctions if the association provides an undue benefit to any person or carries on a business that is not a business related to the purpose or function of the association. Perhaps it is implicit that carrying on a political activity is otherwise carrying on an unrelated business and "related business" for RCAAAs will be broader than for registered charities and permit conduct that includes not only carrying on a related business but also carrying on non-partisan political activities within certain limits.

E. Effect of Changes on Existing RCAAAs

The June 2011 Budget provisions do not include transitional or grandfathering rules for existing RCAAAs. Many RCAAAs have been formed in specific situations that contemplate a primary purpose and primary function of promoting amateur athletics where it was never intended that this be an *exclusive* purpose and exclusive function. RCAAAs that have relied in good faith on the current rules, allowing them some leeway if they meet the primary purpose and primary function test, will be adversely affected and will no longer be able to qualify. Their registration may be revoked, they will no longer be exempt from tax (unless they meet the tests for NPOs) and they will no longer be qualified donees. This will have a seriously negative impact on a number of RCAAAs, including those formed for specific purposes, such as maintaining athletic facilities previously used for specific international or national games held in Canada.

In the alternative, if the proposals are implemented to change primary to exclusive, relief should be offered for existing RCAAAs. For instance, there could be grandfathering for RCAAAs that were formed, organized and registered under the current rules, if they have never been subject to compliance agreements, have never participated in abusive tax shelter arrangements and have not created any of the perceived problems at which the proposals are apparently aimed.

III. NEW GOVERNANCE REQUIREMENTS FOR CHARITIES AND QUALIFIED DONEES

The June 2011 Budget document states that the CRA will consult stakeholders in developing administrative guidelines for the proposed measures. The CBA Section applauds this commitment to consultation. However, given the serious unintended consequences of the measures discussed below, the proposed measures should be delayed for one year to permit full consultation with the charitable sector to consider and possibly amend the proposals.

Currently, CRA does not have the ability to refuse to register or revoke the status of a registered charity or RCAAA based on any of these grounds. The June 2011 Budget proposes to give CRA unprecedented new authority over the governance of registered charities and RCAAAs. This authority will necessarily be subject to discretionary decision-making by CRA. However, no clear guidance is provided for the great majority of registered charities and RCAAAs attempting compliance.

The June 2011 Budget gives CRA discretion to refuse or to revoke the registration of a charity or RCAAA or to suspend its authority to issue official donation receipts. This can be done if a member of the board of directors, a trustee, officer or equivalent official, or any individual that otherwise controls or manages the operation of the charity or RCAAA:

a) has been found guilty of a criminal offence in Canada or an offence outside of Canada that, if committed in Canada, would constitute a criminal offence under Canadian law, relating to financial dishonesty (including tax evasion, theft or fraud), or any other criminal offence that is relevant to the operation of the organization, for which he or she has not received a pardon ("relevant criminal offence");

b) has been found guilty of an offence in Canada within the past five years, or an offence committed outside Canada within the past five years that, if committed in Canada, would constitute an offence under Canadian law, relating to financial dishonesty (including offences under charitable fundraising legislation, convictions for misrepresentation under consumer protection legislation or convictions under securities legislation) or any other offence that is relevant to the operation of the charity or RCAAA ("relevant offence");

c) was a member of the board of directors, a trustee, officer or equivalent official, or an individual who otherwise controlled or managed the operation of a charity or RCAAA during a period in which the organization engaged in serious non-compliance for which its registration has been revoked within the past five years; or

d) was at any time a promoter (as defined by section 237.1 of the Act) of a gifting arrangement or other tax shelter in which a charity or RCAAA participated and the registration of the charity or RCAAA has been revoked within the past five years for reasons that included or were related to its participation.

These individuals are collectively defined in the June 2011 Budget as "ineligible individuals."

The June 2011 Budget states that CRA will look at the "particular circumstances" of a charity or RCAAA in determining whether CRA's new authority to refuse or revoke registration as a charity or RCAAA, or suspend the ability to issue official donation receipts ,will apply. It does not state what those circumstances are except to say that if there is involvement of an "ineligible individual" with an organization, CRA will take into account whether "appropriate safeguards have been instituted to address any potential concerns." There is no explanation of what those safeguards might be.

It is unclear in respect of c) above, what constitutes the reference period for determining whether an individual would be considered ineligible in respect of a revoked charity or RCAAA. The revocation of a registered charity or RCAAA is often specific to a particular audit period that is referenced in the audit letter, but in some circumstances the revocation can be related to activities that occurred prior to the audit period. Consideration of activities undertaken prior to the audit extends the period under scrutiny considerably.

For example, for a director of a registered charity from 1998 to 2001, the audit for that period was generally clean but an undertaking letter was signed in 2005 for administrative requirements regarding books and records. An audit of 2002 to 2006 discloses that the undertakings were not met and the charity's status is revoked in 2008. Arguably, the former director is an ineligible individual and cannot serve another charity until 2013. This will also result in directors of a charity at the time of revocation (particularly involving a revocation arising from an alleged failure to comply with an earlier compliance agreement that the directors may not have had any involvements in negotiating), either individually or collectively considering whether to resign prior to pending revocation for fear of otherwise having the dubious distinction of being an "ineligible individual" for the next five years.

A practical question arises as to what due diligence a charity or an RCAAA must undertake to ensure that an "ineligible individual" is not involved as a board member, trustee, officer or equivalent official, or one who controls or manages the organization. Even though the June 2011 Budget indicates that a charity or RCAAA will not be required to conduct background checks, a charity will likely want a prospective board member, officer or manager to complete a questionnaire to demonstrate due diligence.

The following practical questions also result. Is the questionnaire to be done on yearly or just when the person joins the organization? How extensive must the questionnaire be, given the breadth of the definition of "relevant offences", which extends beyond *Criminal Code* provisions to, for instance, violation of provincial fundraising and securities legislation and similar legislation outside of Canada? A prudent approach might be for organizations to avoid directors, officers, or staff who have ever served another registered charity or RCAAA. In smaller communities, this might make it difficult for some organizations to recruit enough volunteers to continue their charitable or not-for-profit activities.

IV. NEW RULES FOR RETURNED GIFTS

The June 2011 Budget proposes that where a registered charity returns a gift to a person on or after budget day, the qualified donee must issue an amended official donation receipt where the value of the returned property is greater than $50. This is to ensure that taxpayers are not able to claim a charitable tax credit for a gift in one year and have it returned in future years. Currently the Act does not require that the return of that gift be included in income and tax paid thereon.

This proposal seems to condone the return of charitable gifts. The definition of a gift at common law is "a voluntary transfer of property for no consideration". Further, at common law once property is contributed to a charity it is to be used for the charitable purposes of the charity and not otherwise. Returning a gift is inconsistent with those principles and should only occur in the rarest of circumstances. Including this provision in the *Income Tax Act* could lead unknowing donors, charities and advisors who are not experts in charity law, to think it is appropriate for a charity to return a gift at any time.

There may be times where a gift is structured with conditions, which, if not met, may give rise to a return of a gift. The circumstances in which a return of a gift would arise however are very limited and the actual incidents of return of gifts are few and far between.

Also, it is not clear that consideration was given to the role of the Attorney General of the Provinces (or the Public Guardian and Trustee in Ontario). It is not evident that Attorneys General were consulted about this new provision. As the Provinces hold the constitutional jurisdiction over charitable property, they might have similar concerns about a provision that suggests the return of a gift is proper.

The CBA Section understands that the Department of Finance may be concerned about a loss of fiscal revenue because a returned gift is not considered to be taxable under the current provisions of the Act. However, the measures proposed are not an appropriate way to deal with this issue. Anything in the Act that suggests to Canadians, registered charities and advisors that a return of gift is appropriate is inconsistent with the common law concepts of charity and could lead to considerable problems from a trust law perspective.

V. EXPANSION OF REGULATORY REGIME FOR QUALIFIED DONEES

The June 2011 Budget announced initiatives to broaden the scope of the oversight of the CRA for entities granted receipting privileges under the Act, which are not necessarily registered charities. CRA is to be given more authority and responsibility over certain qualified donees in the interest of fairness and consistency:

- RCAAAs;
- Municipalities in Canada;
- Municipal and public bodies performing a function of government in Canada (these entities are proposed to be added to the list of qualified donees and were included in the proposed technical amendments to the ITA released on July 16, 2010);
- Housing corporations in Canada constituted exclusively to provide low-cost housing for the aged;
- Prescribed universities outside of Canada, the student body of which ordinarily includes students from Canada; and
- Certain other charitable organizations outside of Canada that have received a gift from Her Majesty in right of Canada.

While enhanced regulation may be needed in light of recently identified donation abuses associated with QDs and RCAAAs, the CBA Section questions the practicality of extending regulatory powers in these areas and the impact on both CRA and organizations in complying with the new rules.

Proposed measures include publications of comprehensive lists of QDs, including RCAAAs, and mandating that QDs comply with the books and records and receipting requirements to which registered charities are currently subject. CRA would have authority to suspend receipting privileges or revoke status for non-compliance by QDs. While this has the advantage of creating a level playing field among organizations issuing receipts, difficulties inherent in enforcing these rules on the range of entities within the definition of QDs are manifest. lnconsistent application of the law will likely result in uncertainty. Uncertainty discourages donors.

The massive new responsibility that would result from the June 2011 Budget proposals would inevitably strain CRA resources. It might result in neglect of other priorities. Bringing RCAAAs within the full Intermediate Sanction regime raises capacity issues for CRA similar to those noted for extended powers regarding QDs. To date, CRA has made limited use of Intermediate Sanctions. Given that extending these measures to groups other than registered charities is contemplated, CRA should be mandated and given adequate resources to make sufficient use of provisions to develop certainty and consistency in the application of these rules.

VI. CONCLUSION

For the foregoing reasons, the CBA Section is concerned about certain changes proposed in the June 2011 Federal Budget. In summary:

- Proposed changes to the regime for RCAAAs are not necessary;
- If changes to the rules for RCAAAs are made, the Section makes specific suggestions to improve the proposed changes;
- Proposed new authority over the governance of registered charities and RCAAAs may exceed CRA's constitutional jurisdiction and potentially compound existing problems;
- Proposed changes to the treatment of gifts appear to condone the returning of charitable gifts; and
- We question the practicality of extending regulatory powers in relation to certain qualified donees.

We thank you for the opportunity to provide comments on the proposed changes and would be pleased to discuss the foregoing recommendations in greater detail at your convenience.